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

CRIMINAL APPEAL NO.AAU 145 of 2016
[In the High Court at Suva Case No. HAC 32 of 2015]

BETWEEN	:	**SIUTA SERU** **ASAELI RABOLECA**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**01st appellant in person**
	:	**Mr. T. Lee for the 02nd appellant**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	:	**26 March 2021**
Date of Ruling	:	**29 March 2021**

RULING

[1] The 01st appellant had been indicted in the High Court of Suva on one count of murder contrary to section 237 of the Crimes Act, 2009, one count of attempted arson contrary to section 363 (as read with section 362) of the Crimes Act, 2009 and both appellants had been charged with the last count of aggravated robbery contrary to section 311 of the Crimes Act, 2009 committed on 19 August 2012 at Bua in the Northern Division.

[2] The information read as follows:

*'**FIRST COUNT**'*

STATEMENT OF OFFENCE

***MURDER**: Contrary to section 237 of the Crimes Decree 2009.*

PARTICULARS OF OFFENCE

***SIUTA SERU**, on the 19th August 2012 at Bua in the Northern Division murdered Babu Ram.*

*'**SECOND COUNT**'*

STATEMENT OF OFFENCE

***ATTEMPTED ARSON**: Contrary to section 363 (as read with section 362) of the Crimes Decree 2009.*

PARTICULARS OF OFFENCE

***SIUTA SERU**, on the 19th August 2012 at Bua in the Northern Division, unlawfully attempted to set fire to a building or structure, namely the home of Babu Ram.*

*'**THIRD COUNT**'*

STATEMENT OF OFFENCE

***AGGRAVATED ROBBERY**: Contrary to section 311 of the Crimes Decree 2009.*

PARTICULARS OF OFFENCE

***SIUTA SERU and ASAELI RABOLECA**, on the 19th August 2012 at Bua in the Northern Division robbed Babu Ram of approximately $350.00 cash.*

[3] At the conclusion of the summing-up on 16 September 2016, the two assessors' unanimous opinion (one having being discharged due a conflict of interest) was that the appellants were guilty as charged. The learned trial judge had disagreed with the assessors in his judgment delivered on the same day, convicted the appellants as charged and on 21 September 2016 imposed life imprisonment with 19 years of minimum serving period on murder and 12 years of imprisonment for aggravated robbery and 05 years of imprisonment on attempted arson (all sentences to run concurrently) on the 01st appellant. The 02nd appellant was sentenced to 12 years of imprisonment for aggravated robbery with a non-parole period of 09 years.

[4] I find an appeal against conviction and sentence dated 11 October 2016 unsigned by the 01st appellant and without any seal for acknowledgement by the Correction Center or the Court of Appeal registry in the appeal file. The appellant submitted a

photocopy of a dated (11 October 2016) and signed copy of the same document at the hearing. It is not clear when the CA registry had received the unsigned copy. The Legal Aid Commission had filed an application for extension of time, amended grounds of appeal, the appellant's affidavit and written submissions on 29 May 2017 on the basis that the appeal was out of time by over 06 months. In the affidavit the appellant had stated that his trial counsel Mr. Paka who had drafted 05 grounds of appeal had assured him that he had lodged the appeal on 11 October 2016 but he had realized on his first appearance in the Court of Appeal that only his co-appellant's appeal had been received by the CA registry. It also appears that the Court of Appeal registry had informed the appellant in writing on 25 October 2016 that it had received his appeal on 19 October 2016. The appellant had adverted to that fact and reiterated that he had appealed within time in another affidavit tendered at the leave to appeal hearing. In the circumstances, although I am not fully convinced that the 01st appellant had appealed timely, I am constrained to give the benefit of this doubt and uncertainty to the appellant and treat his appeal to be timely, particularly in the light of the letter of acknowledgement sent by the CA registry to the appellant.

[5] The 01st appellant had filed additional grounds of appeal on 13 October 2017 in person. Later, in the year 2019 the 01st appellant had in writing withdrawn his appeal from the Legal Aid Commission and filed in person an application for leave to appeal against conviction with grounds of appeal on 21 May 2019 supplemented by additional/amended grounds of appeal on 08 July 2020 and 27 August 2019 and written submissions on 19 August 2020. He also submitted a typed version of 'speaking notes' at the leave to appeal hearing on all seven grounds of appeal against conviction.

[6] The 02nd appellant had in person signed a timely notice of appeal against conviction and sentence on 11 October 2016 received by the CA registry on 19 October 2016. He too had filed several amended notices of appeal from time to time and written submissions in person only against conviction. The Legal Aid Commission had filed an amended notice of appeal and written submissions only against conviction on 21 January 2021.

[7] The state had tendered its written submissions on 28 February 2019 and 11 March 2021 in respect of both appellants.

[8] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[9] The grounds of appeal against conviction urged on behalf of the 01st appellant are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact and misdirected himself and the assessors on the direction of the question of causation towards the appellant confession in the question interview as it clearly indicated through the appellant's unlawful detention (excessive detention) at Police Station was above the Constitutional time limit and infringement of his constitutional rights."*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and in fact in not considering the appellant unwillingness in confession fully satisfying as the delay in production of the appellant to court in a reasonable time indicates the unwillingness which paramount to the appellance (sic) constitutional rights."*
>
> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to direct the assessors and himself that the truthfulness and voluntariness of confession was a matter for them to decide in the light of evidence in these matters."*

Ground 4

THAT the Learned Trial Judge erred in law and principle in exercising to the assessors the discretion based on the case facts and unsafe evidences. The judge act upon wrong principle allowing extraneous, irrelevant matters to guard and affect him mistaking the facts and not taking into account some of relevant consideration."

Ground 5

THAT the Learned Trial Judge failed to direct the assessors and himself on the danger in considering and relying on tainted evidence of Meli Bulitogalevu and Pita Dabobo."

Ground 6

THAT the Learned Trial Judge failed to adequately address the issue concerning immunity witness and the weight of evidence that they should have afford or to give to such witness which the failure was detrimental to fairness of the trial and the weight upon which the evidence ought to have been received by the assessors which rendered the judgment unsafe and unsatisfactory.

Ground 7

THAT the Learned Trial Judge failed to direct the assessors and himself on the absence of agreement in the testimonies of the prime prosecution witnesses."

[10] The grounds of appeal against conviction urged on behalf of the 02nd appellant are as follows:

*'**Conviction***

Ground 1

THAT the Learned Trial Judge may have erred in law and in fact at Summing Up in not properly directing the assessors in respect of circumstantial evidence.

Ground 2

THAT the Learned Judge may have fallen into an error in fact and law in Summing Up by not properly and adequately addressing the assessors on the weight that should be attached to caution statement.

Ground 3

THAT the Learned Trial Judge may have fallen into an error in law and fact in failing to direct the assessors adequately on the weight to be given to the alibi witness evidence of his wife which resulted in a miscarriage of justice.

Ground 4

THAT the Learned Trial Judge may have caused a miscarriage of justice to direct the assessors to the facts and evidence relating to the charges against Mr. Pita Dabobo being dropped and yet rejecting the evidence of Appellant that the confession was obtained by force and assault.'

[11] The learned trial judge had summarized the evidence led by the prosecution in the sentencing order as follows:

'[3] On the 19th August 2012, the first accused had been drinking grog followed by rum for some 9 hours until 5am.

[4] Prior to this a plan had already been agreed between both accused to go on that day (the 19th) to the home of an elderly Indo-Fijian in a neighbouring village and steal from him. It was suspected that he kept small amounts of money in the house, money earned from the sale of tobacco and goats.

[5] The first accused left the rum party and went to the home of the second accused, waking him up. Both set off to the village of Naqilimoto, each carrying a cane knife. On arrival at the house of the deceased Babu Ram ("BR") they covered their faces and surprised BR who was having his breakfast.

[6] They seized the old man and demanded money from him. He showed them a coin box with a few coins but they demanded more while holding their knives. The first accused ransacked the house and found a wallet which contained $250. He took it. At this stage a third man approached the house calling out the name of the victim. The second accused went outside and chased the visitor away by brandishing his knife. The first accused then struck a heavy blow to the old man's neck with his cane knife. He said he did this because the old man knew both of the assailants and would be able to identify them as the robbers. The old man fell to the ground and the first accused used benzene fuel he found inside the house and pouring it around the house intended to burn the house down to cover up his act of chopping the old man. He then lit a match to set the building alight. He then fled by the kitchen door.

[7] The pair then met up again and rode their horses back to Cubue Settlement. On nearing home, they paused and shared the cash stolen between them.

[8] The house did not burn.

[9] Both accused led the Police to a reconstruction of the crime in Naqilimoto village.

[10] The pathologist has opined that the cause of death of BR was the excessive loss of blood caused by a deep and severe chop wound to the neck.'

[12] The judgment reveals more details of the evidence led by both parties at the trial:

'[5] The main thrust of the prosecution case against the two accused were their respective interviews under caution in which each confessed to the crimes they were charged with along with an inculpatory answer to charge given by the first accused.

[6] In a pre-trial voir dire the Court had heard evidence relating to the generation of those records including evidence from each accused and the Court was satisfied beyond reasonable doubt that the records were made voluntarily without unfairness and without breach of their Constitutional rights.

[7] Those issues were then rehearsed in the trial on the general issue as is perfectly proper.

[8] The State called additional evidence which to a large degree corroborated the inculpatory answers given by both of the accused in their interviews; not that there is any requirement for corroboration.

[9] Two separate witnesses gave evidence of the first accused's confession to them of his implication in all three crimes. Neither of these witnesses were persons in authority.

[10] The answers of the second accused in his interview under caution clearly implicated him as a joint and willing party in the robbery along with the first accused, a robbery conducted with force.

[11] One difficulty raised in this trial was the pre-trial intervention of a third party confessing to the murder and attempted arson. He claimed to have had this confession forced out of him by Police assaults and claims that his confession is not true. Police enquiries subsequently substantiated his claim of abuse and as a consequence the D.P.P. withdrew all charges against this third party.

[12] The Court has no doubt whatsoever that this "confession" was false and his subsequent testimony in this trial further strengthened the evidence against the two accused.

[13] Both accused gave evidence in their defence, both claiming that their admissions were fabricated and that they were forced to sign the records. Nothing either of the accused said caused me to doubt the prosecution evidence.

[14] Each of the accused called an alibi witness, having complied with the alibi procedure as set out in the Criminal Procedure Decree.

[15] Whilst an accused does not have to prove anything to the Court, I could not believe the evidence of either accused and their "alibi" witnesses were of no assistance to them whatsoever. The wife of the second accused gave evidence which was fundamentally different from her earlier Police Statement and when this was drawn to her attention she claimed that the Police had fabricated her statement to them. The Court could not believe this.

[16] The Court finds that the State has proved the case against each accused beyond reasonable doubt.'

<u>01st appellant's grounds of appeal</u>

01st to 03rd grounds of appeal

[13] It is convenient to consider all of them together as the challenge in all three appeal grounds relate to the appellant's cautioned interview.

[14] Under these grounds of appeal the appellant submits that he had been detained by the police in violation of constitutional rights for 05 days and therefore his cautioned statement is invalid and inadmissible. He must be referring to Article 13(1)(f) of the Constitution of the Republic of Fiji. He also submits that the delay had affected his 'paramount' constitutional right. He also argues that the trial judge had failed to address the assessors on truthfulness and voluntariness of the confession which was a matter for them to decide.

[15] **<u>Ganga Ram and Shiu Charan vs. R</u>** Criminal Appeal No. AAU 46 of 1983 the following two tier test for the exclusion of confessions had been set down as follows:

> *"**First,** it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats or prejudice or inducement by offer of some advantage which has been picturesquely described as "the flattery of hope or the tranny of fear" Ibrahim v R (1914) AC, 599; DPP v Ping Lin (1976) AC 574.*

> ***Secondly**, even if such voluntariness is established there is also a need to consider whether the more general ground of unfairness exists in the way in which police behaved, perhaps by breach of the Judge's Rules falling short of overbearing the will, by trickery or by unfair treatment. R v Sang (1980) AC 402; 436 at C-E. This is a matter of overriding discretion and one cannot specifically categorise the matters which might be taken into account."*

[16] The appellant represented by counsel had challenged his confession on the following grounds (see *voir dire* ruling dated 06 September 2016):

> *'[1](a) When arrested he was punched on the side of his ribs and sworn at. On the journey to the C.I.D. Headquarters in Toorak Suva he was again punched and sworn at.*
> *(b) Inside HQ he was punched on the back by Officer Jimmy who also swore at him. He was threated that if he did not tell the truth he "would get it".*
> *(c) Before commencing his interview he was shown the statement of a person who purportedly claims that the first accused confessed to him and was told he had better plead guilty.*
> *(d) At Nabouwalu Police Station to where the interview had moved, he was further assaulted.*
> *(e) In a reconstruction exercise he was forced to point out areas at the direction of the Police.'*

[17] Thus, the appellant had challenged the admissibility of his cautioned interview on the first limb of ***Ganga Ram.*** The appellant had not taken up the position that he was detained by the police for 05 days as a ground on which he sought to challenge the cautioned interview. Moreover, even if he had been detained for 05 days that alone or by itself would not affect the admissibility of the cautioned interview [vide **Heinrich v State** [2019] FJCA 41; AAU0029.2017 (7 March 2019)] where unlike the appellant's case, the accused had challenged the cautioned interview on the basis of detention of 05 days and the Court of Appeal did not uphold his contention on the facts available.

[18] The summing-up (see paragraph 13) sets out the appellant's sworn evidence and it is clear that even at the trial proper he had not challenged the cautioned interview on the basis of extended detention. I think the trial judge's directions at paragraphs 48-52 of the summing-up on how the assessors should evaluate and act upon the appellant's cautioned statement cannot be faulted in the light of principles laid down in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) where the court analysed **Maya v State** [2015] FJSC 30; CAV 009. 2015 (23 October 2015), **Volau v**

State Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51, **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.

[19] Therefore, there is no reasonable prospect of success in the above grounds of appeal.

04th ground of appeal

[20] The appellant's argument under this ground of appeal seems to be that the trial judge had not considered his *alibi* evidence but relied on hearsay evidence from prosecution witnesses. He goes on to contend that since there is no other evidence in the absence of the cautioned interview to connect him with the crimes, the trial judge had convicted him on hearsay evidence.

[21] However, it appears from the reading of the summing-up and the judgment that the prosecution case against him was not only based on his cautioned interview but also on his admissions made to two other witnesses who were not persons of authority. They were Meli Bulitogalevu whose evidence and directions how to evaluate, is found at paragraphs 28-33 and Marika Sau and his evidence along with directions how to evaluate, is at paragraphs 34-38 of the summing-up. Their evidence alone when believed was sufficient to prove the case against the appellant beyond reasonable doubt. Moreover, their evidence had in fact corroborated the matters stated in the appellant's cautioned interview. The trial judge had also turned his attention to this evidence at paragraph 9 of the judgment.

[22] The trial judge had fully addressed the assessors on the appellant's evidence at paragraphs 69-77 and that of his *alibi* witnesses named Laisiasa and a Bua medical Centre nurse at paragraphs 79 & 80 of the summing-up. The judge's directions on how the assessors should treat *alibi* evidence are at paragraph 78 which cannot be faulted in the light of guidance given in **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and later in **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020). The trial judge had considered the *alibi* evidence at paragraphs 14 and 15 of the judgment and rejected it.

[23] Therefore, there is no reasonable prospect of success in the 04th ground of appeal.

05th ground of appeal

[24] There is no substance of the appellant's complaint that Meli Bulitogalevu's evidence was tainted and against whom the appellant had not suggested any sinister motive for false implication. Regarding the evidence of Pita Dabobo who had earlier 'confessed' to the murder and attempted arson, the trial judge in the course of narrating his evidence at paragraphs 59-67 had advised the assessors particularly as to how they should approach his evidence at paragraph 64, 65 and 66 of the summing-up. The trial judge had given his mind to the evidence of Pita Dabobo in the judgment at paragraphs 11 and 12 and rejected his 'confession'.

[25] It appears that Kamal Singh had lent support and credibility to Pita's evidence in court (see paragraphs 40-43 of the summing-up). Secondly, Pita Dabobo had not implicated the appellant in the crime other than speaking to some circumstantial evidence regarding the occurrence of the crimes but not the identities of any of the appellants. It appears that the DPP had dropped charges against Pita in the light of the evidence of Meli Bulitogalevu, Marika Sau and Kamal Singh. None of them stood to gain by exonerating Pita and implicating the appellant. Even without the evidence of Pita Dabobo the prosecution was not deficient of sufficient evidence to prove its case against the appellant.

[26] Therefore, there is no reasonable prospect of success in the 05th ground of appeal.

06th ground of appeal

[27] The appellant's submission is premised on Pita Dabobo allegedly being an 'immunity witness'. Pita Dabobo was not an 'immunity witness' and under no obligation to give evidence against the appellant. His discharge from the case was not conditional. The charges against him were dropped due to his position that his alleged 'confession' was false and that position was proved to be true by the evidence of Meli Bulitogalevu, Marika Sau and Kamal Singh. The DPP had no choice but to drop charges against him. The state need not have essentially led his evidence to prove charges against the appellant, for he did not implicate him. But, his evidence explained why he went to the deceased's house on the morning on 19 August 2012 and how the prosecution got

to know of Meli Bulitogalevu and how he and Kamal Singh saw the carnage at the deceased's house in the morning.

[28] I have dealt with the rest of the matters relating to Pita Dabobo under the 05th ground of appeal and need not be repeated here.

[29] Therefore, there is no reasonable prospect of success in the 06th ground of appeal.

07th ground of appeal

[30] The appellant seems to argue that there is some inconsistency between the evidence of Meli Bulitogalevu and Marika Sau as to the admissions the appellant had allegedly made. The main inconsistency appears to be that the appellant had admitted to Meli that he had chopped the deceased with his cane knife as he thought that the former would reach for his gun. However, he had not admitted using the knife on the deceased to Marika.

[31] The trial judge had placed their evidence as they were before the assessors as already pointed out. No significance could be attached to this omission as the appellant had made the admissions to Meli Bulitogalevu and Marika Sau not at the same time but on different occasions and it is entirely possible that the appellant decided not to reveal his attack on the deceased to Marika Sau but disclose everything else. However, even what he had disclosed to Marika Sau is strong circumstantial evidence suggesting that it could not be any other person other than the appellant who had caused the death of the deceased who was still alive by that time his co-appellant went out of the house chasing Pita Dabobo with his knife and waiting at the roadside.

[32] In any event, apart from the evidence of Meli Bulitogalevu and Marika Sau there was the evidence of the appellant's own admissions under caution implicating him with the murder of the deceased.

[33] Therefore, there is no reasonable prospect of success in the 07th ground of appeal.

02nd appellant's grounds of appeal

01st ground of appeal

[34] The 02nd appellant argues that the trial judge had not properly directed the assessors on circumstantial evidence. He contends that the directions on circumstantial evidence at paragraphs 23 and 24 are not adequate and relies on **Vulaca and Others v The State** [2011] FJCA 39; AAU0038 of 2008 (29 August 2011).

[35] The paragraphs 23 and 24 are as follows:

> *'[22] A large part of the State's case is founded on what we call circumstantial evidence. That is evidence, while not direct such as witnessed or heard, is evidence that the circumstances would lead you to make certain inferences.*
>
> *[23] Circumstantial evidence can be powerful evidence, indeed, it can be as powerful as, or even more powerful than, direct evidence, but it is important that you examine it with care — as with all evidence — and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand it reveals any other circumstances which are or may be of sufficient reliability and strength to cast doubt upon or destroy the prosecution case.*
>
> *[24] Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence, nor you should do that.*

[36] These directions have to be put into proper context. The main evidence against the 02nd appellant seems to have been his cautioned interview which had been admitted after the *voir dire* inquiry. Confessional statements are admitted in evidence as an exception to the hearsay rule rather than circumstantial evidence. The case against the appellant was not based on pieces of circumstantial evidence alone though there was circumstantial evidence to explain different aspects of the narrative. In **Slatterie v Pooley** (1840) 151 ER 579 it was held per Parke V at page 581 *'What a party himself admits to be true may reasonably be presumed to be.'*

[37] In **Pollit v R** (1991 – 92) 174 CLR 572 Brennan J commented at page 578:

> *'The most obvious exception to the hearsay rule is an admission by a party against the party's interests (in criminal cases, a confession by the person charged) [because what a defendant admits is generally accepted as being truthful].' (emphasis added) [words in brackets added]*

[38] Therefore, typical circumstantial evidence directions as expressed in the decided cases are not required in the case of cautioned interview evidence as long as the proper directions as to how the assessors should evaluate a confessional statement have been given.

[39] The Court of Appeal re-visited the directions that should be given on a case based on circumstantial evidence in **Lulu v State** [2016] FJCA 154; AAU0043 of 2011 (29 November 2016) which considered several decisions including **Vulaca and Others** and held that ***Vulaca*** directions are not *sine qua non* in every circumstantial case and there is no stereotyped direction in evaluating circumstantial evidence. **Lulu** was affirmed in **Lulu v State** [2016] FJSC 19; CAV0035 of 2016 (21 July 2017).

[40] If the appellant's complaint relates to other circumstantial evidence other than his cautioned interview I think the above direction is quite adequate.

[41] Therefore, there is no reasonable prospect of success in the 01st ground of appeal.

02nd ground of appeal

[42] The appellant's second complaint is that the trial judge had not adequately directed the assessors on his cautioned interview.

[43] The appellant had challenged the admissibility of his cautioned interview on the basis of the first limb of ***Ganga Ram*** as seen from the *voir dire* ruling:

> '*[13] (a) That on the third day of interview at the Nabouwalu Police Station after a party of Officers had arrived from Suva he was threatened and assaulted by punches on the ribs and mouth. These improprieties forced him to admit the allegations.'*

[44] I think the trial judge's directions at paragraphs 48-52 of the summing-up on how the assessors should evaluate and act upon the appellant's cautioned statement cannot be

faulted in the light of principles laid down in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) where the court analysed **Maya v State** [2015] FJSC 30; CAV 009. 2015 (23 October 2015), **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51 and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.

[45] Therefore, there is no reasonable prospect of success in the 02nd ground of appeal.

03rd ground of appeal

[46] The appellant argues that the trial judge had failed to adequately direct the assessors on the weight to be given to his *alibi* witness evidence *i.e.* the evidence of his wife resulting in a miscarriage of justice.

[47] The judge's directions on how the assessors should treat *alibi* evidence are at paragraph 78 which cannot be faulted in the light of guidance given in **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and later in **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020). The trial judge had considered the *alibi* at paragraphs 14 and 15 of the judgment and rejected it.

[48] However, the appellant further argues that the trial judge had not directed adequately regarding his wife's evidence at paragraphs 90-92 as to how the inconsistency in her evidence should be evaluated based on **Ram v State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012) which had followed **Swadesh Kumar Singh v The State** [2006] FJSC 15:

> *"The judge should remind the assessors of the explanations given by the witness for the earlier sworn statement and instruct them that the evidence in court should be regarded as unreliable unless the assessors are satisfied in two particular respects. Firstly, the explanations are genuine. Secondly, that, despite the witness previously being prepared to swear to the contrary of the version the witness now puts forward, he or she is now telling the truth."*

[49] The Court of Appeal in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) considered ***Swadesh Kumar*** and ***Ram*** in a situation where the inconsistency was with an unsworn previous statement and held:

*[11] The Supreme Court in **Swadesh Kumar's** case was dealing with a situation where a witness has made a previous statement **on oath** directly inconsistent with the evidence given in court. However, **Praveen Ram's** case the Supreme Court considered the implications arising from inconsistencies between the testimony of a witness in court with his previous statement to the police. The fact that the Supreme Court in **Praveen Ram's** case quoted with approval the above passage from **Swadesh Kumar's** case implies that the Supreme Court thought that the same principles of law and guidelines should apply to inconsistencies between out of court statements and testimony in court irrespective of whether the previous statements have been sworn or unsworn. Chief Justice Lord Parker's comments in **Regina v Golder** [1960] 1 WLR 1169; 45 Cr.App.R.5; [1960] 3 All E.R.457 support this proposition. The remarks of Lord Goff of Chieveley in **Regina v Governor of Pentonville Prison, ex p. Alves** [1993] AC 284 cited by the Supreme Court in **Praveen Ram's** case is also a case on unsworn inconsistent previous statements.*

*'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)'*

[50] Although, the trial judge had not administered a typical ***Ram*** direction in verbatim on the appellant's wife's evidence, paragraph 92 and 93 collectively encapsulates the gist of ***Ram*** and ***Nadim***:

'[92] The witness said that what she was saying in Court was true and that the Police had fabricated that earlier statement. It wasn't given to her to read and they told her to sign it. You have seen that statement.'

'[93] Sir, and Madam I want to give you a further direction in law at this stage about evidence. It is what is called inconsistent statements. In particular with this witness and on several other occasions in this trial it has been pointed out to a witness that he or she has said something different in a previous police statement. The law says that whatever a witness says in Court is the definitive evidence. In some cases you might think that the differences are unimportant such as there being a difference in time or date for example, or you may think that the differences are more important. If so, while accepting the evidence in Court as the proper evidence you might think that

the very different version given before would make the evidence of that witness unreliable and you might not give it much weight. It is all a matter for you. However in the case of the second accused's alibi evidence the difference is fundamental. ***She tells the Police she doesn't know where her husband was on 18th/19th August while she says in Court that they were going to church all day.*** *Because the difference is fundamental and because she claims that the Police have fabricated her earlier out of court statement you may well think that you cannot rely on her evidence in Court and you will give it little weight. However as with all questions of evidence you will make the final decision as to the value of her alibi evidence yourselves.*

[51] In the judgment the trial judge, as he was entitled to do, had specifically disbelieved her explanation for the inconsistency at paragraph 15 and therefore rejected her evidence in court. In Fiji the assessors are not the sole judges of facts. The judge is the sole judge of facts in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

[52] Therefore, I do not think that there is no reasonable prospect of success in the 03rd ground of appeal.

04th ground of appeal

[53] The appellant complains of the trial judge's directions to the assessors on Pita Dabobio's evidence at paragraphs 61-66 and argues that he should not have accepted Pita's evidence by not accepting his 'confession' while rejecting the appellant's challenge to his cautioned statement based on police assault.

[54] On the evidence of Pita Dabobo who had earlier 'confessed' to the murder and attempted arson, the trial judge in the course of narrating his evidence at paragraphs 59-67 had advised the assessors particularly as to how they should approach his evidence at paragraph 64, 65 and 66 of the summing-up. The trial judge had given his mind to the evidence of Pita Dabobo in the judgment at paragraphs 11 and 12 and rejected his 'confession'. I do not think that the trial judge had lost the objectivity and balanced nature of his summing-up on Pita's evidence as stated in **Tamaibeka v State** [1999] FJCA1; AAU0015u of 1997s (08 January 1999) due to what he had stated in paragraph 64.

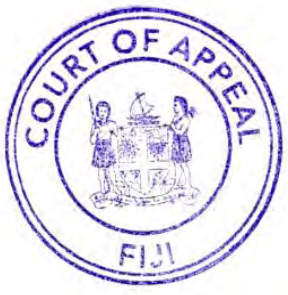
[55] It appears that Kamal Singh had lent support and credibility to Pita's evidence in court (see paragraphs 40-43 of the summing-up). Secondly, Pita Dabobo had not implicated the appellant in the crime other than speaking to some circumstantial evidence regarding the occurrence of the crimes but not the identities of any of the appellants. It appears that the DPP had dropped charges against Pita in the light of the evidence of Meli Bulitogalevu, Marika Sau and Kamal Singh. None of them stood to gain by exonerating Pita and implicating the appellant. The decision to drop all charges against Pita was not that of the trial judge but that of the DPP. Even without the evidence of Pita Dabobo the prosecution was not deficient of sufficient evidence to prove its case against the appellant. The fact that Pita had alleged an assault by the police does not necessarily mean that the appellant had also been assaulted by the police.

[56] Therefore, there is no reasonable prospect of success in the 04th ground of appeal.

[57] All of the 02nd appellant's grounds of appeal are based on criticism of the summing-up of the trial judge. His counsel should have sought redirections in respect of those alleged inadequate directions, mis-directions or non-directions as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). In the absence of such a request for redirections the appellant would not be able to urge those grounds of appeal with sufficient credibility.

Orders

1. 01st appellant's application for leave to appeal against conviction is refused.
2. 02nd appellant's application for leave to appeal against conviction is refused



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL