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

CRIMINAL APPEAL NO.AAU 0009 of 2014
[High Court Criminal Case No. HAC 84 of 2009)

CRIMINAL APPEAL NO.AAU 0008 of 2014
[High Court Criminal Case No. HAC 84 of 2009)

CRIMINAL APPEAL NO.AAU 0035 of 2014
[High Court Criminal Case No. HAC 84 of 2009)

BETWEEN : **JOJI ROKETE**

01st Appellant

: **JOSUA WAKA**

02nd Appellant

: **JONETANI ROKOUA**

03rd Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**
Fernando, JA
Nawana, JA

Counsel : **Mr. Yunus. M for the 01st Appellant**
: **Mr. Fesaitu. M for the 02nd Appellant**
: **03rd Appellant in person**
: **Mr. Babitu. S for the Respondent**

Date of Hearing : **11 February 2019**

Date of Judgment : **07 March 2019**

JUDGMENT

Prematilaka, JA

[1] The three appeals arise from the conviction of the appellants (01st , 02nd and 04th accused) on the following three counts, alleged to have been committed along with another called Sanjeev Mohan (03rd accused) between 07 and 08 September 2009 at Yalalevu Ba in the Western Division.

(i) Robbery with violence contrary to section 293(1)(b) of the Penal Code by having robbed Vinod Dutt Sharma of Nokia Brand mobile phone valued at $200.00, a wrist watch valued at $150.00, a gold ring valued at $300.00 and a Uniden cordless phone valued at $50.00, all to the total value of $700.00 and at the time of such robbery, used personal violence to the said Vinod Dutt Sharma.

(ii) Murder of Vinod Dutt Sharma contrary to section 199 and 200 of the Penal Code.

(iii) Unlawful use of Motor Vehicle contrary to section 292 of the Penal Code by unlawfully and without a colour of right but not as to guilty of stealing took to their own the private registration number EX 110 the property of Vinod Dutt Sharma.

Evidence in a summary

[2] 01st appellant (Rokete), 02nd appellant (Waka), 03rd accused (Mohan- acquitted by the trial Judge) and 03rd appellant (Rokoua) were jointly charged with one count each of murder, robbery with violence and unlawful use of motor vehicle. The charges arose from the same facts. It was alleged that the four accused persons were part of a joint enterprise to rob the victim in his home, and in the course of committing the robbery, the victim was killed. The victim died from asphyxiation and suffocation. It was alleged that the perpetrators fled the scene in the victim's vehicle, which they later

abandoned. On the night in question, witness Tasvinder Singh transported four men in his van to the address of the victim. According to Singh's evidence the 03rd appellant had arranged with him to drive all four of them to the victim's address. After dropping the accused persons, Singh drove back to his base. The following day, 03rd appellant approached Singh and offered to pay $200.00 for the hire of the van. Singh said Rokoua admitted that the victim died when they tied a cloth around his neck. 01st and 02nd appellant's case was based on their confessional statements and then case against the 03rd appellant was based on circumstantial evidence including that of Tasvinder Singh.

[3] After trial, the three assessors had returned with mixed opinions. Three appellants and the other accused had been found unanimously guilty of the robbery with violence (count 1) and of the unlawful use of the motor vehicle (count 3). Two of the assessors have found three appellants and the other accused guilty of the murder (count 2) while one assessor has found all four not guilty of murder but guilty of manslaughter.

[4] The Learned Trial Judge on 21 February 2013 delivered the judgment and convicted the first, second and third appellants of all three counts and acquitted the third accused of all counts.

[5] The Learned Judge had on 04 March 2014 sentenced the 01st and 02nd appellants to life imprisonment with a minimum serving period of 18 years on count 02, 14 years of imprisonment on count 01 and 05 months imprisonment on court 03, and directed that the last two sentences should run concurrently with the first sentence. The Learned High Court Judge had imposed life imprisonment with a minimum serving period of 15 years on count 02, 14 years of imprisonment on count 01 and 05 months imprisonment on court 3 on the 03rd appellant, and directed that the last two sentences should run concurrently with the first sentence.

[6] The 01st and 02nd appellants appealed against the conviction and sentence and the 03rd appellant appealed only against the conviction. All three had filed separate grounds of appeal.

[7] The single Judge of the Court of Appeal who considered the appellants' Leave to Appeal Applications refused leave both in respect of conviction and sentence (01st and 02nd appellants) and conviction (03rd appellant) on 23 June 2016.

[8] The 01st appellant had filed his initial grounds on 4 April 2014. However, those grounds had been abandoned and his counsel had filed an amended application for leave to appeal on 11 January 2016 containing three fresh grounds against conviction and one ground against sentence which were considered at the leave stage.

[9] However, on behalf of the 01st appellant a renewal application filed on 27 December 2018 had been tendered with 16 grounds only against the conviction. I consider this renewal application under Rule 37(1)(b) of the Court of Appeal Rules as the State had been served with a copy and it had filed written submissions in reply. Grounds 11-13 are the same as 01-03 grounds urged at the leave stage and the rest are completely fresh grounds of appeal. However, I am constrained to reiterate the sentiments expressed by the Supreme Court in **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 with regard to totally new set of grounds of appeal being brought before the Full Court which, I believe, is advanced more in desperation than in conviction. Time and resource of any appellate court are too precious to be sacrificed for such an exercise.

> *'82.It is improper that litigants be allowed to argue their cases on piece meal basis. Once a set of appeal grounds are unsuccessful, they raise another set to test whether that will hold some substance. If stringent rules are not applied where necessary, there will never be an end to litigation and there can be huge disruptions to case management in the appellate court.*
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> *83.The Courts time is not only for a particular litigant. Access to justice is meant for all the users of the Court and if these users are allowed to come to Court as and when they think of a point that may be arguable, I say without hesitation, that a lot of the Courts resources are going to be shamefully wasted*

[10] The 16 grounds of appeal before this Court are as follows.

> *'**Ground 1** – That the learned Trial Judge erred in law and in fact to hold a second voir dire inquiry despite existence an earlier voir dire inquiry proceeding and ruling delivered by Justice S. Thurairaja.*

Ground 2 *– That the learned Trial Judge erred in law and in fact to hold a second voir dire inquiry despite existence an earlier voire dire inquiry proceedings bolstering the prosecution case.*

Ground 3 *– That the Appellant's application to appeal against the conviction and sentence has been duly prejudiced by no records of court proceedings between 21 October 2009 and 15 February, 2012.*

Ground 4 *– That the Appellant's application to appeal against the conviction and sentence has been duly prejudiced by no records of evidence for the second voir dire inquiry held by the learned trial judge between 21 to 25 October 2013.*

Ground 5*-That the learned Trial Judge erred in law and in fact to admit the admission in caution interview of the Appellant as admissible evidence, despite there being no evidence from the interviewing officer during the trial proper.*

Ground 6 *– That the learned trial Judge erred in law and in fact by failing to direct the assessors that PW 3 is Sgt Sivo's evidence may be tainted as he has undue influence over the Appellant in his capacity as an uncle and preacher.*

Ground 7 *– The learned trial Judge erred in law and in fact to allow the prosecution to lead the evidence of uncharged act and failing to direct the assessors to disregard the evidence uncharged act and not to form any adverse inference against the Appellant.*

Ground 8 *– The learned trial Judge erred in law and in fact when he misdirected the assessors on the evidence of the pathologist as to the cause of death.*

Ground 9 *– The learned trial Judge erred in law and in fact when he failed to direct the assessors to consider that despite the availability of the post mortem report to police, the appellant was cautioned by police that Vinod Dutt Sharma was strangled to death.*

Ground 10 *– The learned Judge erred in law by usurping the role of the assessors when he directed the Assessors as follows, that may not cause you any difficulty with the robbery, but with the murder additional legal considerations come into effect.*

Ground 11 *– The learned Trial Judge erred in law and in fact when did not direct himself and the assessors that prosecution witness Tasvinder Singh, would have implicated the appellant and others to save himself and whether this witness could be treated as an accomplice.*

Ground 12 *– That the learned Trial Judge erred in law and in fact by misdirecting the assessors on the elements of murder causing substantial miscarriage of justice to the appellant.*

Ground 13 *– That the learned Trial Judge erred in law in failing to give any direction to the assessors on the issue of malice aforethought causing substantial miscarriage of justice to the Appellant.*

Ground 14 *– That the learned Trial Judge erred in law and in fact when he failed to direct the Assessors on the defence of intoxication despite evidence that the Appellant smoked marijuana just prior to committing the alleged offence.*

Ground 15 *– The learned Trial Judge erred in law and in fact when he did not adequately direct and/or guide the assessors to approach the evidence contained in the caution interview of the Appellant, along with all other evidence.*

Ground 16 *– The learned Trial Judge erred in law and in fact in his judgment to hold him guilty of murder despite evidence in the confession that he did not intend to kill the deceased.*

Ground 1 and 2

[11] In considering the grounds of appeal, I think 01st and 02nd grounds could be amalgamated and dealt with at once. Both challenge the Trial Judge's decision to hold a second *voir dire* inquiry despite the existence of an earlier *voir dire* ruling by another Judge. The appellant's main plank of attack is that the holding the second *voir dire* inquiry amounts to a jurisdictional error, abuse of process and substantial miscarriage of justice.

[12] A judge of the High Court before whom the case had come up earlier for trial had conducted a *voir dire* and on 25 April 2012 ruled the admissions contained in the appellant's caution interview admissible. However, some parts of the ruling are admittedly missing from the record. The judge who had delivered the first *voir dire* ruling appears to have left the jurisdiction thereafter and the case had come up for trial before two judges thereafter. The question whether there should be a fresh *voir dire* inquiry had been discussed among the first new judge, defence counsel and the prosecuting counsel on several occasions after the judge had invited the counsel to giver their mind and come up with their thoughts. Both counsel had indicated to court on 06 August 2013 as follows.

'Court : What is your position?'
State and Defence: A new voir dire must be heard. The ruling is missing.

[13] On 21 October 2013 the second new High Court Judge had ruled that there would be a new *voir dire* inquiry though the State, understandably, had opposed it and wanted to proceed to commence the trial with the earlier ruling. The Defence had stated that it was for *voir dire* inquiry. The new *voir dire* inquiry had taken place before the new judge for two days and the ruling had been delivered on 24 January 2014 admitting caution interviews of all appellants. It is the second High Court Judge who conducted the trial proper and concluded it.

[14] The appellant relies on sections 288, 290(1)(f) and 290(3) of the Criminal Procedure Act in support of his contention. Section 288 is as follows.

> *'When necessary to determine any issue during the course of a trial in any court, a judge or magistrate may proceed to determine the issue by a voir dire. A voir dire may be conducted prior to the swearing in of the assessors but after the accused person has pleaded to the information.'*

[15] Section 290 (1) (f) and (3) cited by the appellant are as follows.

> *'290. — (1) Prior to the trial of any criminal proceeding either party may make application to the court having control of the proceeding for any order necessary to protect the interests of either party or to ensure that a fair trial of all the issues is facilitated, and such applications may relate to —……..*
>
> *'(d) a challenge to the use of any report or other evidence that may unfairly prejudice the defence case'.....*
>
> *'(f) a challenge to the proceedings on the grounds of the breach of any fundamental human right of the accused person, or any applicable human rights issue; and……*
>
> *'(3) Upon hearing any application under this section the court may make any necessary order to protect the rights of any party to the proceedings, or to facilitate a fair and timely hearing of the proceedings to which the application relates.*

[16] I do not think that there is anything in any of the above provisions which prohibits the Learned High Court Judge from adopting the course of action in holding a fresh *voir dire* inquiry. It would have been in a way unfair for the appellants had the trial judge continued the trial with the earlier ruling on the caution interviews by one of his predecessors who was not available in Fiji to continue with the case. If I may use an

idiomatic expression, the appellants had been given a second bite of the cherry by the trial judge and at the end of the fresh *voir dire* inquiry he had been satisfied of the voluntaries of their caution interviews and therefore admitted them in evidence. There is no legal basis to challenge that course of action and in any event, the appellants had not raised it as a point of contest at all in the proceedings in the original court.

[17] Therefore, I cannot see how it could be argued that holding the second *voir dire* inquiry amounts to an abuse of process of court and bolstering of the prosecution case. In any event, the previous ruling had ruled the caution interviews voluntarily and admissible and even without the second ruling the prosecution anyway would have led them in evidence. In addition, no prejudice had been caused to the appellants by the second *voir dire* inquiry Thus, this is not a fit case for this Court to intervene on the principle of abuse of process (see **Moevao v Department of Labour** [1980] 1 NZLR 464) or on the basis of ensuring a fair trial or avoiding a substantial miscarriage of justice (see **Zoneff v The Queen** [2000] HCA 28, 200 CLR: 25 May 2000).

[18] Therefore, I reject both grounds of appeal.

Ground 3

[19] Under grounds 3, the 01st appellant complains of the non-availability of the record of proceedings in the High Court between 21 October 2009 and 15 February 2012. The State seems to agree that the records during this period may be missing as they cannot be found according to the registry. The 01st appellant contends that the absence of records during pre-trial stages would deter this Court from performing its supervisory function and is prejudicial to him. However, it is not clear what the material prejudice the appellant is complaining about is.

[20] Admittedly, the complaint relates to pre-trial stage where the appellant claims to have opted to plead guilty to manslaughter but had been told by the Master to do so at the trial. The information had been filed on 21 October 2009 and the trial had commenced on 15 February 2012. What happened in between does not seem to have a substantial

impact on the conviction and the sentence of the appellant. The 01st appellant had not indicated any desire to plead to manslaughter at the commencement of the trial. After the close of the prosecution case and the trial Judge ruling in favour of calling for the defence, the 01st appellant had started giving evidence on 17 February 2014 and his counsel had indicated that his client was willing to plead to 01st and 03rd counts and for manslaughter instead of count 2.The Judge had left it to the prosecution and the defence. On the following day, after the prosecution presumably disagreed, the trial had continued.

[21] In the circumstances, I do not see any merit in the appellant's argument and reject this ground of appeal.

Ground 4

[22] Under this ground of appeal the appellant's complaint is that without the first *voir dire* inquiry proceedings in the copy record, he had been prejudiced in his appeal against the conviction and sentence. He also claims that the non-availability of the transcript of evidence pertaining to the *voir dire* inquiry would hamper the ability of this Court to undertake an independent assessment of the correctness of the admissibility of his caution interview. The decision in **Arora v State** CAV 0033 of 2016: 06 October 2017 [2017] FJSC 24 has been cited by the appellant to support the proposition that because an appeal is by way of a rehearing, the appellate court is required to make an independent assessment of the evidence and **Tuilagi v State** CAV 0013 of 2017: 26 April 2018 has been cited to show that it is not necessarily wrong for the appellate court to reverse the trial judge's decision made upon the *voir dire* inquiry on the admissibility of an alleged confession having taken into account the facts and circumstances of the particular case. However, it is clear that the decision in ***Arora*** is in relation to a complaint that the trial judge had disagreed with opinions of the assessors and convicted the accused while in ***Tuilagi*** the Supreme Court also quoted **D.P.P v Ping Lin** (1975) 3 A.E.R 175 to affirm the principle that the appellate court should not interfere with the trial judge's ruling on the admission in evidence of the statement unless satisfied that the judge had completely wrongly assessed the evidence or had failed to apply the correct principles.

[23] Admittedly, the second *voir dire* proceedings are not available in the copy records prepared for this appeal and according to the registry, cannot be found. However, the detailed *voir dire* ruling is available. I have carefully considered the first and the second rulings on the admissibility of the 01st appellant's caution interview. In the former only about a single page had been devoted to narrate the prosecution evidence whereas in the latter, the trial judge had analysed and subjected the prosecution evidence to a great deal of scrutiny in the light of the defence evidence before ruling the caution interview admissible. The judge had correctly applied the relevant principle of law on the voluntariness and general fairness in coming to his decision.

[24] The appellant has not shown where the trial judge has wrongly assessed the evidence or wrongly applied the law in the second *voir dire* ruling. It is pertinent to note that the appellant's first application for leave to appeal filed through his attorney does not mention this ground of appeal at all and his amended application for leave filed by another attorney and considered by the single Judge of this Court, too has no reference at all the current appeal ground. It is only after the single Judge ruling against the appellant that this matter has been raised as a totally new ground of appeal before this Court by way of the renewal application settled by the same attorney. It must also be mentioned that the appellant has not challenged the admissibility of his caution interview *per se* before this Court even in his renewal application.

[25] Having closely considered the second *voir dire* ruling spanning 19 pages, I do not think that this Court is handicapped to such an extent as to be unable to say with certainty and conviction that the trial judge had completely wrongly assessed the evidence or failed to apply the correct principles in his decision to admit the appellant's caution interview.

[26] Therefore, I see no reason though it is not necessarily wrong, for this Court to reverse the trial judge's decision on the *voir dire* inquiry on the admissibility of the appellant's confessional statement, having taken into account all the facts and circumstances of this case. I hold that no substantial miscarriage of justice had ensued to the appellant due to the non-availability of transcript of the second *voir dire* inquiry. Accordingly, I reject the 04th ground of appeal.

Ground 5

[27] The appellant argues that the interviewing officer Ilario Belo was not summoned by the prosecution at the trial and it had caused substantial prejudice to him. DC Belo had given evidence at the first *voir dire* inquiry on 26 March 2012 and the second *voir dire* ruling indicates that he was serving on a Peace Mission abroad by that time and was not available. In the absence of DC Belo, at the trial on 15 February 2014, the appellant's caution interview was tendered by D/Sgt 2203 Yakobo Vaisewa who had been the witnessing officer. The appellant represented by a counsel did not raise any objection that his caution interview was being tendered by D/Sgt 2203 Yakobo instead of DC Belo. D/Sgt 2203 Yakobo had been cross-examined by his counsel.

[28] The absence of the interviewing officer DC Belo at the trial appears to have been due his non-availability in Fiji. The appellant had not demonstrated any reservation to the production of his caution interview through the witnessing officer. The appellant's position had been suggested to D/Sgt 2203 Yakobo and was before the assessors. I see no merits in the 05th ground of appeal raised for the time before this Court and no substantial miscarriage of justice had occurred and therefore, reject it.

Ground 6

[29] The appellant contends that the Learned Trial Judge should have directed the assessors that Sgt Sivo's evidence may be tainted as he has undue influence over the appellant, being one of his uncles and a preacher.

[30] Sgt Qaranivalu Sivo is supposed to be an uncle of all the accused and a preacher. When the 01st appellant was brought to court, he had been present at the police station. He admits to have encouraged all of the accused to co-operate and tell the truth. Sgt Sivo had played no role in the investigation. In fact, the 01st appellant in his evidence at the trial does not even come out with Sgt Sivo's name leave aside him having influenced the appellant to make the confession.

[31] In the circumstances, I do not think that there should necessarily have been a direction of what Sgt Sivo had told the appellant to the assessors. In any event, the counsel for the appellant had not sought a redirection on this point either when the opportunity was available to him at the end of the High Court' Judge's address to the assessors. The Supreme Court in ***Tuwai*** **s**aid

> *'100. Before I go any further I must say that the trial judge had asked the parties if they needed any re-directions in the matter. The parties did not seek any re-directions on the grounds they allege that the directions were inadequate. Was this done for a deliberate reason to find a ground of appeal? If that is so, the appellate courts approach must be stringent.*
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> *101. Litigants must not wait for trial judges to make mistakes to find a point of appeal. The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked parties to seek re-directions and they do not and subsequently raise the issue in the appellate Court then in the absence of any cogent reason, it should be held against that party as having employed a deliberate tactic to find an appeal point.*
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> *102. The petitioner has not given any reasons why any re-directions were not sought. His complaint now to this Court that he will suffer a miscarriage of justice is therefore unacceptable.'*

[32] The above observations of the Supreme Court and similar observations in **Raj v State** CAV 0003 of 2014: 20 August 2014 [2014] FJSC 12 where it was held that

> *'[35] The raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where* ***counsel have held their seats, hoping for an appeal point****, when issues in directions should have been raised with the judge. We do not believe this was intended in this case.'(emphasis added)*

[33] In my view, the above observations apply to several grounds of appeal raised not only by the 01st appellant but by other two appellants as well which I shall deal with later in the judgment. Going by the plethora of totally fresh grounds of appeal taken up, I cannot help but feel that the appellants (or their counsel) have undertaken a campaign of fishing for appeal grounds irrespective of their relative merits. However, to be absolutely fair by all the appellants, this Court has dealt with all those grounds of appeal *in extenso*.

[34] Accordingly, I hold that this ground of appeal has no merit and reject it.

Ground 7

[35] Once again the appellant complains of an alleged non-direction by the trial Judge with regard to an uncharged act on the evidence of his having escaped from Ba Police Station during interview. Admittedly, this had not been raised by the counsel for the appellant when the trial Judge asked for any redirections. The appellant relies on **Senikarawa v State** AAU0005 of 2004 S: 24 March 2006 [2006] FJCA 25 and **Vesikula v State** AAU0070 of 2014: 23 October 2018 [2018] FJCA 176 in support of his argument. The litmus test for leading evidence of an uncharged act is whether the probative value of the evidence outweighs the prejudice to the accused.

[36] The Supreme Court comments in ***Tuwai*** would apply here as well. In addition, in my view the impugned piece of evidence could have been legitimately led under the principle of subsequent conduct or conduct influenced by the fact in issue. In any event the appellant in his written submissions concedes that the prejudicial value of the evidence of uncharged acts may not overweighs the probative value of the rest of the evidence and therefore, no substantial miscarriage of justice may have occurred. I agree and this ground of appeal I rejected.

Ground 8

[37] The appellant argument here is based on an alleged misdirection the assessors on the medical evidence as to the cause of death. The relevant paragraphs are as follows.

> *'[27] The second element the State must prove is that the unlawful act caused the death. In our case the pathologist has said that Vinod died from asphyxiation and suffocation and it would almost certainly have been caused by the gag around his nose and mouth. You might find that this cloth gag and the pressing of his mouth caused the death.*
>
> *'[48] The third medical witness was the Pathologist, Dr Tudravu who conducted a post mortem on the deceased at Lautoka hospital on the 9th September 2009. She found the cause of death to be asphyxia due to suffocation. She said that the bruising on the face and around the mouth led her to believe that the cloth found around his neck would have at one stage been around his nose and mouth contributing to the suffocation. You may or perhaps you may not find that the cloth around the nose and mouth and the pressing on it by one or more of these accused was the unlawful act causing death.'*

[38] The Post Mortem Examination Report made by Dr Litia Tudravu had found that the cause of death is asphyxia due to suffocation and she had also observed a piece of cloth (rounded 3x) tied with fixed notch hanging loosely on neck. The doctor had assumed that the said cloth would have been around nose and mouth causing obstruction to air in the lungs which had been congested with fluid due lack of oxygen *i.e.* asphyxia as result of pressure on the face. Bruises had been observed on the checks, lower chin and on the nose. She had not observed any marks on the neck and said that any strangulation would have left bruises on the neck.

[39] When one closely examines the impugned directions and the pathologist's evidence with regard to the injuries found on the body of the deceased and the cause of death, it appears that the Learned Judge had not said anything materially different. His statement that asphyxiation and suffocation certainly caused by the gag around his nose and mouth is not inconsistent with medical evidence. Further, when the trial Judge said *'You may or perhaps you may not find that the cloth around the nose and mouth and the pressing on it by one or more of these accused was the unlawful act causing death.',* he had left a possible inference from the totality of the evidence available including the admissions in the caution interviews and medical testimony for the assessors to accept or reject. I do not find anything obnoxious in either of the statements as far as the trial Judge's function in addressing the assessors is concerned. The doctor's evidence that the cloth may have come off the nose and mouth when his body was moved and it is even possible that even the deceased may have pulled it off before he suffocated are not inconsistent to the generality of her evidence. I am not convinced that the complaint under this ground of appeal is sustainable.

[40] In any event, the counsel for the appellant should have sought appropriate redirections, when offered the opportunity, if he thought the impugned directions were so inadequate or inconsistent with the evidence. In **Balekivuya v State** CAV0014 of 2016: 26 August 2016 [2016] FJSC 37, the Supreme Court remarked as follows.

> *'66. Hon. Justice Goundar who gave the leading judgment in* ***Mesulame Waqabaca and Tiko Uate v. The State*** *[2015] FJCA 167; AAU 0063.2010 (3 December 2015) made very pertinent observations and consequences that a party may face when he complains of impropriety on the trial judge's directions to the assessors after waiving his or right not to seek re-direction on any matter when asked by the trial judge. He Lordship observed (at para 12):*
>
> *"Counsel for the first appellant submits that the directions are inadequate because the assessors were not told that if they found the appellant did not have the requisite mens rea for murder due to his state of intoxication at the time of the offending then they may find the appellant not guilty of murder but guilty of manslaughter. At trial, the parties were given an opportunity to seek re-directions after the Summing Up was delivered. Counsel for the appellant did not seek any re-directions. No explanation was offered for not seeking re-directions on matters which are now appealed. One can only assume that by not seeking re-directions, counsel for the appellant did not find the alleged inadequacy in the direction on intoxication and manslaughter insignificant".'(emphasis added)*

[41] I have given due consideration to the appellant's complaint but do not find any unfairness in the High Court Judge's impugned direction. I am not convinced that the trial Judge had not lived up to the responsibility in the summing-up in this respect as set out in **Ram v State** CAV0001 of 2011: 9 May 2012 [2012] FJSC 12 and hold that there is no resulting substantial miscarriage of justice.

[42] Accordingly, I reject the 08th ground of appeal.

Ground 9

[43] This ground of appeal is based on the argument that the trial Judge failed to sum up to the assessors that despite the police having in their possession the Post Mortem Report, they had put to the appellant that it was strangulation that had caused the deceased's death. In the first place, this was never raised with trial Judge by the counsel for the appellant when the opportunity was available by way of a redirection. The portions of the summing-up challenged by the appellant are as follows.

> *'29. The State is running their case of murder on intention to kill. They say that having found proved so that you are sure that there was an unlawful act which caused the death of Vinod, an intention to kill is present. They point to*

the caution interview of the first accused who says he held a cloth over the deceased's mouth and nose until he was motionless……'

'35. ……Tasvinder asked Roko how did he kill him and he replied that "he was a sick person and we tied a cloth around his neck and he died"……..'

[44] The Learned High Court Judge had only referred to what the appellant had told the police at the caution interview and what he told witness Tsavindar. He had not erred in that. The appellant had confessed, on more than one occasion at the caution interview, to having blocked the deceased's mouth until he was motionless and later revealed who tied the cloth over his mouth. Therefore, there could not have been any confusion in his mind as to what most likely would have caused the death of the deceased. Thus, the interviewing officer putting to the appellant that the deceased was strangled to death could not have crated any prejudice to the appellant's case. It is not as if the appellant's defence was that he was innocent because the deceased had died of asphyxia due to suffocation but not due to strangulation. In addition, there was no doubt at all of what the cause of death was, as the Post Mortem Report was available to the appellant.

[45] I see no substantial miscarriage of justice arising of this complaint and reject the 09th ground of appeal.

Ground 10

[46] The appellant is critical of some parts of the summing-up by the Learned High Court Judge. Subject to this alleged misdirection not having been pointed out to the trial Judge at the end of summing-up, I would consider the relevant paragraph which is as follows.

'[17] Your approach to the case should therefore be as follows: if looking at the case of each accused in turn you are sure that with the intention I have mentioned he took some part in committing it with the others he is guilty. That may not cause you any difficulty with the robbery, but with the murder additional legal considerations come into effect

[47] The complaint of the appellant is that the trial Judge had usurped the function of the assessors by taking away the charge of robbery from their consideration or at least made them take it for granted as having been already proved. However, the above paragraph has to be considered along with the preceding paragraphs where the trial Judge had described the basis of liability of the appellant as follows.

> *'[14] As you are aware, there are four accused persons in this trial, charged with all three offences. You must look at each offence separately. Just because you may find one accused guilty of one does not mean necessarily that he is guilty of another offence.*
>
> *[15] Similarly, you must look at each accused separately. If you think one accused is guilty it does not mean that the others are also guilty. It is like having four separate trials against each of the accused. So for each count you will examine the case against each accused separately.*
>
> *[16] Now having said that, it is the prosecution case that all four were acting together in this house invasion and they rely on the legal doctrine of "joint enterprise". What joint enterprise means is this: where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as a joint plan or agreement to commit the offence, they are each guilty. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his part in it (however great or small) so as to achieve that aim.'*

[48] Given that the appellant had confessed to his unqualified participation in the robbery, the trial Judge's statement that '*That may not cause you any difficulty with the robbery'* is only to say that it may not be difficult for them to decide the appellants' liability for robbery on the legal basis of joint enterprise; not that the assessors should presume the guilt of the appellants. Therefore, the comments in **Mudaliar v State** CAV0001 of 2007:17 October 2008 [2008] FJSC 25 on the continuing role of assessors in Fiji, are not applicable to the current dispute. There is no miscarriage of justice.

[49] Accordingly, I see no merit in ground 10 and reject the same.

Ground 11

[50] The appellant's argument is that the trial Judge should have given full accomplice warning to the assessors of Tasvinder Singh's evidence. This again is a matter that could and should have been sought by way of a redirection. I can do no better than quoting from the single Judge's ruling the summary of Tasvinder Singh's involvement to understand and put the appellant's complaint in the proper context.

> *'[3] On the night in question, Tasvinder Singh transported four men in his van to the address of the victim. Singh's evidence was that Rokoua had arranged with him to drive to the victim's address. After dropping the accused persons, Singh drove back to his base. The following day, Rokoua approached Singh and offered to pay $200.00 for the hire of the van. Singh said Rokoua admitted that the victim died when they tied a cloth around his neck. Singh did not report the matter to police. There is no evidence to suggest that Singh was a party to the joint enterprise to rob the victim. He might have suspected that the four accused persons he dropped off were up to some illegal activity, but suspicion is not enough to impute improper motive. Singh could not have been charged with any of the offences that the appellants were charged with because he did not participate in those offences. There is no arguable ground to treat Singh's evidence with caution for improper motive. In any event, Singh did not implicate Rokete as one of the persons he had dropped off at the victim's address on the night in question. Ground 1 is unarguable.'(emphasis added)*

[51] The appellant has cited **Mudaliar v The State** AAU0032 of 2006:23 March 2007 [2007] FJCA 16 in support of the contention that whether a particular witness is an accomplice is a matter for the assessors and they should be directed accordingly. However, on a perusal of the above decision it becomes clear that for a person to be treated as an accomplice he should be a *particeps criminis* (one who takes part in a crime) and otherwise, a warning on the desirability of corroboration is not necessary. Section 21 of the Penal Code provided that a person, who counsels or procures any other person to commit the offence, is deemed to have taken part in the offence and to be guilty of the offence. Counselling another to commit an offence is further defined in section 23 and it is clear that Tasvinder Singh had neither counselled nor procured the appellants to commit the offence with which they stand charged. His position even under cross-examination was that he did not know that there may be a robbery. This is another reason why Tasvinder Singh cannot be treated as an accomplice.

[52] Therefore, I conclude that this ground of appeal is without merit and should be rejected.

Ground 12 and 13

[53] The appellant's complaint here is that the trial Judge had misdirected the assessors on the elements of murder and particularly the element of *'malice afterthought'* causing substantial miscarriage of justice. Paragraphs 25, 26, 27 and 28 of the summing-up are as follows.

> *'[25]. Murder is committed when:*
>
> *(i) The accused did an unlawful act;*
> *(ii) That the act caused the death of the deceased;*
> *(iii) That at the time of the act the accused:*
> *(i) Intended to kill the deceased; or*
> *(ii) Intended to cause him very serious harm, or*
> *(iii) That he knew what he was doing would cause death OR very serious harm but went on to do it regardless.'*
>
> *[26] An unlawful act is simply an act not justified in law, for example punching, stabbing, strangling, suffocating are all unlawful acts.*
>
> *[27] The second element the State must prove is that the unlawful act caused the death. In our case the pathologist has said that Vinod died from asphyxiation and suffocation and it would almost certainly have been caused by the gag around his nose and mouth. You might find that this cloth gag and the pressing of his mouth caused the death.*
>
> *'[28] The third element of murder to be proved by the State concerns the accused's intentions at the time of doing the unlawful act. As a matter of common sense, nobody can look into a person's brain to ascertain his intentions, however intentions can be inferred from his physical actions and the surrounding circumstances.*

[54] The appellant's contention is that he had been charged under section 190 and 200 of the Penal Code where the third element of the offence of murder was malice afterthought which had not been explained by the trial Judge who had instead explained the elements of murder under the Crimes Decree, 2009.

[55] Penal Code describes malice afterthought in section 202 as follows.

> *'202. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.'*

[56] I think in subparagraphs (i) and (ii) of paragraph 25 of the summing-up the learned Judge had described the first two elements of murder under section 190 of the Penal Code and the rest of paragraph 25 adequately deal with the element of malice afterthought in a way that the assessors could understand. In paragraph 29 of the summing-up, the trial Judge had further elaborated this aspect as follows.

> *'[29] The State is running their case of murder on intention to kill. They say that having found proved so that you are sure that there was an unlawful act which caused the death of Vinod, an intention to kill is present. They point to the caution interview of the first accused who says he held a cloth over the deceased's mouth and nose until he was motionless. If you agree with that and agree that the first accused actually said that (and he says he didn't, he says he had no intention to kill) then you will find the first accused guilty of murder and also the three others too, If you find that the others knowing that there was a person present in the house, recognized the probability that this might happen to a householder disturbed and then joined the enterprise, taking that risk.*
>
> *'[30] If however, you find that there was no intention to kill then you are entitled to find the accused persons guilty of manslaughter. Manslaughter is a lesser offence than murder. There must still be an unlawful act which causes death but without the third element of intention to kill*

[57] Therefore, I do not see any merits in ground 12 and 13 and reject the same.

Ground 14

[58] The appellant argues that the trial judge erred in not directing the assessors on the defence of intoxication based on the evidence of Tasvinder Singh who had said in evidence as follows.

> *'.... One asked me if I had something-drug. I said yes. I gave them. We smoked it (marijuana). Three of them, Jai Roko did'nt smoke....'*

[59] The appellant relies on **Ram v State** CAV0001 of 2011: 9 May 2012 [2012] FJSC 12 in support of his argument. It should be understood that the pronouncements relied on by the appellant in ***Ram*** were made in the context where the counsel for the appellant contended that the omission on the part of the trial judge to make an appropriate direction to the assessors on the question of provocation, despite there being sufficient evidence from two prosecution witnesses suggestive of the said defence, was a grave error. He had submitted that the omission on the part of the trial judge had eventually led to a serious miscarriage of justice insofar as it prevented the alternative defence of provocation, which could have resulted in a verdict of manslaughter, being put to the assessors *(emphasis added)*.

[60] The facts of this case are different. The appellant admits that he did not raise the defence of intoxication at the trial and in the absence of scientific evidence and testimonies of eye witnesses, it is difficult for this Court to make any independent assessment of the effect of the Tasvinder Singh's evidence on smoking marijuana. In any event, in my view, the simple statement of Tasvinder Singh on smoking marijuana is not sufficient evidence even for the trial Judge to have put to the assessors for the consideration of the defence of intoxication. The duty of the court to place before the assessors all possible conclusions open to them on evidence presented in the trial or leave alternative verdicts in the hands of the assessors whether or not they have been canvassed by either parties, depends on the facts and circumstances of each and every case. There cannot be a rigid set of guidelines in that respect.

[61] Once again, it must be emphasised that the counsel for the 01st appellant never sought any redirection on the defence of intoxication. Accordingly, I see no merits in this ground of appeal and it is rejected.

Ground 15

[62] The appellant's complaint here is that, though the learned High Court Judge had correctly directed the assessors to consider the truthfulness of the charge statement and the caution interview and whether he had made them, he had failed to ask them to weigh them along with other evidence. The relevant paragraphs in the summing-up are the following.

> *'[41] First of all I direct you on how to treat the cautioned interviews and the answers to charge of the first, second and third accused. Each of those interviews and each of the answers to the formal charge appear to contain admissions or confessions to the offences they have been charged with. If you are sure that the individual accused did indeed make those admissions then you may take them into account when formulating your opinions. All three accused however challenge those admissions. The first accused says he was assaulted and slapped around the head and was thus forced to sign. In addition to that he says that the whole interview has been fabricated.*
>
> *[42] The second accused says he was also assaulted at Ba Police Station and as a result forced to sign the admission. The third accused says that he was asthmatic and deprived of his asthma medicine meaning that he was not in the right frame of mind when making the admissions attributed to him in the interview and in the charge statement. If you conclude that these allegations may be true (and remember the Police deny any impropriety) and that the confessions were or may have been obtained by assault or improper treatment then you must disregard the admissions and answers. If however you are sure that each accused, whose case you are looking at made the admissions and that they were not obtained by improper treatment, you must nevertheless decide whether you are sure that the admissions are true. If whatever reason, you are not sure that the admissions are true, you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them. Remember in this regard there are no confessions from the fourth accused. The evidence is that he was called in the interview but he said nothing to implicate himself in this affair. He merely told the same story that he told us in evidence.*

[43] Mr Niudamu told you in his closing speech that I had already ruled these statements to be admissible. He had no right to say that. Those were different proceedings before this trial started. It is a matter for you to decide and not me .Whether the accused were assaulted or not can only be decided by you. If you find they were assaulted and oppressed you will discard the interviews and their evidence, if you find that you prefer the Police evidence that everything was done properly then you can regard the interviews as evidence and if you find the answers true you may act on them.

[44] I remind you in the strongest possible terms of something I said to you during the trial. The contents of each accused's interview can only be used against that accused alone and not against any other accused that he might be talking about. To be specific about this, if the first, second and third accused say anything about the fourth accused then you are not permitted to use that as evidence against the fourth accused.

[45] As a related issue, and finally before I leave the question of the caution interviews, you will recall that when the statement of the third accused was read to you, and in the copy that you have, there is a reference he makes himself to being in prison with the fourth accused. Now first you cannot use that in any way against the fourth accused and secondly it is evidence about the third accused himself which you will ignore. His being in prison before is of no relevance whatsoever to any allegations he is facing on this case.

[63] It appears that the trial Judge had not particularly directed the assessors that the weight namely the probative value to be attached to the charge statement and the caution interview is a matter for them. However, in the judgment, the learned Judge had gone on to state that

'[3] I now direct myself on my own summing up and in consideration of all of the evidence in this trial I come to the following judgment.'(emphasis added)

[64] In Fiji, it is settled that the verdict, that is, the decision to convict or acquit in the case is always that of the judge (**Joseph v The King** [1948] AC 21, **Ram Dulare & Or v R** [1955] 5 FLR 1). The assessors only give an opinion which the trial judge may or may not accept (see section 237 (2) of the Criminal Procedure Act).

[65] Therefore, it is safe to assume that the learned trial Judge had considered the aspect of weight to be attached when he considered all the evidence before pronouncing the judgment. In those circumstances, the absence of reference to 'weight or probative value' of the appellant's caution interview cannot be said to have resulted in a

substantial miscarriage of justice. As the Supreme Court said in **Khan v State** CAV009 of 2013: 17 April 2014 [2014] FJSC6, there is no incantation which must be read in a summing-up and the required guidance need not be formulaic. It should be placed on record that the counsel for the 01st appellant had not sought any redirection on the so called deficiency in the summing-up when afforded the opportunity.

[66] Therefore, I reject the 15th ground of appeal.

Ground 16

[67] In his last ground of appeal the appellant argues that he had stated in evidence that he had gone to the house of the deceased alone and put a piece of cloth with chloroform on the deceased's nose until he was motionless but did not want or mean to kill him but only to put him to sleep and therefore, should have been convicted of manslaughter. He further states that one assessor had believed him and expressed an opinion that all appellants were guilty of manslaughter.

[68] In his evidence the appellant had stated that his first and second versions narrated in the caution interview are true and not the third one. In the first narration, he had said that he never even went to the deceased's house. He was arrested after he escaped from police custody during the caution interview and thereafter, continued the interview by stating that he was earlier frightened as an Indian man had died and then told that he went to the deceased's house alone to steal but admitted later in the statement that the other appellants were also with him. While they were inside the house the deceased had woken up and he had got hold of his neck and covered his mouth. Thereafter, he had placed the hand covered with his socks with chloroform on the deceased's mouth and nose while the other two were holding him by his legs and hands. A little later the deceased had slacked and they had continued their search in the house. The third version is not much different to the second one except that the appellant had said that he planned the robbery with the second appellant joined by the third appellant later in the day. Inside the house, he had felt that the deceased not moving after blocking his mouth with hand and told the other two to leave him there with his hands tied behind the body for a while and before they left the house he had

untied the hands and left the deceased lying on the ground facing upwards. He had not mentioned in the third narration about the use of chloroform upon the deceased but stated that he simply blocked his mouth with one hand while holding the neck with the other.

[69] The appellant's evidence at the trial is unreliable and untruthful as according to his own evidence the first two versions in the caution interview were correct and true. In the first version he had said that he did not go to the deceased's house in that night. In the second version he had admitted his presence inside the deceased's house along with the other two appellants as part of the robbery. His evidence at the trial is that he went there alone and committed the robbery alone. Thus, the appellant's evidence is self-contradictory and irreconcilable.

[70] Two of the assessors have found all four accused guilty of the murder while one assessor has found all four not guilty of murder but guilty of manslaughter. Thus, all assessors and the trial Judge had acted upon the caution interviews. The single assessor's opinion of manslaughter may well be due to a misunderstanding of the doctrine of joint enterprise on his part which is the basis on which the prosecution ran its case.

[71] Crimes Decree, 2009 in section 46 states as follows.

'*Offences committed by joint offenders in prosecution of common purpose'*

> *46. When two or more persons form a common intention to prosecute an unlawful 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.*

[72] **Prasad v Queen** [1959] FJ Law Rp 2; [1958-1959] 6 FLR 160 (11 November 1959) elaborated on section 22 of the Penal Code which is similar to section 46 of the Crimes Decree, 2009 as follows.

'Section 22 of the Penal Code indicates a definitive sequence of events, all factual in character. There must first be the formation of a common intention to prosecute, in conjunction, an unlawful purpose. Next there must be the sustained prosecution of that purpose; then finally, an offence must be committed which was a probable consequence of the prosecution of the purpose.

[73] The caution interview of the 01st appellant clearly shows that there had been a common intention in the form of a plan to commit robbery (unlawful purpose) in the deceased's house and in the prosecution of which the deceased had been killed. The only issue is whether the murder was a probable consequence of the prosecution the robbery. It is well established that in case of joint enterprise, it suffices if each participant can be shown to have in contemplation the probability of infliction of serious harm on the deceased in the execution of the planned unlawful purpose and malice afterthought is not required.

[74] In **Niume v State** AAU0106 of 2011: 2 October 2015 [2015] FJCA 132 the Court of Appeal held

'[23] The test for secondary liability for murder under section 22 is whether each participant contemplated the probability of death or infliction of serious harm on the deceased in the execution of the planned unlawful purpose (**Kumar & Ors. v. R** [1987] SPLR 131, 134). The contemplation does not need to be express. It may be implied. As the Privy Council in **Chan Wing-Siu v The Queen** [1985] AC 165, 175 said:

"It [the principle] turns on contemplation or, putting the same idea in other words, authorization, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

[75] In **Vasuitoga v State** CAV001 of 2013: 29 January 2016 [2016] FJSC 1 the Supreme Court discussed the subjective element involved in the doctrine of joint enterprise and tests that have been applied and held

'[40] In case of murder, the subjective element that the prosecution is required to prove is that the secondary party contemplated and foresaw the probability of death or infliction of serious harm on the deceased in the execution of the planned unlawful purpose. This principle was enunciated by

*the Privy Council in **Chan Wing-siu and others v The Queen** [1984] 3 ALL ER 877 and followed by the courts in Fiji in **Kumar and others v R** [1987] S.P.L.R. 131, 134, **Pauliasi Nacagilevu v The State** unreported Cr App No. AAU0058 of 2010; 14 August 2015 at [23] and **Eparama Niume and another v The State** unreported Cr App No. AAU0106 of 2011; 2 October 2015 at [23].*

*[41] Various tests have been formulated by the courts to determine what was contemplated by the secondary party in pursuance of an unlawful purpose. In **Johns v R** [1980] HCA 3; (1980) 143 CLR 108, 130-13, the High Court of Australia endorsed the test as "an act which might be done in the course of carrying out the primary criminal intention – an act contemplated as a possible incident of the originally planned particular venture". In a later case of **Miller v R** (1980) 55 ALJR 23, the High Court of Australia spoke of contemplation by the parties of a substantial risk that the killing would occur. In **R v Gush** [1980] 2 NZLR 92, the New Zealand Court of Appeal preferred the test "an event that could well happen".*

*[42] In **Chan Wing-siu**, the Privy Council considered the various tests and concluded that no one test is exclusively preferable because the question is not one of semantics. Sir Robin Cooke who wrote the principal judgment said that all that is required is that the prosecution must prove the necessary contemplation beyond reasonable doubt, although that might be done by an inference from all the admissible evidence led at the trial including any explanation the accused gave in evidence or in a statement put in evidence by the prosecution. At the end of the day, it can only be for the jury to determine any issue of that kind on the facts of the particular case.*

[76] This is not an opportunistic robbery but a well-planned robbery. It is clear from the caution interview of the appellant how he planned to rob the deceased, an old person in his house. He may not have intended to kill the deceased but it cannot be argued that he did not contemplate and foresee the probability of death or infliction of serious harm on the deceased in the execution of the robbery. As every person is presumed to know the consequences of his acts, the appellant should be deemed to have contemplated or foreseen that what he did to the appellant namely blocking his mouth until he became motionless may result in his death or serious harm.

[77] In all circumstances of the case, I do not see any merit in the appellant's argument that because he did not intend to kill the deceased and therefore he should be convicted for manslaughter when the case against him and the other appellants was based on the doctrine of joint enterprise. I reject the last ground of appeal too.

02nd Appellant's appeal

[78] The 02nd appellant by himself had filed a notice of appeal against conviction and sentence dated 01 April 2014 containing 20 grounds of appeal. At the leave stage, grounds 01, 02-05 and 06-12 had been argued together and leave to appeal had been refused by the single Judge on 23 June 2016. Thereafter, a renewal application dated 03 January 2019 had been filed by the Legal Aid Commission containing 10 grounds of appeal. They are as follows.

'**Ground 1**

The learned Trial Judge erred in law and in fact in holding a voire dire inquiry in this:

(i) The trial judge has no jurisdiction to conduct the voire dire which had been conducted and decided by the previous presiding trial Judge.
(ii) The failure to give reasons for re-conducting another voire dire hearing;
(iii) The Appellant right to fair trial is prejudiced by the second voire dire hearing in the proceedings allowed the prosecution to canvass any defects from the first voir dire proceeding, as the State relied wholly on the Appellant's confession contained in his disputed caution interview.
(iv) The trial Judge voire dire ruling contains serious defects giving rise to a conclusion that inadequate assessment of the evidence upon reaching a finding.

Ground 2

The Appellant is prejudice by the unavailability of the second voire dire proceedings resulting in that;

(i) The Appellant Court cannot carry out its function to independently assess whether the trial judge applied the correct assessment and or principles in its findings;

Ground 3

The learned Trial Judge failed to fairly and adequately assess the admissibility of the confession by not considering;

(i) The Appellant was offered immunity by the investigating officer Iakobo Vasewa (PW 28) in exchange for his testimony against his co-accused persons;

(ii) The significance of Dr Joyce called to medically examine the Appellant in light of the Appellant's evidence that he was assaulted / complained of being assaulted prior, during and after the caution interview.

(iii) The failure of the interviewing officer, Laisiasa Tamani (PW16), to note on the record of interview that the Appellant complained of chest pain and the breaks given for the Appellant to be examined by Dr Joyce.

(iv) The significance of police officer, Sgt Qaraiwalu Sivo (PW13) evidence, that in his capacity as a relative, he made spiritual encouragement and prayer during the Appellant's police interview having no direct role in the appellant's caution interview.

(v) The significance of witnessing officer, Josefa Nainima (PW17) evidence his role was to see fairness done to the appellant during the caution interview. Yet the record of the caution interview did not reflect on breaks offered to the appellant for chest pain and medical examination by Doctor Joyce.

(vi) The evidence of Appellant's escorting officer, Maleli Romoka (PW18), who testified that during the Appellant's interview he complained of chest pain and a doctor was brought in to examine the Appellant.

(vii) The time the Appellant was medically examined as per medical report (exp 15) he was examined on 12th of September 2009 at 1320 hours as opposed to Doctor Joyce evidence that the appellant was medically examined at lunch break midday whilst the station diary records (exp 10) states that Doctor Joyce was at the police station from 1211 hours to 1220 hours on 12th September 2009.

Ground 4

The verdict is unreasonable and not supported by the evidence in its totality.

Ground 5

The appellant right to a fair trial is prejudice by the trial judge direction in paragraph 40 stating 'I don't propose to go into details about the police evidence. You heard it and you heard the same things form many witnesses and you heard the same matter put in cross examination to each of the witness. …" of the summing up in that;

(i) The appellant is charged with others in which the circumstances for arrest and interview is different.

(ii) The appellant with two of his co-accused are disputing their confession whilst the fourth accused is giving exculpatory statement.

(iii) The investigating officer, Iakobo Vasewa (PW28), agreeing under cross examination that the appellant was offered immunity.

Ground 6

The trial judge erred in law by misdirecting the assessors in paragraph 17 of the summing up by stating 'your approach to the case should therefore be as follows: if looking at the case of each accused in turn you are sure that with intention I have mentioned he took some part in committing it with the others he is guilty.

That may not cause you any difficult with the robbery, but with the murder additional legal consideration come into effect.

The use of the words in the sentence construct that may not cause you difficulty with the robbery' is a fatal error as it restricts and usurps the function of the assessors to draw their own conclusion on the issues of facts.

Ground 7

The Trial Judges erred in law and facts by directing the assessors in paragraph 46 (line 6 of the summing up) stating that 'there was nothing to report on his examination of the second accused' which is factually contrary to the evidence adduced by Doctor Dragon (PW22), particularly on the issuance of bruffein tablets.

Ground 8

The Trial Judge erred in law and facts by failing to consider the principle in DPP v Ping Lin (1975) CA in considering the impropriety of the offer of immunity made to the appellant prior and after the caution interview by the investigating officer Insp. Iakobo Vasewa. Had the trial judge considered impropriety of the offer of immunity, the trial Judge would have formed a different opinion on the admissibility of the confession.

Ground 9

The Trial Judge acquitting the Apellant's co-accused (Sanjav Mohan) gives rise to the failure of the trial Judge to accord the same findings on the Appellant's case which is similar to that of his co-accused as the only incriminating evidence against the appellant is his disputed confession.

Ground 10

The Trial Judge failed to carry out an independent assessment and consider crucial evidence when deciding the truthfulness of the confession evidence whereby had the trial judge done so, he would have differed from the findings of the assessors. The crucial evidence are that;

(i) The cause of death contained in the allegation out to the Appellant in his caution interview is different from the post mortem report.

(ii) The co-Appellant (Joji Rokete) tendering the car keys during the trial and Sanjeev Mohan (co-Accused) stating in his caution interview that he left the key on the ignition, is different to the Appellant stating in his caution and charge interview that he found the car keys.

Appeal against conviction

Ground 1

The minimum term of 18 years imprisonment is excessive in the circumstances of the case.

Ground 1

[79] Under the first ground of appeal which is taken up for the first time, the 02nd appellant is also challenging the Learned High Court Judge's decision to hold a fresh *voir dire* inquiry on the basis that he had no jurisdiction to do so and is in breach of the principle of res judicata. I have already dealt with this issue earlier and would not repeat myself. In addition, my view is that the principle of res judicata has no application in this situation as the rights of the parties had not been finally decided with the earlier ruling and there was no end to the case. It was an interim ruling on the admissibility of a piece of evidence and the second *voir dire* ruling has not come to a different finding. The 02nd appellant had raised no objection to the second *voir dire* ruling either, as understandably he would have benefited from it if the trial Judge were to come to a finding different to the first *voir dire* ruling.

[80] It was in the interests of the appellant that the trial Judge wanted to be satisfied of the voluntariness of the appellant's caution interview when he could have gone ahead with the earlier ruling. In any event the previous ruling was incomplete. Though the Judge had not spelt out reasons for holding the fresh *voir dire* inquiry, his decision to

cause a fresh *voir dire* inquiry to be conducted cannot be criticised as being unfair to the appellant or a violation of his right to fair trial. If at all, it would have been disadvantageous to the prosecution having to prove the voluntariness of the caution interview twice.

[81] The appellant also attempts to challenge the fresh *voir dire* ruling on its merits on the basis that not adequate assessment had been done before reaching a conclusion. Thus, the current ruling has been criticised by the appellant with reference to the evidence given at the previous proceedings. There is little point in trying to examine the correctness of the second ruling having regard to the evidence given at the previous inquiry.

[82] The appellant has particularly compared the evidence of the interviewing officer Laisiasa Tamani as narrated by the trial Judge in the new ruling and his evidence at the earlier inquiry. The copy record shows that Laisiasa Tamani who had caution interviewed the 02nd appellant had given evidence at the trial and the counsel for the appellant had cross-examined him but does not appear to have confronted the witness with the matters now being raised. Dr. Joyce too had given evidence at the trial but the appellant's counsel does not appear to have posed even a single question to her on the issues being brought up now. Thus, it has to be assumed that the defence had not considered them to be material issues to be raised with the witness.

[83] The appellant is also being critical of the trial Judge's reference to various rights now guaranteed by the Constitution (2013) under Chapter 2 – Bill of Rights being accorded to the 02nd appellant when the current Constitution was not in existence at that time and no Constitution being in force in 2009. It should be remembered that the rights afforded to an accused prior to recording a confessional statement were always part of common law requirements and had to be provided prior to the caution interview of the appellant was recorded if it were to be led in evidence as having been given voluntarily.

[84] Therefore, no substantial miscarriage of justice had occurred as a result of the fresh *voir dire* inquiry and I, accordingly reject this ground of appeal.

Ground 2

[85] I have already dealt with more or less a similar complaint with regard to the 01st appellant earlier in the judgment and my reasons for rejecting this ground of appeal are the same as given above. Accordingly, 02nd ground of appeal is rejected.

Ground 3

[81] This fresh ground of appeal concentrates on the trial Judge's assessment of the admissibility of the caution interview *vis-à-vis* its voluntariness. The *voir dire* ruling is challenged from several angles.

[86] Firstly, the appellant contends that prosecution witness Iakobo Vasewa, the investigating officer visited him along with a legal officer from the DPP's office on 16 October 2009 an offer of immunity was made. That offer had been admittedly made after all the accused had been taken to court. The important aspect of this offer of immunity is that it had been made after the appellant's caution interview had been completed on 12th, 13th and 14th September 2009. The fact that a legal officer from the DPP's office also had joined the police officer shows, that it was not being done in a secretive manner. In the circumstances, this offer of immunity could have impacted the appellant's caution statement.

[87] The appellant also alleges that the offer of immunity was for him not to complain to the doctor and for withdrawal of charges against him. The first part had not been suggested to witness Iakobo Vasewa who had generally denied suggestion of assault and promise of withdrawal of charges. The trial Judge had considered in detail the appellant's evidence in this regard in the *voir dire* ruling.

[88] The appellant also states that Dr. Joyce was summoned to examine him while the interview was in progress because the police had assaulted him. However, Dr. Joyce's evidence is that the appellant complained of pain but not said where the pain was. The doctor had not seen any physical injuries and recommended that he was fit to be further interrogated. He had not disclosed any injuries to the doctor, the Magistrate or the High Court Judge. The trial Judge had considered this aspect also in the ruling.

[89] The appellant's third complaint is that the interviewing officer had not recorded the fact that Dr. Joyce had seen the appellant. It does not affect the voir dire ruling in any way as the doctor had admitted having seen the appellant and interviewing officer also had admitted the arrival of doctor.

[90] The fourth aspect of his complaint is to the presence of Sgd. Qaraiwalu Sive, a relative of the appellant at the police station who had given spiritual encouragement and prayer amounting to an undue influence. I have dealt with this matter earlier and there is no merit at all in this allegation.

[91] Fifthly, the appellant criticises the witnessing officer Josefa Nainima for not recording the arrival of Dr. Joyce during the caution interview of the appellant. This fact is not in issue and not recording it as part of the interview notes does not materially affect the voluntariness of it in anyway.

[92] The appellant argues that the evidence of Maleli Remoka shows that he had developed a chest pain as a result of the police assault. However, the evidence of Maleli Remoka is that he complained of chest pain but the witness had not seen him in pain. Dr. Joyce had spent about 15 minutes with him but not diagnosed any chest pain and not prescribed any medicine either. There is no substance of the appellant's argument.

[93] Finally, the appellant attempts to draw an inference from the fact that there is a difference with regard to the time of Dr. Joyce's arrival and examination to the effect that it goes to show that he had been assaulted. Dr. Joyce had not been challenged at all for lack of integrity on her part or helping the police to suppress an assault on the appellant. The time difference has been due to an inadvertence and can be explained.

[94] I am not satisfied that the judge had completely wrongly assessed the evidence or had failed to apply the correct principles in admitting the caution interview and therefore I refuse to interfere with the trial Judge's ruling [see ***Tuilagi*** and ***D.P.P v Ping Lin***]

[95] Therefore, I see no reason to doubt the trial Judge's decision to admit the appellant's caution interview, upon the *voir dire* inquiry which has dealt with all aspects of the appellant's case in sufficient detail, on matters urged under 03rd ground of appeal and therefore, reject the same.

Ground 4

[96] The appellant argues that the verdict is unreasonable and not supported by the evidence without elaborating on the point or except to say that the only evidence against the appellant is his caution interview. It is well established that an accused could be convicted on a confessional statement alone. There is no merit in this ground and I reject the same.

Ground 5

[97] This ground of appeal is based on paragraph 40 of the summing up on the basis that the trial Judge should have summarised the police evidence to the assessors. Paragraph 40 is as follows

> *'[40] I don't propose to go into detail about the police evidence. You heard it and you heard the same things from many witnesses and you heard the same matters put in cross examination to each of the witnesses. There are however important matters arising from that evidence that I must remind you of and direct you on.'*

[98] In paragraph 39, 41 and 42 the trial Judge had said as follows

> *'[39] From then on we heard from 14 Police witnesses in all who gave evidence as to the cautioned interviews made by the first, second, and third accused, about their arresting witnesses who formally charged the accused and took statements from them in answer to that charge. We heard from the investigation officer, the officer who compiled the Crime office station diary, the officer who seized the stolen phone from the cane field which had been hidden by Josua Nokosia, the officer who went to re-apprehend the first accused after he had escaped from the Crime Office. We heard from the officer who took the deceased's body from the mortuary to the Lautoka Hospital for the post mortem examination and the final police witness was Inspector Iakobo who was the principal investigation officer of this case as well as being a witness to the cautioned interview of the first accused which he read into the record.'*
>
> *'[41] First of all I direct you on how to treat the cautioned interviews and the answers to charge of the first, second and third accused. Each of those interviews and each of the answers to the formal charge appear to contain admissions or confessions to the offences they have been charged with. If you are sure that the individual accused did indeed make those admissions then you may take them into account when formulating your opinions. All three accused however challenge those admissions. The first accused says he was assaulted and slapped around the head and was thus forced to sign. In addition to that he says that the whole interview has been fabricated.*
>
> *[42] The second accused says he was also assaulted at Ba Police Station and as a result forced to sign the admission. The third accused says that he was asthmatic and deprived of his asthma medicine meaning that he was not in the right frame of mind when making the admissions attributed to him in the interview and in the charge statement. If you conclude that these allegations may be true (and remember the Police deny any impropriety) and that the confessions were or may have been obtained by assault or improper treatment then you must disregard the admissions and answers. If however you are sure that each accused, whose case you are looking at made the admissions and that they were not obtained by improper treatment, you must nevertheless decide whether you are sure that the admissions are true.*

[99] Therefore, it is not as if the learned Judge had not referred to the gist of the evidence of the police officers and those of the appellants. It is obvious that if the trial Judge were to repeat the evidence of 14 police officers (along with evidence of other witnesses and the appellants) once again which the assessors had heard in the most recent past, the summing-up would have lost its brevity in terms of the most important aspects of the case. In my view, the assessors should not be overburdened with details unless they are absolutely necessary lest they would obscure the real issues before them and the essential evidence relevant to resolve those issues. The observations of

Lord Hailsman in **R v Lawrence** [1982] AC 510 are on the direction to a jury who are the ultimate judges of facts in the UK but in Fiji it is trial Judge who is the ultimate authority on facts and law and the assessors only express non-binding opinions.

[100] I do not think that there is a substantial miscarriage of justice and accordingly, reject 06th ground of appeal.

Ground 7

[101] This ground of appeal is based on paragraph 46 of the summing-up which is as follows

> *'[46] As part of the prosecution case you heard evidence from three doctors. Dr Dragon of the Ba Medical Centre gave evidence of a routine examination he made of the first, second and third accuseds at the request of the Police on the 15th September 2009. He said that his examination revealed no visible sign of injury on anyone of the three. Bear in mind that these examinations were conducted within a day of the interviews being conducted. More specifically he found that the first accused had a dental problem and referred him to dentist. There was nothing to report on his examination of the second accused and to the third accused he found a small abrasion behind his ear and he made an incidental finding of mild asthma, a finding which he said had taken the third accused by surprise*

[102] The appellant has picked up the underlined part of paragraph 46 for his criticism. Dr. Dragon's evidence is that he examined the appellant on 15 September for 10-15 minutes and saw visible injuries. The appellant had been calm and not complained him of any chest pain but had asked for tablets. He had prescribed him Baufren. The appellant's complaint is that the trial Judge should have referred to Dr. Dragon prescribing Baufren in the summing up. It appears that what the Judge had meant was that there were no injuries for the doctor to report. I agree that it would have been desirable for the Judge to have added the prescription of Baufren but the lack of a mention to that had not resulted in a substantial miscarriage of justice.

[103] In any event, the 02nd appellant's counsel had not sought any redirection of matters complained above. Accordingly, I reject the 07th ground of appeal.

Ground 08

[104] I have already dealt with this complaint under the third ground of appeal with regard to the admissibility of the caution interview. The appellant now raises it regarding the summing-up and cites **DPP v Ping Lin** (1975) CA in support of his argument. The appellant admits that the trial Judge had considered the issue of offer of immunity at the *voir dire* stage. The observations relied on by the appellant in ***DPP v Ping Lin*** is applicable at the stage of deciding whether to admit a confessional statement as evidence. ***Tuilagi*** is on when the appellate court should interfere with the decision of the trial Judge on his admission of a confessional statement at the *voir dire***.** As I have already held that the offer had been made after recording the appellant's caution interview and could not have influenced his decision to say what he said to the police. Therefore, by not placing it before the assessors, in my view, the trial Judge had not caused a substantial prejudice to the appellant's case.

[105] Therefore, no substantial miscarriage of justice had occurred and this ground of appeal is rejected.

Ground 9

[106] This ground of appeal was urged before the single Judge and overruled with cogent reasons. I am in full agreement with it and nothing more to usefully add to it except to state that all the evidence the appellant was relying on was before court unlike in the case of Mohan whose medical report surfaced later which made the trial Judge change his mind. In addition, unlike the 02nd appellant, Mohan in the first instance had complained to the Magistrate of police having attempted to make use of his medical condition in custody to put pressure on him. The reasons of the single Judge are as follows.

> *'[7] The first compliant relates to the acquittal of Mohan. Mohan was found guilty by the assessors. But when the trial judge adjourned to consider his judgment, he found a medical report in the court file that showed that Mohan was chronically asthmatic. The only incriminating evidence against Mohan was his confession under caution. Mohan was unrepresented at trial. However, he challenged the admissibility of his confession on the ground that*

it was obtained unfairly in the circumstances when he was denied medication for his illness. To rebut this contention, the prosecution led evidence from Dr. Dragon who upon examination of Mohan ruled out that he was chronically asthmatic. Based on Dr. Dragon's evidence, the trial judge ruled Mohan's confession admissible. But when the trial judge saw another medical report of Mohan in the court file but not led in evidence, the trial judge re-visited his earlier decision admitting the confession and decided not to give any weight to Mohan's confession. As a result, Mohan was acquitted. Waka's contention is that the same reasoning should have been applied to him because he was also medically examined by Dr. Dragon whose credibility was questionable according to the trial judge.

[8] I accept Waka's submissions that the trial judge made an error in referring to a medical report which was not led in evidence. However, I do not think Waka was prejudiced by the error. Dr. Dragon's credibility was never tested when the trial judge learnt about Mohan's second medical report contained in the court file. So when the trial judge based his decision to acquit Mohan on evidence not led at trial, arguably the prosecution was prejudiced by that decision, and not Waka. Waka's conviction is based on the evidence led at trial, and Mohan's acquittal had no bearing on that decision. Ground 1 is unarguable.'

[107] Therefore, this ground of appeal is rejected.

Ground 10

[108] I have already considered *in extenso* the argument in subparagraph (i) of ground 10 under the 01st appellant's appeal and rejected. I can only reiterate the same here and for the same reasons reject the 02nd appellant's contention here as well.

[109] Paragraph (ii) of ground 10 is on different versions with regard to the car keys by the 01st appellant, Mohan and the appellant. Mohan had been acquitted and what Mohan had said in his caution interview can no longer be used for the purpose of assessing the case against the appellant or the 01st appellant. Each appellant's case depends on the evidence against him and the caution interview evidence of one appellant cannot be used to corroborate or discredit another appellant. In any event, the divergent versions of the car keys do not have a material effect on the conviction of the appellant. Neither do they make admissions of the 02nd appellant and the 01st

appellant unreliable. The trial Judge had summed up to the assessors as follows as to how they evaluate the evidence of witness and directed himself on the same lines.

> *'[6] In assessing the evidence, you are at liberty to accept the whole of a witness evidence or accept part of it and reject the other part or reject the whole. In deciding on the credibility of any witness you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he or she evasive? How did he or she stand up to cross-examination? You are to ask yourselves was the witness honest and reliable?*

[110] Therefore, this ground of appeal is rejected.

Ground 11

[111] The appellant states that his sentence is excessive. The trial Judge had dealt with the sentence as follows in the sentencing order dated 04 March 2014

> *'(4) The second accused is aged 34 years, also a farmer and he is married with 2 children. He has two previous convictions which are current, one for housebreaking and larceny. His counsel submits that his role in this enterprise was minimal but this Court does not agree. One of his admissions in the caution interview was that he held and pressed down the body of the victim while another applied force to his nose and mouth. He therefore is an aider and abetter of the offence, as well as being a party in the joint enterprise. Of such he is equally liable with the first accused who admitted applying the gag to the deceased's mouth.*
>
> *'(6) The maximum penalty for robbery with violence under the Penal Code is life imprisonment and the accepted tariff is 10 to 16 years (Rasaqio HAC 15 of 2007, Rokonabete HAC 18/07, Wainiqolo AAU 27 of 2006).*
>
> *(7) This particular robbery was especially violent with at least one if not all of you subjecting the lone householder to violence of being tied up and suffocated with a cloth gag until he was "motionless". Even if it was only one of you who did the suffocating you must all bear responsibility for that violence.*
>
> *(8) There are several factors of aggravation;*
>
> > *The robbery was not spontaneous, it was planned*
> > *It was effected at about 2 – 3 in the early morning.*
> > *The murder was effected to avoid justice by removing any potential identification by the householder.*

(9) I take a starting point for the robbery a term of ten years. For the aggravating features I add four years bringing the total sentence up to fourteen years.

(10) For the offence of murder I have no option but to pass a sentence of life imprisonment. That is the sentence fixed by law. I do however have the discretion to determine a minimum term which you must serve before you are eligible for parole. This Court said in Nilesh Chand HAC 345 of 2013 (Labasa) a minimum term is set so that the community can be assured that persons taking the lives of others may serve a meaningful period in custody. It was said that a murder with intention to kill will attract a longer term than a murder committed by recklessness. In this particular case, there is no evidence of provocation whatsoever on the part of the deceased. In fact the 1st accused says in his caution interview that the deceased woke and was looking around. He was obviously in abject fear of what was happening in his house and he was then jumped on and his face smothered and pressed. I find it very serious that this innocent householder was killed so callously just because he was there observing the robbery. A killing to prevent later identification is of course aggravating in that it is intended to obstruct the course of justice and that is very serious aggravation indeed.

[112] There is no error in the impugned sentence within the guidelines for challenging a sentence set out in **House v The King** [1936] HCA 40; (1936) 55 CLR 499), **Bae v State** AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 that requires the intervention of this Court.

[113] Therefore, the ground of appeal against sentence is rejected.

03rd appellant's appeal

[114] The third appellant had filed an application for leave to appeal application dated 26 March 2014 against conviction and his amended application for leave to appeal is dated 20 May 2015. He informed this Court at the hearing that he is not relying on another set of amended grounds of appeal dated 27 December 2018 bearing the names of all appellants but only rely on nine grounds of appeal set out in his hand written submissions dated 30 January 2019. It appears that except ground 2, 3, 4, and 5 the others are fresh grounds of appeal not urged before the single Judge. The State had not filed written submissions in reply to the 03rd appellant's submissions before the hearing but tendered them after the hearing.

[115] Therefore, the 03rd appellant's grounds of appeal that would be considered are as follows.

Ground 1

That the Court's verdict is unreasonable and cannot be sustained on the evidence of the pathologist as the cause of death in the post mortem report clearly contradicts the State's case particularly;

(a) The particulars that the deceased was strangled to death put to the appellant during caution interview (pg. 320, vol.2) on 14 Sept, 2009.
(b) The particulars that the deceased was strangled to death put to the appellant during his charged statement (pg. 334, vol.2) on 15 Sept, 2009.
(c) The evidence considered by the Court as strong circumstantial evidence against the appellant emanated from PW7 Tasvindar Singh who stated that the appellant in his reply to the question as to how the deceased died, gave the following answers 'He was a sickly old man and we tied a cloth around his neck and he died (p.17, 114 vol.2).

Ground 2

That the learned Trial Judge erred in law when he misapplied a judicial warning on the defence evidence of Subashni Lata (DW5) at [SU 64 line 2] [vol. 2 pg. 139] by stating these words to the assessors "I must ask you to examine it with care, particularly;

*(a) That the words 'examine with care' has been used interchangeably with words scrutinize with care in several case authorities in Fiji to convey judicial warning to the assessors [**Akuila Drumudole v State**] AAU 107/2008; **Swadesh Singh v State** CAV 007.05]*

(b) That applying judicial warnings to the evidence of the defence is at odds with rule expressed in the Supreme Court decision in Cava v State CAV 28/2014 where such warning are applied only to prosecutorial evidence.

The applying of judicial warnings to the evidence of defence is a fatal error.

Ground 3

That the learned trial judge erred in law by posting a highly prejudicial question to a defence witness DW5 Subashni Lata 'You missing Tasvindar because he gave you a lot of money (pg. 559 (149) vol 2) having no judicial reason to do so, particularly;

(a) That the cumulative effects or the impressions tailored from such question carrying the force of judicial authority, on the minds of lay assessors, two of whom of the same age and gender of the defence witness seriously undermines the evidence sought by the defence to challenge the prosecutions evidence of PW7 Tasvindar Singh engendering a direct

conflict with the appellants constitutional right conferred in Article 14(2) (l) of the 2013 Constitution.

(b) That the learned trial judge erred as he cannot adopt an inquisitorial role in an adversarial system when the State did not, in the face of the records, sought legal recourse available under section 180 of CPA to effectively rebut DW5 Subashni Lata's evidence.
(c) That the learned Single Justice of Appeal erred when he did not consider the impacts of such question on the appellant's right to a fair trial under the common law [Re : Pinochet 1998, UKWL Dec. 17, 1998]
(d) That the Single Justice of Appeal erred when it did not consider the impacts of such question on the appellant's rights of a fair trial underscored in Article 15(1) of the 2013 Constitution.

Ground 4

That the learned trial judge misdirected the assessors by stating the following at para 71 line 3–7 of the summing up: "If you accept the caution interviews of the first, second and third accused, then we know the job was done by a group of four people.'

(a) In that, the direction at 71 was devoted solely on the evidence against the appellant in particular.
(b) That the directions virtually negates the effects of the learned trial judge initial general direction at 42 on the impermissible use of one accused confessions against the other bearing in mind that the appellant alone gave exculpatory statements.
(c) After acquitting the third accused Sanjeev Mohan, he failed in law to consider the effects of such direction and in particular the evidence led before the assessors where Mr Mohan confessed in knowing the appellant during remand in 1995.

Therefore, the effects of such direction caused serious miscarriages of justice.

Ground 5

That the learned Judge erred in law;

(a) In allowing the State to pose questions of bad character on the appellants mother DW4 Inise Naisau, as the State itself lifted the bar on character by relying on PW7 Tasvindar Singh evidence of supply and consumption of drugs.
(b) By failing to give propensity warning to the assessors after the State elicited evidence of bad character in accordance with correct principles of fair trial endorsed by this Court in Sheik Hussein and Chetty [2001] FLR 347 at pg. 348.

Such failure has caused serious miscarriages of justice.

Ground 6

That the learned trial Judge erred in law in failing to direct the assessors the first limb of alibi directions, in that, once they accept the alibi put forward to be reasonably true, they would be obliged to acquit, particularly where the defence relied wholly on alibi. (R v Amyouni NSW cc 18, 1988) R v Mohammdi (2011) 112 SASR 17 (2011).

Ground 7

That the learned trial Judge erred in law in misdirecting the assessors in paragraph 17 of the summing up stating 'your approach to the case should therefore be as follows, if looking at the case of each accused in turn you are sure that with intention I have mentioned he took some part in committing it with other he is guilty.

That may not cause you any difficulty with the robbery, but with murder additional legal considerations comes into effect. The use of the words in the sentence construct that may not cause you any difficulty with the robbery is a fatal error as it restricts and usurps the functions of assessors to draw their own conclusions on the issues of facts.

Ground 8

That the Courts verdict is unreasonable and inconsistent with the acquittal of the third accused Sanjeev Mohan, in that, the court failed to conduct proper independent assessment on the deficiencies of the recognitions evidence of PW7 Tasvindar Singh giving rise to a substantial miscarriage of justice.

Ground 9

That the copy records contained serious defects and does not accurately reflect the actual proceedings thus preventing the appellate court from undertaking its functions of independent assessments.

Ground 1

[116] In a gist, the appellant's first ground of appeal is more or less similar to the 01st appellant's 08th and 09th grounds of appeal which I have dealt with in detail earlier in the judgment and my reasons for not upholding the 01st appellant's said complaint are valid as far as the 03rd appellant's ground of appeal is concerned.

[117] I have no doubt of the principles expressed in the decisions in **Arora v State** CAV0033 of 2016: 6 October 2017 [2017] FJSC 24, **Ram v State** CAV0001of 2011: 9 May 2012 [2012] FJSC 12 and **Stephen v State** AAU53 of 2012: 27 May 2016 [2016] FJCA 70 cited by the appellant but those principles have to be applied in the

factual context of each and every case. Therefore, how the appellant was prejudiced in his defence by the wrong description of the cause of death by the police is not clear.

[118] The appellant had not made any incriminatory statements to the police at any stage. The case against him does not depend on his charge statement or caution interview. Yet, his complaint is that he was informed by the police that the cause of death of the deceased was strangulation whereas it was asphyxia due to suffocation that had caused the death of the deceased. His defence was that at the time of the offences he was at a different location in Nailaga Village. Therefore, the police putting to him that the cause of death of the deceased was strangulation had not affected his right to a fair trial.

[119] Contrary to the argument of the appellant, when Tasvindar Singh stated to the police that the appellant had told him referring to the death of the deceased *'He was sickly old man and we tied a cloth around his neck and he died',* the police had enough grounds to arrest and formally interview the appellant as the technical cause of death was immaterial to his criminal liability based on joint enterprise. What was important was that the deceased had died due to some act or acts on the part of any one or more members of the group of people who committed the robbery in the deceased's house. Therefore, based on joint enterprise all of them would be liable. If Tasvindar Singh is believed (and he has been believed by the police, assessors and the trial Judge) then the fact that the appellant's description of what they did to the deceased does not tally with the medico legal cause of death, was not going to make a difference to his criminal liability.

[120] Although the appellant has criticized the trial Judge for having taken the example of strangulation to explain how the legal concept of joint enterprise works, I do not think that there is anything wrong in that. He also could have been criticised if the trial Judge had taken the example of suffocation. The relevant paragraphs are as follows

> *[18] Very unfortunately Vinod Sharma was killed during this robbery and the evidence is not clear as to who actually killed him, but the law says that that doesn't really matter. If all four are acting together by agreement to do the*

robbery and one of them goes beyond that plan and kills the house owner, and if you are sure that killing, or inflicting very serious harm on the householder was a probable event in the robbery and whichever accused you are looking at realized that it was probable that could happen, then by taking part in the robbery with that knowledge he is taken to have accepted the risk that his co offender would act in that way and he therefore becomes responsible for the act and is jointly guilty of the murder.

'[19] Let me give you an example of this: Let us say that three men agree to rob R B Patel Supermarket during the night and they then do go to do the robbery. Mr A. stands outside, Mr B. drives the car and Mr C. goes inside, takes $10,000.00 cash and in the process he is disturbed by the security guard, he strangles him and he dies.

A, B and C all are guilty of the robbery because they all play a part in the robbery it doesn't matter that A & B don't go inside and steal the money.

[20] But are they all guilty of the murder, if all the necessary elements of murder are proved? C certainly is because he strangled the deceased. A and B are also guilty if they knew that there was a probability that there would be a security guard and that he would be "neutralized" by having force applied to him to kill him.'

[21] I stress that that is only an example. I will come back to this difficult doctrine after I have dealt with the elements of the crime and with the evidence.

[121] It cannot be said that the example of strangulation would have influenced the assessors as during the trial the cause of death was clear to everybody as asphyxia due to suffocation.

[122] Therefore, I see no merit in this ground of appeal and I reject the same.

Ground 2

[123] The appellant under this ground of appeal contends the cautionary words of the trial Judge during his summing up. They are as follows.

'[64] Now, ladies and gentleman you are entitled to accept the evidence of Subashni and give it whatever weight you think fit but I must ask you to examine it with care. There is no evidence before the Court that Tasvindra was a drug dealer and Subashni doesn't know that but she asks us to speculate. Nor is there any evidence that his drug habits were in any way connected to his identification of the fourth accused as the man who hired his van. There is no suggestion that he was so befuddled with drugs that he might

have identified the wrong man and there is no suggestion that because of his relationship with the Police his identification of the fourth accused is not valid. It was never put to the Police officers. Of course you may accept her evidence and you are entitled to disagree with me on this point but you must ask yourselves how her evidence really assists us in the case against the fourth accused.' (emphasis added)

[124] Ms Lata was called by the appellant to impeach the character of Tasvinder Singh. Ms Lata, who used to be in an intimate relationship with Singh, gave evidence that Singh was a drug user and he always had money to spend. The appellant's contention is that the cautionary words of the trial Judge, which the appellant had equated to a judicial warning, would have had the effect of diminishing the witnesses' evidence. It is true that a judicial warning is usually given in the case of an accomplice as seen from the decisions cited by the appellant but from the above paragraph it is clear that the trial Judge had not used the words *'examine with care'* in that context. It is in the context of Ms Lata's speculative evidence in certain aspects that the trial Judge had given that guidance to the assessors but had told them at the end of the paragraph that they were free to accept her evidence and disagree with Judge.

[125] In **Tamaibeka v State** Criminal Appeal No.AAU0015 of 1997S: 08 January 1999 [1999] FJCA 1 the Court of Appeal held

'A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced.'

[126] Therefore, I do not think that the trial Judge had acted unfairly to the appellant's defence by the use of the words ' *'examine with care'* in relation to witness Ms Lata. I do not see any basis to suggest a miscarriage of justice. Less do I see any violation of constitutional rights of the appellant as contended by the appellant. This ground of appeal is accordingly rejected.

Ground 3

[127] This ground relates to a question posed to Ms Lata by the trial Judge to the effect *'you missing Tasvinder because he gave you a lot of money? No.'* This is after the witness had told in evidence that Mr. Tasvinder was used to give her substantial sums of money from time to time when he was her boyfriend from 2008 to 2011. The Judge directed the assessors on Ms. Lata's evidence as follows

> *'[63] The last witness for the fourth accused was Subashni Lata who was once the girl friend of Tasvindra Singh who you remember had identified the fourth accused as one who had hired his vehicle to go to Yalalevu on the night of the 7th September. Subashni told us that she was concerned about Tasvindra's drug use and that he seemed to have a lot of money to throw around. Her biggest concern was the fact that the Police appeared to be protecting him, especially considering that they had found him in possession of marijuana. He once told her that he had been asked by the Police to point out a person who was involved in the robbery/murder and he had pointed out the fourth accused.*

[128] The above paragraph taken along with paragraph 46 of the summing up, one cannot say that the trial Judge had made use of impugned question and answer in a way detrimental to her evidence or the appellant. The Judge had not even referred to that in the summing up. In what context the Judge had asked the question is not very clear but it cannot be said that the assessors in their opinions or the judge in the judgment had been swayed by the said question and answer in rejecting her evidence.

[129] I am not satisfied that the appellant's complaint amounts to a miscarriage of justice or deprives of a fair trial. Therefore, I reject the third ground of appeal too.

Ground 4

[130] The appellant has based this ground of appeal on paragraph 71 of the summing-up. It is as follows

> *'[71] The case against the fourth accused is different. The State bases their case against him on circumstantial evidence. We know that there was a robbery and a death at 8 Bula Street that night. If you accept the caution interviews of the first, second and third accused then we know that the "job" was done by a group of four people. If you accept the evidence of Tasvindra Singh you might find that the fourth accused hired his van to take him with others to 8 Bula Street, borrowing a shifter from him. A shifter was used to*

remove the burglar bars. They said that they had work to do that night. Again accepting the evidence of Tasvindra Singh, the fourth accused came to him the next day and told him that "the job was done" and offered him $200 to keep quiet. He also mentioned that the man had died because he was "sickly person and we tied a cloth around his neck and he died". The State is asking you, on this circumstantial evidence to find that the fourth accused was a member of the group who did the robbery where Vinod was killed and he is therefore guilty of the robbery and the taking of the car. They claim in addition that as a member of the group agreeing to rob he is also guilty of the murder if you find that the first accused had the intention to kill or if that intention is not proved, then he is guilty also of manslaughter. You would have to find that the fourth accused knew that there was a probability that the householder, disturbed, would be killed. I remind you that in defence the fourth accused gives an alibi saying he was at the village that night and that Tasvindra Singh's identification of him was tainted. (emphasis added)

[131] The appellant's contention is that by directing the assessors as in paragraph 71 (the underlined sentence) of the summing-up, the trial Judge had conveyed to the assessors the impression that they could use the contents in the caution interviews of other appellants against the 03rd appellant. In other words since the other appellants had spoken to the presence of 04 persons in the robbery in the caution interviews including the 04th appellant, the assessors would invariably have got the impression that the 04th appellant should have been the fourth member of the group.

[132] However, this might have been the case, if the trial Judge had not said what he told the assessors in paragraph 44 in the following terms.

'[44] I remind you in the strongest possible terms of something I said to you during the trial. The contents of each accused's interview can only be used against that accused alone and not against any other accused that he might be talking about. To be specific about this, if the first, second and third accused say anything about the fourth accused then you are not permitted to use that as evidence against the fourth accused.'(emphasis added)

[133] Therefore, in my view when one considers paragraph 44 and the last sentence in paragraph 71 of the summing-up the assessors had ben adequately warned that they must not consider what one appellant had said in his caution interview against another appellant. In paragraph 71 the trial Judge had specifically referred to the 04th appellant's defence of *alibi*.

[134] Further, from paragraph 08 of the judgment it is clear that the trial Judge had not considered anything other than the evidence of Tasvindra Singh to arrive at a verdict of guilt against the 04th appellant.

> *'[8] The circumstantial evidence against the fourth accused is strong. The assessors have clearly accepted the evidence of PW7 Tasvindra Singh who took the fourth accused, with others, to the scene of the crime and borrowing a shifter talked about work to do. The next day he came back saying that the man died because "he was a sick person and we tied a cloth around his neck". By admitting that he knew of the death in connection with the robbery and by admitting that he had participated in tying the cloth the majority opinion of the assessors is available*

[135] In my view, in the aforesaid circumstances there is no substantial prejudice caused to the appellant by the reference to four persons in paragraph 71 and no substantial miscarriage of justice had occurred. I reject this ground of appeal.

Ground 5

[136] The appellant's complaint is that the trial judge has failed to give bad character warning (propensity warning) to the assessors necessitated by the evidence elicited from his mother Inisea Naisua during cross-examination by the State causing a substantial miscarriage of justice. Obviously, the appellant called his mother for no other reason other than to speck to his good character and not to support his *alibi*. The trial Judge had remarked that by doing so he had the risk of discovery that the appellant was not of good character and was a tactical error on the part of the defence.

[137] Inisea Naisua's evidence shows that the impugned evidence had come about after her answer under cross-examination recorded as follows

> *'Q: How describe him?*
> *'A: Good person, helps people. Loves me and his brother.*

[138] When the state counsel asked her whether she knew that he was in trouble with the police defence counsel appears to have objected and the trial Judge had given a ruling that as the appellants' mother had given general evidence as to his good character the prosecution could rebut that generally and could ask if he had convictions and how many. Thereafter, the following questions and answers had followed

> *Q: Know if he has previous convictions?*

A: He has been sent to jail and was a prisoner and a known fact.
Q: Other cases involving him
A: Knew most of the cases. Robbers at Westpac at Namaka.
Q: Only knew of one case but others?
A: Didn't recall- but now I realise that Westpac robbery at Namaka.
Q: Love your son, do anything for him?
A: As a mother.

[139] The appellant cites **Hussein v State; State v Chetty** [2001] 1 FLR 347: 18 October 2001) [2001] FJLawRp 90 in support of his argument where, as the case was presented the assessors were faced with three possibilities – Hussein killed the victim without Chetty's involvement; Chetty killed the victim without Hussein's involvement; or the accused acted together and were jointly responsible. One Abbas was called on behalf of the prosecution. While being cross examined on behalf of Chetty, it came out that in 1996, Hussein was serving a sentence as an extra mural prisoner. Later, when cross examined by Hussein's counsel, he said he called Hussein Master, because in prison everyone called him that. The Judge took no action in respect of these two pieces of evidence but in light of the subsequent evidence about Hussein's conviction, nothing further need to be said about that. At the time, the reason why Hussein was then in prison was not disclosed. When Chetty gave evidence, Hussein's counsel cross examined him on the lines of Hussein's caution statement, and put it to Chetty that he was responsible for the killing. The Judge gave leave to Chetty's counsel to cross examine Hussein on his previous record. It then emerged that Hussein had a conviction for robbery in 1985, and another for escaping from custody.

[140] In the above background in **Hussein v State; State v Chetty** the judge had not given any direction about the permissible use of the evidence. The only permissible purpose for admitting the previous conviction was to cast doubt on Hussein's credibility, in particular on his assertion that Chetty killed the victim. The Court of Appeal said

> *'Since the Assessors rejected the third scenario they must have given thought to the respective merits of the first two. A relevant consideration would have been which (if either) of the accused was the ringleader. The revelation that one of them had committed a robbery previously may have played a significant part in their deliberations. In a case where robbery, rather than murder, was the predominant motive for the offending, the earlier conviction had the potential to be highly prejudicial. The potential prejudice could have been*

heightened by the earlier evidence that Hussein was referred to as "Master" in prison. In the absence of directions the Assessors may have thought the previous conviction indicated a propensity by Hussein to commit such offences and that he was therefore more likely to have taken the initiative in the present event. It is because of the risk of propensity reasoning that the Courts take such care to keep knowledge of an accused's record from juries or Assessors.

In these circumstances, by a majority the Court is of the opinion that the absence of a direction regarding the permissible use of the evidence amounted to a miscarriage of justice.'

[141] Thus it is clear that in **Hussein v State; State v Chetty** both appellants had put themselves at the scene and tried to blame each other for the murder. However, in the present case, the 03rd appellant had completely disassociated himself from the scene of the offence and taken a defense of *alibi*. Therefore, his character evidence could not have played a crucial role, for if he had succeeded in his defense of alibi he would have been found not guilty despite his bad character evidence.

[142] In any event the trial Judge had put bad character evidence very mildly to the assessors.

'[62] The fourth accused's mother gave evidence about her son and his relationship with Bulou. She said he was a good boy and very kind to herand his brothers. The State, in rebuttal, suggested that he was not as good as she claimed putting to her that he had been in trouble with the Police before. She agreed.' (emphasis added)

[143] In **Saqasaqa v State** AAU 116 of 2011: 25 October 2013 [2013] FJCA 112, the Court of Appeal found that is a prejudicial reference by the trial judge to call the appellant as 'General in the Criminal World' where the trial judge in his summing up had said

*'He admitted, he was known as the "General" in the criminal world. A general controls the troops, engaged in war, from afar, in the safety of his headquarters. Was **Saqasaqa** acting as a general in directing Osea, Alipate and Isimeli in robbing the complainants at the material time. These are matters for you'*

[144] Having considered all the above matter, I am of the view that the absence of a propensity warning as envisaged by the appellant had not resulted in substantial miscarriage of justice. I therefore, reject this ground of appeal.

Ground 6

[145] The appellant criticises the trial Judge's summing up on his defence of *alibi* on the basis that he had failed to give the assessors the third limb of *alibi* direction namely that although the assessors do not accept the *alibi* but do not reject it either in the sense that they regard it as something which could reasonably be true, in that event also they must acquit the accused. However, the appellant's counsel had not any redirection on this matter at the end of the summing-up, if thought to be such an important omission.

[146] The trial Judge addressed the assessors in paragraph as follows in relation to Mohan

> *'…… As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary the prosecution must disprove the alibi. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence.'*

[147] With regard to the 03rd appellant the trial Judge's directions were as follows.

> *'[60] The fourth accused called five witnesses in his defence – three of those witnesses gave evidence with relation to his alibi – Lusiana, Salanieta and his de-facto Bulou. They all confirmed that he was at the village on the night of 7th September and they all accounted for his movements up until about 11pm. Bulou said that he had stayed the night.*
>
> *[61] As with the third accused his alibi evidence is for you to consider in his defence. Jonetani doesn't have to prove anything to you but if you don't believe the alibi then that doesn't necessarily make him guilty. But bear in mind that Jonetani has been consistent in his alibi even since he was arrested.(emphasis added)*

[148] The appellant also takes issue with the trial Judge having not repeated what he had told in relation to Mohan on his *alibi* as well. It would have been certainly desirable had the trial Judge dealt with the law separately on the defence of *alibi* rather than under Mohan and the appellant.

[149] In relation to the appellant complaint it is relevant to look at paragraphs 58 and 59 where he elaborated the appellant's *alibi* evidence

> *[58] The fourth accused told us that on the 7th September he had met his girlfriend in Ba from about 5pm to 7pm. He then took a bus to Nailaga to see his de facto wife and his children. He saw when he got there that there was a youth meeting going on at Bulou s house so he left his bag at Lusiana's house and sat in the bus shelter. At about 10pm he saw the meeting winding up and went home. He and Bulou had an argument about his dinner not being there. She made something for him to eat. They talked and retired sometime after 11pm and he spent the night there. You heard a lot of evidence about his relationship with Bulou, his mother-in-law, his snoring etc; whether you think that is important is up to you – you are masters of the facts.*
>
> *[59] On the 9th September the Police came to him and questioned him at Ba, but then released him. However a few days later, having heard they were still making enquiries of him, he surrendered himself to the Ba Police. The officers then aggressively told him to admit the affair because he had been implicated by 3 others, he said he knows nothing and he can't admit something he didn't do. He was threatened with assaults and he was interviewed under caution. He made no admissions in that interview; in fact he says that he told them exactly the same things that he has told us in his evidence. The Police went out and checked his alibi. When asked about Tasvindra Singh he said he doesn't know him and he doesn't know anybody called Avi. He has a scar on his face from an assault when he was working as a security guard in 2008. He is related to the first and second accused and only came to know the third accused through being charged with him in this case.'*

[150] It appears from the opinions of the assessors that they had for their full consideration the *alibi* evidence of the appellant but completely rejected the appellant's defence of *alibi*. Even the single assessor's opinion that the appellant was guilty of manslaughter shows that he too had not accepted his *alibi*. The trial Judge had not disagreed with that position in the judgment. In those circumstances, I do not think that the omission to refer to the third limb of alibi direction had caused a substantial miscarriage of justice. Accordingly, I reject this ground of appeal.

Ground 7

[151] I have dealt with a more or less similar ground of appeal taken up by the 02nd appellant under his 06th ground of appeal and therefore, find no need to repeat myself. I may place on record that the counsel for the 03rd appellant had also not taken up this

complaint by way of a redirection with trial Judge. For the reasons set out there I reject this ground of appeal too.

Ground 8

[152] The appellant complains of the acquittal of Mohan by the trial Judge. The 02nd appellant had also taken up the same complaint under his appeal ground 9 and I have fully dealt with it earlier. The evidence against Mohan and the appellant were not the same and the reason for the acquittal of Mohan was mainly on the finding of a medical report by the trial Judge in the case record not disclosed at the trial which cast doubt on the voluntariness of his caution interview being the only evidence against Mohan. The case against the appellant was based on circumstantial evidence. For the same reasons given earlier, which I need not repeat, I reject this ground of appeal.

Ground 9

[153] This ground of appeal is based on some alleged missing parts of the proceedings. However, no error of fact or law had been disclosed. This aspect of the matter was dealt with in detail previously in the judgment in relation to the 01st and 02nd appellants' appeal grounds (see grounds of appeal No.3 and 4 of the 01st appellant and ground of appeal No. 2 of the 02nd appellant). In addition, this appeal had been called many a time before a single Judge prior to being fixed for hearing and the complaints by all the appellants and particularly the 03rd appellant on missing proceedings had been addressed to the best of ability of this Court.

[154] The appellant bases his complaint on paragraph 43 of the summing up and states that the closing speech is not available in the case record.

> *'[43] Mr Niudamu told you in his closing speech that I had already ruled these statements to be admissible. He had no right to say that. Those were different proceedings before this trial started. It is a matter for you to decide and not me .Whether the accused were assaulted or not can only be decided by you. If you find they were assaulted and oppressed you will discard the interviews and their evidence, if you find that you prefer the Police evidence that everything was done properly then you can regard the interviews as evidence and if you find the answers true you may act on them.'*

[155] As pointed out by the State, the closing submissions are not recorded and thus, cannot be found in the record. In any event what the judge had said is actually to the advantage to the appellants not to their detriment.

[156] His second complaint is based on paragraph 44 of the summing up where the appellant states that what the Judge had said is not on record.

> *'[44] I remind you in the strongest possible terms of something I said to you during the trial….'*

[157] No prejudice is caused by this omission as the trial Judge had repeated the same in the rest of paragraph 44 which I have quoted earlier in the judgment. The gist of the balance part of paragraph 44 is again to ensure that a caution interview of one appellant must not be taken against another appellant.

[158] The appellant also complains that some words are missing from the proceedings when the issue of bad character evidence was discussed during the evidence of the appellant's mother. While this Court can observe that some parts have not been typed the omission has no material effect on the conviction of the appellant.

[159] Accordingly, I see no merit in the appellant's complaint and reject this ground of appeal.

Fernando JA

[160] I have read in draft the judgment of Prematilaka, JA and agree with the reasons and conclusions.

Nawana, JA

[161] I agree with the reasons and conclusions of Prematilaka, JA .

Orders of Court are:

1. *01st appellant's application for leave to appeal is refused.*
2. *01st appellant's appeal against conviction is dismissed.*
3. *01st appellant's conviction is affirmed.*
4. *02nd appellant's application for leave to appeal is refused.*
5. *02nd appellant's appeal against conviction and sentence is dismissed.*
6. *02nd appellant's conviction and sentence are affirmed.*
7. *03rd appellant's application for leave to appeal is refused.*
8. *03rd appellant's appeal against conviction is dismissed.*
9. *03rd appellant's conviction is affirmed.*

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL

Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL