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

CRIMINAL APPEAL NO.AAU 129 of 2016
[In the High Court at Suva Case No. HAC 063 of 2013L]

BETWEEN	**:**	**LIVAI KAIVITI RATABUA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	**:**	**Appellant in person**
	:	**Ms. E. Rice for the Respondent**
Date of Hearing	**:**	**09 September 2022**
Date of Judgment	**:**	**29 September 2022**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Lautoka for the murder of Maciu Bakani contrary to section 237 of the Crimes Act, 2009 committed on 07 January 2013 at Lautoka in the Western Division.

[2] After full trial, the assessors had expressed a unanimous opinion of guilty for murder. The learned High Court judge had agreed with the assessors and convicted the appellant. He was sentenced on 14 July 2016 to life imprisonment with a minimum serving period of 15 years.

[3] The appellant being dissatisfied with the conviction had filed a timely notice of appeal only against conviction. The single judge of this court had refused leave to appeal against conviction and the appellant had renewed the conviction appeal before the full court.

Prosecution case

[4] On 07 January 2013, between 04 pm and 07 pm, the appellant (DW1), Elia (PW1), the deceased and one Navitalai were drinking liquor. At about 09 pm, Elia returned home with the deceased and the two continued drinking at Elia's house. The appellant also joined the two a while later. An argument erupted between Elia and his wife and the deceased took Elia's side, while the appellant took Elia's wife's side. Elia and the deceased later 'ganged up' and jointly assaulted the appellant. The parties were somewhat related. The appellant however managed to free himself and fled to Navutu Village. He later returned to the scene with one Etonia Bose. The appellant told Bose about Elia and the deceased jointly assaulting him. At the scene, the appellant repeatedly swore at the deceased. There was bad blood between the two. The deceased approached Bose and the appellant. The deceased threw a punch at Bose. Bose avoided the punch and countered with a right hand punch to the deceased's nose and mouth. The deceased fell backwards with his head hitting the ground. The deceased tried to get up from the ground. The appellant suddenly appeared and stomped four times on the deceased's head, while simultaneously delivering three kicks to his forehead. The stomps and the kicks were hard ones. The deceased was unconscious and bleeding severely from the head. Bystanders stopped the appellant from further assaulting the deceased. The deceased was later taken to Lautoka Hospital. He died 10 minutes after arriving at the hospital.

[5] On 8 January 2013, the day after the appellant's alleged assault, a post-mortem was performed on the deceased. Visible external injuries were found on the deceased's forehead, right side of the head, middle of the head and on the left ear region. The cause of death was "compression of medulla oblongata" (brain injuries) due to assault.

[6] In his caution interview statements on 08 and 09 January 2013 [Exhibit 2 (A) and 2 (B)], the appellant had admitted stomping and kicking the deceased's head, when he was lying on the ground.

[7] Doctor Gounder (PW9), the pathologist who conducted the post mortem on the deceased on 08 January 2013 at Lautoka Hospital, found the deceased largely injured on the forehead, the right side of the head, left ear region and middle of the head.

Defence case

[8] At the trial while giving, the appellant (DW1) admitted that he was at the crime scene with Etonia Bose at the material time and that he swore at the deceased before he confronted him. He also admitted that Bose punched the deceased on the right jaw causing him to fall to the ground. He then kicked and stomped only on the deceased's right hip, mid-section and left shoulder and that he kicked the deceased on the chest and twice on the stomach on the deceased when he was lying on the ground. However, Doctor Gounder found no injuries, on the areas that the appellant said he stomped and kicked on the deceased.

[9] Thus, it would appear that the appellant's case was that his assaults on the deceased did not cause his death. In his evidence, he appeared to deny kicking and stomping on the deceased's head. He seems to be saying he was not liable for the deceased's murder.

[10] The appellant's written submissions filed for the full court hearing have raised issues relating to lack of intention/knowledge, provocation, intoxication and the admission of the cautioned interview.

Ground 01

[11] The appellant seems to argue that even if it could be accepted that he had stomped the deceased's head he could not be held to have entertained the fault element in causing the death of the deceased.

[12] The fault element for murder is intention to cause the death or recklessness as to causing the death. Intention and recklessness are defined in section 19 and 21 of the Crimes Act, 2009 respectively.

[13] Section 19 is as follows:

> *'19. — (1) A person has intention with respect to conduct if he or she means to engage in that conduct.*
>
> *(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.*
>
> *(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.'*

[14] Section 21 reads thus:

> *'21. — (1) A person is reckless with respect to a circumstance if —*
>
> *(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(2) A person is reckless with respect to a result if —*
>
> *(a) he or she is aware of a substantial risk that the result will occur;* ***and***
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(3) The question whether taking a risk is unjustifiable is one of fact.*
>
> *(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.'*

[15] In terms of section 21(4) when recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element. Knowledge is defined in section 20 as follows:

'20. A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.'

[16] Recklessness has been described as the state of mind of a person who foresees the possible consequences of his conduct, but acts without any intention or desire to bring them about. A man is said to be reckless with respect to the consequences of his act, if he foresees the probability that it will occur, but does not desire it nor foresee it as certain. It may be that the doer is quite indifferent to the consequences, or that he does not care what happens. In all such cases, the doer is said to be reckless towards the consequences of the act in question. In other words, recklessness is 'an attitude of mental indifference to obvious risk'. Driving at a furious speed through a narrow and crowded street is a reckless act. The person foresees that someone in the crowd may get injured by his act, but is 'mentally indifferent' to such obvious risk. Likewise, if A throws a stone over a crowd, without caring whether it would injure someone, and the stone falls on the head of one of the persons in the crowd, A is responsible for causing injury recklessly (see ***Criminal Law: Cases and Materials Sixth Edition Reprint 2012 by KD Gaur*** *page 52*)

[17] Thus, recklessness involves subjective awareness of an unjustifiable *risk* of harm. If a doctor performs a difficult operation and is aware that it may prove to be fatal but goes ahead because there are no other safer options, he cannot be said to be reckless as it is justifiable to take the risk.

[18] On the other hand knowledge requires awareness that harm is *likely*. If A throws a small stone in the direction of B's head and if A is aware that B is likely to suffer hurt, A has knowledge that hurt to B is likely. Another example is that if a person conceals a time bomb in a building, he can be said to know that it is likely to kill the occupants of the building even though the bomb may be discovered and defused before it can do any harm.

[19] The trial judge had clearly directed the assessors that the prosecution had run its case on the basis that the appellant was reckless as to causing the deceased's death. Therefore, the question for determination on the facts of this case is whether the appellant was aware that there was a substantial risk that the death of the deceased will occur as a result of his acts and having regard to the circumstances known to him, it was unjustifiable for him to have taken that risk.

[20] The learned trial judge had correctly put to the assessors the fault element of recklessness in paragraphs 12, 13 and 36 of the summing-up and directed them in paragraph 14 to consider (if they do not find him guilty of murder) the lesser offence of manslaughter based on his intention to cause serious harm or being reckless as to causing serious harm to the deceased (as per section 239 of the Crimes Act). The assessors had obviously decided that the appellant was reckless as to causing the death of the deceased and the learned trial judge had agreed with them that the appellant had been reckless in causing the death of the deceased in paragraph 5 of the judgment.

[21] According to eye-witness accounts, the appellant intervened when the deceased was trying to get up following a heavy punch from Etonia Bose. The appellant stomped four times on the deceased's head hard and delivered three hard kicks to his forehead. The deceased appears to have gone unconscious and was bleeding severely from the head. The appellant had to be stopped from further assaulting the deceased by the bystanders. He had died within about 10 minutes after the assault. According to the respondent's submissions (the state counsel who had settled written submissions was one of the prosecutors), two of the eye-witnesses had demonstrated at the trial as to how hard the appellant stomped the head of the deceased.

[22] Doctor Gounder had found the deceased's external injuries largely on the deceased's forehead, right side of the head, middle of the head and on the left ear region. The cause of death was brain injuries due to assault. Dr. Gounder had said:

> *'..the medulla oblongata contains the centre that controls the heart and breathing. When it is compressed, the function of the heart and lungs are affected and can result in death. The cause is due to dislocation of atlanto – occipital*

joint. The injury from the assault could cause the dislocation of atlanto – occiptal joint. The force used must be very severe. Severe stomping and kicking on the injured area could cause the injuries'.

' ..the stomps and kicks to the head, if severe, could cause dislocation of atlanto – occipital joint and compression of medulla oblongata, leading to death'.

[23] Thus, medical evidence corroborates the evidence of eye-witnesses that the appellant stomped several times heavily on the deceased's head and delivered a few hard blows as well. Dr. Gounder's explanation has discredited the appellant's account that he kicked and stomped only on the deceased's right hip, mid-section and left shoulder and on his chest and twice on his stomach when he was lying on the ground as there were no corresponding injuries observed on the deceased by the doctor.

[24] However, the appellant had contended in his written submissions filed at the leave stage that all what he wanted was to cause serious harm to the deceased to teach him a lesson not to bully him again the way that the deceased assaulted him earlier. He just wanted to 'pay back' what the deceased gave him earlier. The appellant argues that he was 18 years of age at the time the offence was committed and he did not understand the risk and foresee the consequences of his assault on the deceased in that it would cause the death of the deceased. Put it another way his position is that he was not aware that he was taking an unjustifiable risk that the deceased would die due to him being stomped and kicked on the head.

[25] However, the appellant was obviously not of such a tender age as not to understand the natural consequences of his acts or not to know the risk involving in his act of stomping and kicking the head of the deceased. Nevertheless, the gist of his submissions is that he intended only to cause serious harm and not the death of the deceased and therefore should have been convicted for manslaughter.

Assessors' opinion

[26] The trial judge had directed the assessors to consider the alternative verdict of manslaughter. The assessors had not thought that the appellant was only liable for

manslaughter. The trial judge in the judgment had stated that the appellant was reckless in causing the deceased's death.

[27] Having examined the totality of evidence I am unable to conclude that appellant was unaware that there was a substantial risk that the death of the deceased will occur as a result of his acts and I am fully convinced that having regard to the circumstances known to the appellant, it was totally unjustifiable for him to have taken that risk.

[28] The appellant's complaint has to be considered in the context of section 23(1) of the Court of Appeal Act which provides that the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred.

[29] It has been held that if a verdict is unreasonable or cannot be supported having regard to the evidence it amounts to a substantial miscarriage of justice (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 and **Pell v The Queen** [2020] HCA 12, [45]). The High Court of Australia has identified three non-exhaustive situations in **Baini v R** (supra) where substantial miscarriage of justice may occur namely (i) where the jury's verdict cannot be supported by the evidence (2) where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome (3) where there has been a serious departure from the proper processes of the trial.

[30] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court of having seen and heard the witnesses and stated that it was in a better position to assess credibility and weight and the appellate

court should not lightly interfere but based its decision on the reading of the whole record. If the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]. In other words, if the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred.

[31] In this process, the appellate court examines the record to see whether, notwithstanding the fact that the evidence of the complainant was assessed by the fact finders to be credible and reliable, either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence, the Court could be satisfied that the fact finders, acting rationally, ought not to have been satisfied of the witnesses' truthfulness and reliability or they ought nonetheless to have entertained a reasonable doubt as to proof of guilt [vide **Pell v The Queen** (supra)]. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the fact finders, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence (see **M v The Queen** (1994) 181 CLR 487, 494. See also **Inia v The Queen** [2017] VSCA 49, [53]).

[32] To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence [see **Pell v The Queen** (supra), **Libke v R** (2007) 230 CLR 559, **M v The Queen** (supra)]

[33] Upon a reading of the appeal record, I cannot come to a conclusion that upon the whole of the evidence it was not reasonably open for the assessors to have found the appellant guilty of murder or that they 'must have had a reasonable doubt' of his guilt of murder.

Trial judge's verdict

[34] Having directed himself according to the summing-up, the trial judge had also agreed with the assessors that the appellant was guilty of murder. The House of Lords in **Watt v Thomas** [1947] AC 484 laid down the principles on which an appellate court should act when the appeal is against the findings of fact by the trial judge. The Lords held that when a question of fact has been tried by a judge without a jury (in Fiji too the judge has always been the sole judge of fact and law and the assessors – now not in existence - only expressed an opinion) and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.

[35] It was held in **Kaiyum v State** [2014] FJCA 35; AAU0071 of 2012 (14 March 2014) that when a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him.

[36] On the totality of evidence, I cannot say that the trial judge's finding that the appellant was reckless in causing the death of the deceased is unreasonable and plainly unsound. He could have reasonable convicted the appellant for murder. It cannot be doubted upon the totality of evidence that the appellant was aware that there was a substantial risk that the death of the deceased will occur as a result of his acts and

having regard to the circumstances known to him, it was unjustifiable for him to have taken that risk.

Ground 02

[37] The appellant argues that the learned trial judge has failed to direct the assessors on provocation and intoxication that were available on evidence.

[38] His position is that had the learned trial judge directed the assessors on provocation and intoxication that arose from evidence negating the fault element of murder namely the intent to cause death, the verdict of murder may have been reduced to one of manslaughter or causing grievous hurt.

Provocation

[39] The judicial approach to be taken in respect of provocation is set out as follows [see **Masicola v State** [2021] FJCA 176; AAU073.2015 (29 April 2021)]:

> 1. *The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.*
>
> 2. *There should be a credible narrative (i) on the evidence of provocation words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship (ii) of a resulting loss of self-control by the accused (iii) of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.*
>
> 3. *The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However accumulative provocation is in principle relevant and admissible.*
>
> 4. *There must be an evidential link between the provocation offered and the assault inflicted.*

[40] Effect of provocation on a reasonable man is the determining factor to justify a verdict of manslaughter so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did.

In applying the test it is particularly important to consider whether a sufficient interval has lapsed since the provocation to allow a reasonable man time to cool and take into account the instrument with which the homicide was effected, for to retort in the heat of passing induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger [vide **Mancini v Director of Public Prosecutions** (1941) 3 All ER 272 (HL)]. The provocation must not only have caused the accused to lose his self-control, but also be such as might cause a reasonable man (*i.e.* ordinary man of that age and sex) to react to it as the accused did [vide **Director of Public Prosecutions v Camplin** (1978) 2 All ER 168 (HL)].

[41] No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional vales etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. It is neither possible nor desirable to lay down any standard with precision, it is for the court to decide in each case depending upon the facts and circumstances (vide **Jan Muhammad v Emperor** AIR 1929 Lah 861 by Lahore High Court).

[42] Justice requires that consideration be given to a possible defense disclosed by the evidence even if, for reasons good or bad, the defendant chooses not to advance it (vide **Ram v State** (2012) FJSC 12; CAV0001.2011 (9 May 2012). Though, there is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial, the scope of that duty in relation to provocation is that the defense cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these elements [see **Lee Chun Chuen v R** (1963) AC 220].

[43] Unfortunately for the appellant the evidence does not reveal sufficient evidence for the learned trial judge to address the assessors on provocation. In **Ram v State** (supra) the Supreme Court held as follows:

> *"Before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury's consideration that the*

defendant was provoked to lose self-control and act as he did." (emphasis added)"

[44] Even assuming for the sake of argument that the assault by Elia and the deceased provoked the appellant the subsequent events do not suggest that his stomping and punching the deceased who was trying to get up from the ground was the result of such provocation. Provocation should have led to sudden and actual loss of self-control so as to make him for the moment not master of his mind (see **R v Duffy** [1949] 1 All ER 932). The appellant in fact managed to flee the scene and returned to Navutu Village before coming back with reinforcement in the form of one Etonia Bose to teach the deceased a lesson not to bully him thereafter. His action was well-calculated and some way amounts to retaliation. The appellant's stomping and delivering several punches on the deceased is consistent with his declared and admitted position that he intended to cause serious harm to the deceased so that the later would never assault him again. The appellant was always in control of himself and knew exactly what he was doing and why he was doing. Even if the appellant had been provoked, there had been a time lag between the act of provocation and the commission of the offending to allow him to regain self-control. In any event, the harm inflicted by the appellant on the deceased who was reeling under the heavy punch from Etonia and trying to get up, was totally disproportionate to the provocative act upon him by Elia and the deceased.

[45] Therefore, there was no credible narrative of provocation to be put to the assessors and in any event, the facts and circumstances of this case do not establish provocation as a partial defense.

Intoxication

[46] Sections 29-33 of the Crimes Act, 2009 deals with both voluntary and involuntary intoxication. In **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017) the Court of Appeal dealing with intoxication held:

'[22] Like provocation, voluntary intoxication is not an excuse for an unlawful killing. But voluntary intoxication is relevant in determining whether the accused had the pre-requisite fault element to be guilty of murder.'

[47] In **Director of Public Prosecutions v Beard** (1920) AC 479 (HL) it was held that self-induced intoxication is no defense to a charge of crime, *i.e.* the accused gave way to some violent passion or that he did not know what he was doing wrong. However (i) if actual insanity supervenes as a result of alcoholic excess it furnishes as complete an answer to a criminal charge as insanity induced by any other cause and (ii) if through self-induced intoxication, the accused lacked the specific intent necessary to constitute the offence, the accused has a defense – partial exemption from liability. Murder reduced to manslaughter.

[48] The evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts [vide **Director of Public Prosecutions v Beard** (supra)].

[49] If an accused fails to prove such incapacity, the law presumes that he intended the natural and probable consequences of his act (vide **Bas Dev v State of Pepsu** AIR 1956 SC 488).

[50] In my view, in addition to the fault element of murder *i.e.* intention to cause death, the same principles could be extended *mutatis mutandis* to the other fault element of murder namely recklessness as to causing the death.

[51] Undoubtedly, there was evidence that the appellant, Elia, the deceased and one Navitalai were drinking liquor and at about 09 pm, Elia returned home with the deceased and the two continued drinking at Elia's house. Thus, it is a case of voluntary intoxication.

[52] However, there is no evidence whatsoever that the appellant acted the way that he did due to intoxication. The evidence shows that following the assault the appellant managed fled to Navutu Village but he later returned to the scene with reinforcement in the form of one Etonia Bose to teach the deceased a lesson not to bully him thereafter. Etonia's single punch felled the deceased but when the latter tried to get up the appellant took over to stomp and deliver hard punches on the deceased's head.

[53] The counsel for the appellant too never suggested to the trial judge that he should address the assessors on intoxication presumably because not only did the defense not run its case on that basis but there simply was no evidential basis for such a redirection.

[54] Like in the case of provocation, I do not think that there was sufficient evidential basis or a credible narrative warranting any direction on intoxication in this case and in my view, the same observations in ***Ram*** would apply to intoxication as well *i.e.* before the judge can properly invite the jury to consider a defence of intoxication, there must be sufficient evidence fit for the jury's consideration as to whether the appellant entertained any of the fault elements of murder when he executed the physical act.

[55] In this case the appellant's defence was that he did not stomp the deceased's head but only other parts of the body and therefore did not contribute to the fatal injuries. Thus, in that factual context, intoxication need not have been considered in determining whether the appellant entertained any fault element in relation to the offence of murder.

[56] I have no doubt that on the evidence available the appellant had no incapacity not to know the natural and probable consequences of his acts as result of consuming liquor which simply had not affected his mind to such an extent. His moves were calculated and predetermined. He may not have had the intention to kill the deceased but it cannot be said that he was not reckless as to causing his death.

[57] The same goes with his submission on temporary insanity which is misconceived and non-existent. As said in **Darshani v State** [2018] FJSC 25; CAV0015.2018 (1

November 2018) by Keith, J *'The evidential basis for running the defence of diminished responsibility simply does not exist at present'.*

Lack of legal representation

[58] The appellant when asked whether he wished to consult a lawyer he had answered that he had no lawyer. When the interviewing officer then asked whether he wished to have legal assistance from the Legal Aid Commission, he had replied 'yes'. Thereafter, he had expressed his desire to speak to his mother who could not be contacted as she was at work and he had spoken to his brother. Then, the officer had cautioned the appellant that he was not obliged to say anything unless he wished to do so but whatever he said would be put down in writing and given in evidence and proceeded with the caution interview.

[59] The appellant complains of lack of legal representation and argues that failure to provide him with legal assistance should vitiate his cautioned interview. Section 14(2)(d) of the Constitution deals with right to legal representation.

[60] On a perusal of the cautioned interview, I find that before the appellant had confessed to his acts he had been once again cautioned at 8.39 hrs. That he was not obliged to say anything unless he wished to do. Thereafter from questions 80-87 he had confessed to kicking and stomping the deceased on his head with his heals and flat surface of the feet and admitted that two persons whose names he had divulged had stopped him assaulting the deceased further.

[61] The defense counsel had informed court on 04 July 2016 that the appellant would challenge the cautioned interview solely on the ground that it was a fabrication and withdraw their earlier allegations of assault, oppression and intimidation. Therefore, lack of legal representation was never taken up as a matter of dispute at the *voir dire* inquiry nor at the trial proper. In the trial within trial and in the trial proper the appellant's counsel cross-examined the police officers and challenged their evidence.

[62] The right to counsel is not absolute. The question for this Court is whether there is a possibility that he was adversely prejudiced by his lack of representation (vide **Drotini v The State** [2006] FJCA 26; AAU0001.2005S (24 March 2006); **Ramalasou v State** [2010] FJCA 19; AAU0085.2007 (28 May 2010) and **Ledua v State** (2008) FJSC 31; CAV0004.2007 (17 October 2008) or whether the trial miscarried as a result of the appellant being unrepresented [per Keith, J in **Ledua v State** (supra)].

[63] In **Nalawa v State** [2010] FJSC 2; CAV0002.2009 (13 August 2010) the Supreme Court recognized the rights of the accused to represent them as follows:

> "*... The courts here have shown at all levels their respect for the rights of accused persons to a fair trial that is a trial according to law. This includes the right to counsel, right to disclosure, right to adequate time and facilities in order to prepare a defence, the right to remain silent, and the right to trial without delay ...*" (emphasis added)

[64] **Balelala v State** [2004] FJCA 49; AAU0003.2004S (11 November 2004) the Court of Appeal said although it is desirable for the accused to have legal representation this right is not absolute. The absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted.

[65] In **Ledua v State** (supra) the court dealing with the point on right to counsel and fair trial, observed as follows:

> *"[51] The independent constitutional right to a fair criminal trial (s 29(1) means issues of fairness in procedure require separate consideration. Nevertheless, the terms in s28(1) (d) and the non-applicability of Dietrich's Case in this country mean that a trial is not necessarily unfair for want of legal representation . A trial may be fair or unfair whether or not the accused was legally represented."*

[66] The appellant never took up this complaint either at the trial proper or even at the leave to appeal stage before the single judge. In **Ledua v State** (supra) the court also said:

> *"[35] Quite often this court has been presented with arguments by convicted petitioners raising complaints about lack of representation at trial for the first time on appeal to the Court of Appeal or this court. This is most unsatisfactory and when we have generally declined to entertain contested allegations on such matters when the factual ground work has not been laid in the trial court...."*

[67] In **Balaggan v State** [2016] FJSC 47; CAV0022.2016 (4 November 2016) the Supreme Court considered a similar argument based on lack of representation resulting in a lack of fair trial or a miscarriage of justice. The *voir dire* hearing had been held as scheduled and the petitioner had represented herself. After the *voir dire* hearing the trial judge held the caution interview statement and the charge statement to be admissible. The trial proceedings had shown that the petitioner had ably cross-examined the prosecution witnesses at the *voir dire* hearing. The learned trial judge pronounced the ruling stating that the caution interview statement and the charge statement were admissible and could be led in evidence. Having considered *inter alia* all the above authorities the court did not uphold this ground of appeal.

[68] I have considered the appellant's argument based on alleged lack of legal representation at the police station when cautioned interviewed in the factual background and legal principles above stated. I am of the view that this complaint is an afterthought and given how his lawyers had conducted the *voir dire* inquiry and trial proper, the appellant had not been prejudiced by lack of legal representation; nor had he been deprived of a fair trial, neither had it resulted in a miscarriage of justice.

[69] Though, the appellants had not renewed other grounds of appeal urged at the leave to appeal stage, in the interest of justice I shall still deal with them briefly.

'The summing-up lacks essential qualities of objectivity and even-handedness.'

[70] The appellant argues that the learned trail judge had not delivered the summing-up in a fair, objective and balanced manner and particularly complains of paragraphs 31 and 33 of the summing-up. He cites the following observations in **Tamaibeka v State** [1999] FJCA 1; AAU0015u.97s (8 January 1999) in support of his contention:

'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. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the Judge'

[71] I have examined the impugned paragraphs and the summing-up in its totality but cannot find that the trial judge is in violation of the above observations in ***Tamaibeka***. This ground has no merit.

'The learned trial judge erred in law when His Lordship misdirected the assessors by shifting the burden of proof on the appellant to prove his innocence

[72] The appellant refers to paragraphs 04 and 41 on the one hand and 02 and 40 on the other of the summing-up to advance his argument that in the latter two paragraphs the learned trial judge had shifted the burden away from the prosecution. They are as follows:

'4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.

41. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

2. ……..It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

40. There were 9 witnesses for the prosecution and 3 witnesses for the defence. You will have to consider all the evidence together. You will have to

compare them and analyse them together. You have heard and watched the witnesses give evidence in the courtroom. You had observed their demeanour. Who do you think was forthright as a witness? Who do you think was evasive as a witness? Who do you think is the credible witness? Who do you think, from your point of view, was telling the truth? If you accept the prosecution's witnesses as credible, and you accept their version of events, you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.'

[73] I do not agree with the appellant's contention. To me, paragraphs 4 and 41 deal with the burden of proof and standard of proof and there is no error at all. Paragraphs 2 and 40 of the summing-up deal with reliability and credibility of witnesses. Thus, this ground of appeal has no reasonable prospect of success.

[74] In any event, there is nothing to indicate that the counsel for the appellant had sought any redirections on the matters of alleged non-direction or misdirection complained of. Therefore, the appellant is not even entitled to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].This ground has no merit.

Gamalath, J

[75] I agree with the draft judgment of Prematilaka, RJA.

Bandara, J

[76] I have read in draft the judgment of Prematilaka, RJA and concur with the reasons and proposed orders therein.

Order of the Court:

1. Appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL