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

CRIMINAL APPEAL NO. AAU 062 of 2018
[In the High Court at Suva Case No. HAC 018 of 2017]

BETWEEN	**:**	**IMSHAD IZRAR ALI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Mataitoga, RJA** **Andrews, JA**
Counsel	**:**	**Mr. A. K. Singh for the Appellant**
	:	**Mr. M. Vosawale the Respondent**
Date of Hearing	**:**	**03 September 2024**
Date of Judgment	**:**	**27 September 2024**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Suva on one count of murder of Rajeshni Deo Sharma contrary to section 199 and 200 of the Penal Code committed on 01 November 2009 at Samabula, Suva in Central Division.

[2] After the summing-up[1], the assessors had expressed their unanimous opinion that the appellant was guilty of murder. The learned High Court judge had agreed with the

[1] **State v Ali** - Summing Up [2018] FJHC 490; HAC018.2017 (7 June 2018)

assessors' opinion, convicted him for murder[2] and sentenced him on 12 June 2018 to mandatory life imprisonment with a minimum serving period of 18 years[3].

[3] The appellant's appeal against conviction and sentence was considered by a judge of this court and leave to appeal against conviction was allowed on three grounds of appeal and leave to appeal against sentence was refused[4]. The appellant has not renewed the sentence appeal before the Full Court and confined his appeal grounds against conviction only to the 01st, 02nd and 06th grounds of appeal in respect of which leave to appeal was allowed at the Full Court hearing.

[4] The appellant's grounds of appeal against conviction urged before the Full Court are as follows:

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in law when he failed to order prosecution to provide full disclosure vide section 290 (c) of the Criminal Procedure Decree such as:*
>
> *(i) CID Station Dairy for Murder Investigation of Rajeshni Deo Sharma.*
> *(ii) Copy of eligible cell book record.*
> *(iii) Copy of Vehicle's running used to convey the Appellant after his arrest on 12th November 2009.*
> *(iv) Investigating dairy of all Police Officers involved in the investigating of this matter.*
> *(v) Duty Roster for all Officers from 12/11/2009 to 16/11/2009.*
> *(vi) Copy of meal Registrar.*
> *(vii) Photograph of the iron rod at the scene.*
> *(viii) DNA report.*
> *(ix) Statement of DC Atish Lal.*
>
> *And thereby denying the Appellant to properly prepare his case that resulted in the miscarriage of justice.*
>
> ***Ground 2***
>
> *THAT there had been a miscarriage of justice when the Learned Trial Judge failed to exclude the Appellant's caution interview and charge statement when*

[2] **State v Ali** [2018] FJHC 491; HAC018.2017 (8 June 2018)
[3] **State v Ali** - Sentence [2018] FJHC 492; HAC018.2017 (12 June 2018)
[4] **Ali v State** [2021] FJCA 231; AAU62.2018 (30 July 2021)

there was ample evidence in that the said confession were not voluntary or obtained in breach of his common law rights.

Ground 6

THAT the Learned Judge erred in law when he failed to direct himself and the assessors that in assessing the evidence before them, the totality of evidence should be taken into account as a whole to determine whether the prosecution had proved their case beyond reasonable doubt.

02nd ground of appeal

[5] For convenience and logical reasons, I shall consider the 02nd ground of appeal first. The trial judge had summarised appellant's *voir dire* grounds in the Ruling as follows:

'*1) The accused person was slapped around in the police vehicle immediately after his arrest by the arresting officer and three other officers named below:*

i) D/C[; Vereivalu
ii) D/Sgt 2175 Samuela Namusu
iii) D/Sgt Joape Ravunibola
iv) DC Viliame Loki

2) The accused person was stripped naked, had his photographs taken, humiliated verbally, threatened and made to press up and was punched on his stomach and back area by the above officers at Nabua Police station and three other itaukei officers in civilian clothes who told him to confess to the murder before the commencement of the caution interview.

3) At Samabula Police station the accused person upon request to consult his solicitor was not afforded that right at the commencement of the interview and interview continued and he was able to speak to his solicitor over phone later during the interview.

4) The accused person was continuously threatened by inspector Maharam and 3 other officers that there was no constitution in place and they could do anything to him and he should forget about his rights.

5) The accused person was held in custody for more than 100 hours and not given regular breaks and this even included his request to go to the washroom during his caution interview.

6) At Samabula Police station during the caution interview the accused person was verbally threatened, humiliated, made to press up and police fficers kicked in his groin area, assaulted on his back and abdominal area and deprived of his medications whenever he did not give answers to the satisfaction of the

D/IP Abhay Nand and D/IP Maharam by the above named four officers, DC Atish Lal and the interviewing and witnessing officer.

7) *The accused was promised by the charging officer to give the statement that he made on the charge statement in order to get leniency from the court.*

8) *The accused person was not afforded medical attention when he complained of blood in his urine during his custody.*

[6] Thus, it is clear that the appellant's allegations against the admissibility of his cautioned statement contained of acts of oppression as well as general unfairness. The trial judge had correctly directed himself on the law in his *voir dire* Ruling before admitting both the cautioned statement and the charge statement in terms of voluntariness according to the principles in **Ganga Ram and Shiu Charan v. R** (Criminal appeal 46 of 1983 delivered on 13th July 1984)[5] where it *inter alia* laid down:

> *It will be remembered that there are two matters each of which requires consideration in this area. **First** it must be established affirmatively by the Crown (sic) 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 - what has been picturesquely described as the flattery of hope or the tyranny 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 Judges' rules falling short of overbearing 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". [Emphasis added]*

[7] The trial judge had correctly decided that matters of general unfairness are matters for the assessors to decide at the trial. The appellant had also fully challenged, as he was entitled to do, the question of voluntariness at the trial and the trial judge had correctly directed the assessors to consider both voluntariness and general unfairness. He had also independently considered both issues in his judgment. Thus, voluntariness had been ventilated thrice and general unfairness twice in the course of the trial. Therefore, the appellant's position at the *voir dire* inquiry and the trial proper was that

[5] See **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) also.

all the answers given in the cautioned statement were fabrications *either by himself or by the police* and did not represent the truth. They were not given out of his free will because there were acts of oppression and unfairness committed by the police. He also had said that the charge statement was due to a promise of leniency by the police.

Voluntariness of the cautioned interview

[8] I shall first examine the voluntariness of the appellant's cautioned interview and the charge statement. In assessing the voluntariness of a confession, courts use a multifactorial approach and the prosecution bears the burden of proving beyond reasonable doubt that the confession was voluntary. To assess whether a confession was voluntary, the court looks at the totality of the circumstances including medical evidence, opportunities to complain, the behaviour of outside persons who come into contact with the accused during interrogation, failure of the accused to complain to a judicial officer, the conduct of the police such as assault and exerting coercion, whether any promises or inducements were made, the state of mind of the accused, the length of the interrogation and the presence of legal representation. Since voluntariness is assessed based on the 'totality of the circumstances', no one factor is determinative.

[9] The appellant's evidence on the alleged acts of oppression by the police following his arrest at Safs apartment could be summarised as follows:

- *He checked out at 7.30am on 12/11/09. When he came to the road he was intercepted by four individuals claiming to be police officers and was told to get into a white twin cab. No identity card was shown to him but he got into the vehicle because he was scared. When he was inside the vehicle he was told that he is a killer and he killed his girlfriend.*

- *He was seated in the back seat in the middle between Joape and Vereivalu (VD- PW2). Constable Loki was the driver. As soon as he sat, Samuela (VD-PW1) who was in the front seat turned around and started slapping him on his left cheek. He put his head down but Samuela continued to hit him on his head until the vehicle started moving. The vehicle went to Raiwaqa Police Station where Mr. Joape picked a pair of white boots and then he was taken to Nabua Police Station.*

- *At Nabua Police Station he was given a blank paper and was asked to sign and admit that he had killed his wife. When he refused to sign Mr. Vereivalu assaulted his chest and back. Then the police officers forcefully removed his clothes and made him do press-ups. While he was doing that he was kicked on his stomach and the groin area. He said Vereivalu hit him on the left side of his face and one of his teeth broke into half. The police officers took photographs and swore at him. Thereafter he was taken to the Samabula Police Station. He said the assault lasted around 30 minutes at Nabua Police Station.*

- *On his way he was threatened by the police officers that he will be killed and thrown in Colo-i-Suva. At the Samabula Police Station he was handed over to the investigating officer Mr. Sunil Kumar (VD-PW9). He told Sunil Kumar that he was assaulted by police officers and showed the broken tooth. Sunil Kumar told him to tell the boss when they go upstairs.*

- *He was then taken to IP Maha Ram and IP Abhay Nand and he told them that he had been assaulted. He said he requested to go to the hospital but he was told to wait till the interview commenced. He said he was not willing to continue with his cautioned interview because he could not speak to his lawyer. He first said that his answer to Q.11 was that he was not willing to continue until he speak to his lawyer. Later he said, to Q.11 he answered 'he will call me later'. He said he was not given his mobile phone to call his father though before Q.14 it is written that he was given the opportunity.*

- *He said he wanted to be seen by a doctor due to the chest pain and the body pain from assault. He said he was first taken to Samabula Health Centre but because there was a doctor with the same surname 'Ali' the police took him to Raiwaqa Health Centre. He said he informed the doctor that he was assaulted and he showed the doctor his broken tooth. He also showed the doctor the assault marks on his back and the laceration on his stomach.*

- *Thereafter he was taken back to the Samabula Police station. He said he never spoke to his lawyer on the phone at 12.53pm. He said he was not willing to continue with the interview without consulting his lawyer. He said after the breaks he was not informed that he has a right to remain silent and he was not cautioned. He said as it is recorded, it is correct that at 2.35pm on 12/11/09 his lawyer called in to see him. He said he was able to speak to his lawyer in private for 5 minutes. He said his lawyer advised him to remain silent but when he told the interviewing officers they made fun of his lawyer saying that there is no constitution, no human rights and the country is under a state of emergency.*

- *He was not given a pillow, a blanket or a mattress when he was in the police cell. He could not sleep on the first day because he was having body pains, he was urinating blood and the environment was so dirty where he had nothing to sleep on. On the next day he complained to the*

police officers that he was unable to sleep and regarding the blood in his urine. The police officers made him do press-ups so that he will feel fresh. He was not able to seek legal advice because his lawyer was busy and he did not agree to continue with the interview without seeking legal advice.

- *Before he was asked Q.190 he was threatened that he will be killed and thrown in Colo-i-Suva if he does not confess. Because of that in answer to Q.195 he created falsehood to persuade the officers so that they do not beat him. The answers to Qs.197, 204 and from 208 up to 237 were the first version he created which was false, in order to persuade the officers. He had no idea how the deceased died. He created another version regarding the recharge card and buying of kerosene because the police were not satisfied with his answers. He gave the answer to Q.247 because the police were not satisfied with his answers.*

- *The questions after that, the police started fabricating the answers. He said regarding Qs.248 to 251 he was told that there is an iron rod and he should use that in his confession. When he said 'no' the police fabricated that version. He said he don't know whose iron rod it is and it is not his. He said the answer to Q.259 is not his.*

- *His answer to Q.156 is not his. The answer to Q.187 is his but one word is missing and it should read 'I had left it with my wife at the main gate'. He was told to say that he threw the keys. <u>He was made to do press-ups at that time and he was assaulted in his stomach and groin area</u>. The answers to Qs.217, 218, 230, 248 to 282 are fabricated. He said the answer to Q.280 is his answer and that night he was wearing a sulu wrap-around. The answers to Qs.283, 286 to 290 are not his. His answers to Qs. 291 to 298 where he says he 'retrack', it was falsehood and he was forced to retract because the police wanted their fabricated version to go in. What he had stated in answer to Q.296 was because he was put under a lot of pressure and the police were forcing him to say their version after that.*

- *Before going for the reconstruction of the scene he was told that he will be given an iron rod and to agree with the police that he had used it. He refused to go to the scene reconstruction but he was forced to go. He said the answer to Q.343 is not his. He said there is no answer to Q.346 because the police forgot to fabricate the answer. He said the answer to Q.353 is partially fabricated and the second part is fabricated. The answer to Q.354 is not his. The second part of the answer to Q.355 where it says that he did not want to implicate himself is fabricated. Answers to Qs. 357, 358 to 363 are not his.*

- *The caution interview is not his voluntary statement, the third version is fabricated and the first and second versions were 'falsehood' created by him to persuade the police. The charge statement at **PE 9** was made on false promise as he was told to sign it because the court will look at the intention and he will get leniency. The charging officer was well known to*

him and he told the charging officer how he was assaulted and forced. He said the charging officer started giving him moral teachings from the Quran and he was told that if he did not listen to the charging officer he will have more problems.

[10] The recording of the cautioned statement had commenced at 10.50 am on 12 November 2009, on the same day after his arrest. At the beginning, he had been given language rights, explained the allegation against him and administered the usual caution that he was not obliged to answer unless he wished to but anything he would say would be reduced to writing and given in evidence. He had been given the right to consult a lawyer and the appellant had wanted to consult Mr. M. A. Khan who was contacted at 11.20 am and the appellant had spoken to his secretary. The appellant had told IP Abey Nand and informed that Mr. Khan would call him later but expressed no reservation of continuing with the interview. The appellant had been told that he also had the right to seek advice or assistance from a relative, family member or a friend, social worker or a religious leader. At 11.35am the appellant had been given his mobile phone to contact his father. The appellant had been advised that he was free to ask for breaks, refreshments and meals during the interview. When questioned whether he was physically and medically fit to continue the appellant had expressed his desire to see a doctor and accordingly, the interview had been suspended at 11.40 am. At 12.50 pm. the interview had recommenced after he was declared fit to continue by Dr. Sereana Tagici Wood at Raiwaqa Health Centre. At 12.53 pm Mr. Khan had called and the appellant had spoken to him over the phone.

[11] The medical examination had been conducted at 12.30pm and the appellant had related to Dr. Wood only chest pain radiating to left arm and told the doctor that he was feeling dizzy. She examined his head, eyes, ears, nose, throat, chest, cardiac vascular system, abdomen and extremities. The doctor was very specific that he had not complained of being beaten–up by the police. Although, the appellant had said at the *voir dire* inquiry and at the trial that he had a half-broken tooth (which could have been easily observed if the doctor was alerted to the assault at Nabua police station), the defence counsel had not even suggested that to Dr. Wood either at the *voir dire* inquiry or at the trial that the appellant complained to her of a half-broken tooth. The appellant had said so only in his evidence. The police officers were outside the

consulting room. The appellant had told the doctor that he was a diabetic patient and in 2009 had a kidney stone (renal calculi) which according to the doctor could cause blood in urine. The doctor had found only a laceration of 1cm x 1cm on his left abdomen (the best absorption site for insulin) which did not look fresh but could have been caused by repeated needle injection every day. Dr. Ramaswamy Ponnuswamy Gounder's (who conducted the post-mortem of the deceased) evidence at the trial that the needle is sharp and small and cause only small pin point injuries and would not produce a laceration should be understood in the isolated and hypothetical context in which he was posed that question by the defence counsel. Dr. Gounder had not been shown the appellant's medical report (or referred to Dr. Wood's evidence) and briefed of the history of the appellant taking injectable insulin regularly and Dr. Gounder had thought that the question was as to the deceased and said that he had not seen any laceration or a cut in her abdominal wall. The appellant admits that he was taking injectable insulin regularly to control his blood sugar level. His chest was clear, pulse, head, eyes, ears, nose and throat were normal. His ECG, BP and blood sugar were normal. He was not having any distress and his answers were clear. No masses, bruises or fluid collection were observed in the abdomen. The doctor had prescribed paracetamol, aspirin and stemetil (for dizziness). Dr. Wood had also concluded that the appellant was normal and fit to make a statement.

[12] The appellant's cautioned interview had continued after his trip to Raiwaqa Health Centre. At 1.55 pm the interview had been suspended for lunch and at 2.35pm Mr. Khan had seen and talked to the appellant till 2.50pm. At 3.20pm the interview had re-commenced. Up to that point the appellant had not made any admissions but questions had been on background information. At 4.00 pm again the interview had been suspended at the appellant's request and started at 4.20 pm. Even by then he had not said anything self-incriminatory. The interview had been again suspended at 7.00pm for dinner and re-started at 7.30pm. Until 8.15 pm the interview had continued but the appellant had spoken only to matters relating to his relationship with the deceased but not about the incident.

[13] On the following day (13 November 2009) at 9.14 am the interview had re-started after the usual caution and at 9.30am the appellant had wanted to speak to Mr. Khan

and the interviewing officer had called him but was informed by one Nisha that he was in court but would return the call. At 9.30 am the appellant had received a call from his brother Irshad Ali from New Zealand and he had spoken to his brother. The appellant also had read through the interview notes up to that point from 9.38am and handed them back at 9.50am and the interview had continued. I do not think anyone other than the appellant would have known the background information provided thus far by him at the interview in such a logical and chronological order.

[14] Then from Q.188 he had unfolded the narrative as to what happened on 01 November 2009 (i.e. the day of the incident) starting with he and the deceased going to Village 6 cinema to watch a movie and returning home where at Q.195- Q.221 he had come out with what he called the first version (a false narrative created by him) that the deceased fell on the kitchen floor after he pushed her and a little later he pulled the mobile phone cord hanging from her neck in opposite direction and stood on her neck. In the meantime, the interview had been suspended at 1.15pm for lunch and re-commenced at 1.35pm. Thereafter, starting from Q.232 he had come out with what he called his second version (another false narrative created by him) of having an argument over expenses on rent and recharge although it was not different to his first version but only added more details as to how they had arguments during their trip to the cinema and Shop N Save supermarket. After returning home, around 6.15 pm the appellant had started cooking rice and the deceased making tuna sandwiches but the argument resumed where she alleged that the appellant did not know the responsibilities of being a man and he was not fit to be man. They were eating whilst cooking rice. From Q.247 the appellant had come out with the so-called third version (which according to him was a total fabrication by the police) where he had described (after she said that it was her house and she would decide when he should go) how he struck the deceased twice with an iron rod making her fall backwards towards the kitchen cabinet facing upwards, pressed her neck with his leg and kicked her left side of the face. Then, he had pulled her with the kettle cord after putting it underneath her neck while pressing her neck. The interview had been suspended at 6.10pm for the appellant to relive himself and for rest and it had re-started at 6.35 pm. The appellant had left the iron rod on the floor next to the bed in the bad room. From Q.284 the appellant had stated how he left home at 4.00 am on the following day to go to Nadi

taking the house keys and the deceased's mobile phones with him which he threw away on his way (and not found by the police as he could not show them the exact locations). At 7.20 pm the interview had been suspended for dinner and re-commenced at 8.00 pm. The appellant had retracted some earlier statements such as the narrative of pushing the deceased and said 'no comments' and 'I wish to remain silent' to some questions (see Q.292, Q.294, and Q.297. The interview had been suspended for the day at 8.15 pm.

[15] It had commenced at 8.50am on 14 November 2009 from Q.299 with the usual caution. The appellant had said that he did not want to contact his solicitor and he was feeling well to continue (see Q.301 & Q.302). Answering Q.303 and Q.304 the appellant had *inter alia* agreed to show where the iron rod used to attack the deceased was kept and therefore, for reconstruction of the scene the interview had been suspended at 9.10am. After the scene visit, it had re-commenced at 10.40am and at Q.308 the appellant had confirmed that the iron rod recovered at the crime scene was the same rod he used to attack the deceased. Thereafter, he had explained his movements where he had destroyed the deceased's mobile phones and threw the house keys away (as he did not want to be implicated) on his way to Nadi since leaving the house in the early hours of 02 November 2009 and what made him attack the deceased. At 12.50 pm, the appellant's father Ashik Ali had rung him up on the appellant's mobile number 9201994 and the appellant had been given an opportunity to speak with him. The interview had been suspended at 1.20pm for lunch and re-started at 2.00pm. At 2.08pm the appellant had been given the interview notes for him to read and he had given them back after reading them at 2.55pm and he had also said that he had no corrections to be made and the conversation between D/IP Abhay and him represented a true version and there was no force, threat, promise or inducement made by the police. The appellant, D/IP Abhay and D/IP Maharam who witnessed the interview had signed at the end and the interview had been concluded at 3.00 pm on 14 November 2009.

[16] The appellant had not called either Mr. M.A. Khan, his brother Irshad Ali or his father Ashik Ali to testify at the *voir dire* inquiry or the trial and contradict the evidence of the police officers that there was no assault, oppression or any acts of unfairness on

their part. Mr. M. A. Khan, the appellant's lawyer had met him in person and spent a considerable time (15 minutes) with him before the appellant made all the self-incriminatory admissions implicating him as the sole culprit responsible for the murder of the deceased. Mr. M. A. Khan would have been in the best position to independently testify before court of any acts of assault, oppression or any acts of unfairness on the part of the police towards the appellant if the appellant had alerted Mr. Khan at their meeting or over the phone. The appellant had not said at the *voir dire* inquiry or at the trial that he informed Mr. M.A. Khan, Irshad Ali or Ashik Ali of any such occurrence. Neither had he explained why he failed to inform any of them either of such treatment in his evidence.

[17] Rishi Ram (PW12) who was a Justice of Peace (JP) had been called to Samabula police station on 14 November 2009 after mid-day (*i.e.* presumably before or after the conclusion of the cautioned interview at 3.00pm) to meet the appellant and he had done a face to face interview with no one else in the room. The appellant had told the JP that he was assaulted by police officers, not given all his medicine and abused at Nabua police station. However, the appellant had not shown the JP his stomach but lifted his shirt and the JP had seen some scratch marks by finger nails on his back. The JP had handwritten what happened at the meeting in VDPE4/PE12. It is inconceivable that the police would call a JP and allow him to have a one to one conversation with the appellant if they had assaulted him causing injuries as alleged by him. In any event, other than a verbal complaint, the appellant had not even shown his abdomen to the JP. Dr. Jone Nasome had supposedly examined and seen bruises on 17 November 2009 on his abdominal area but not seen scratch marks on the appellant's back. The appellant had not complained of any assault on his back in his evidence either.

[18] The appellant had not said in his evidence that he made any complaint of assault by the police or other acts of general unfairness to the Resident Magistrate when he was produced on 09, 15, 20 & 29 December 2016 and 09 January 2017 (the day he was transferred to the High Court) before Suva Magistrates Court upon being brought to Fiji from India where he overstayed in violation of bail conditions imposed by Suva Magistrates Court on 16 November 2009. Suva Magistrates Court record has no

mention of any such complaint either. He had not made any complaints of police assault or threats to the High Court judge also upon being produced after he was brought from India. It does not appear that he had made a similar complaint to the Magistrates court when he was first produced as a suspect.

[19] In his affidavit dated 13 December 2016 filed in the Magistrates Court at Suva in support of another application for bail pending trial, the appellant had said that he left for India in January 2010 and that he entered into a de-facto relationship with a female in India and had a child of 03 years. All the medical certificates submitted by him show that he had been treated for left renal and ureteric calculi and right ureteric obstruction in the year 2011 and again for brief periods in 2015 in India. He had been convicted and sentenced to 09 months imprisonment in India for having abducted his de-facto partner and again in May 2015 he had been convicted in India for an offence under section 14 of The Foreigners Act 1946, following which he had been kept in the deportation camp in Delhi, India and on 06 December 2016 brought to Fiji. The Resident Magistrate, Suva on 29 December 2016 had refused his bail application. In his said affidavit the appellant had said that *'as a result of police brutality his kidneys, renal and ureter was damaged'*. However, medical evidence in the case including the doctor called by him does not support this allegation at all.

[20] When an accused is brought before a judicial officer (such as a magistrate or judge) and fails to raise any complaint about mistreatment, it weakens the argument that the confession was coerced. That said, courts also recognize that fear, intimidation, or lack of understanding may prevent an accused from making a complaint. However, in this instance the appellant was not a novice to a court house setting or appearing before a judicial officer as he had been twice convicted by courts in India and been to Suva Magistrates Court before being bailed out. Thus, his failure to complain in such a situation could be interpreted as a sign that the appellant did not feel coerced by the police. The appellant had not complained of such oppression to the Resident Magistrate and not said in evidence his failure to do so was due to any fear, intimidation, or lack of understanding.

[21] After being bailed out on 16 November 2009 (two days after the conclusion of the interview), the appellant had presented himself to Dr. Jone Nasome (at a private institution called Fiji Care Medical Centre) who in his report and evidence had said that the appellant complained to him of police assault and not being allowed to access his medications and taken to hospital when he complained of blood in the urine. The doctor had examined the appellant on 17 November 2017, seen bruises and treated him with topical antibiotic cream and oral antibiotics. In his evidence the doctor had said that the pictures taken of the appellant and produced with his report were not taken before him (although the appellant falsely claimed in his evidence that they were taken before the doctor). Dr. Jone Nasome (who gave evidence only at the *voir dire* inquiry) had not said anything which could cast doubt on the integrity of the examination done by Dr. Wood earlier and her findings. Dr. Jone had seen bruises (three as per the photograph) on the bottom hip and the abdomen. He claimed that the age of the bruises was 1-5 days (though not in his report) but not given the size of the injuries. According to Dr. Jone the appellant had been a diabetic since 2004 and blood in urine could be caused by de-hydration, an infection (treatable with prescribed medication) in the kidney or due to kidney stones and not necessarily by trauma caused by force being used on around the kidney, bladder or genital area. He had also said that some form of injury to the layer of the tissue could be caused by an insulin injection, if infected. He had said that the possible reason for the bruises not being mentioned in Dr. Wood's report is that they had occurred after 12 November 2009 but Dr. Jone had admitted that the bruises could be self-inflicted or due an assault. Thus, Dr. Jone's examination of the appellant on 17 November 2009 or his subsequent report and evidence had not materially contradicted Dr. Wood's report and her evidence. It becomes clear from her report and evidence that the appellant was suffering from diabetes for a long time and that was the history given by him to Dr. Wood. Thus, I do not see how the medical evidence as a whole could support the appellant's allegation that *'as a result of police brutality his kidneys, renal and ureter was damaged'*. On the contrary medical evidence in its totality seems to refute the appellant's account of alleged police brutality and make it incredible.

[22] Medical evidence can play a critical role in assessing whether any coercion, including physical assault, was used to obtain a confession. If medical evidence does not

support the claim of an assault, it may weaken the accused's argument that his confession was involuntary due to police brutality. However, this alone is not decisive. Courts may still consider other forms of coercion, such as psychological pressure or intimidation, which may not leave physical marks. Rishi Ram (JP) only observed that the appellant looked upset and tired. Dr. Wood had not seen any signs of psychological pressure or intimidation in the appellant. Neither had Dr. Jone spoken of having seen those signs in the appellant.

[23] Therefore, not only does medical evidence not support the appellant's allegation of police assault or other forms of coercion, such as psychological pressure or intimidation calculated to extract a confession, but some of his answers do suggest that he had a free choice even to be silent or make no comments during the interview.

[24] In **Ratu v State** [2024] FJSC 10; CAV24.2022 (25 April 2024) the Supreme Court said in a similar situation:

> *61. More significantly, there is no record of him having raised the alleged assaults before a judicial officer at the time of his arrest. As the trial Judge noted, Inoke appeared before a Magistrate on 12 January, 26 January and 9 February 2015 and before the trial Judge on 27 February 2015. If he had suffered serious assaults of the type he alleges, it is to be expected that (i) he would have suffered significant bruising and other injuries, which would be visible for some time; and (ii) he would have raised the matter at an early opportunity*

[25] If the accused had the opportunity to communicate with outside persons (such as family, lawyers, or friends) during the interview and did not make a complaint about coercion or mistreatment, this can suggest that the confession was not the result of external pressure. However, courts recognize that individuals may not always feel safe or comfortable making such complaints, especially if they fear retaliation or are psychologically distressed.

[26] It is clear to me that in the midst of the interview the appellant had numerous opportunities to be in touch with several persons from outside the police team including his lawyer Mr. M.A. Khan (whom he met in person) before he came out with self-incriminatory statements and anyone of them could have taken-up the

allegation of oppression pursued vigorously by the appellant at the *voir dire* inquiry and the trial with relevant authorities. He also had not made any complaint of assault to Dr. Wood who found him to be normal and not under stress. In answer to Q.297 the appellant had said 'I wish to remain silent' and in answer to Q.292 and Q.294 he had said 'no comments'. These answers unmistakeably suggest that the appellant was free not to answer the questions when he chose to. The appellant had not said in evidence that he did not complain to anyone due to fear of retaliation by the police or stress.

[27] Therefore, I have no doubt about the voluntariness of the appellant's cautioned interview. As for general unfairness, I have already set out the evidential matters relating to this complaint. Duration of the interrogation had been for 03 days. However, it had been done with breaks to allow the appellant to rest and have access to food and water. Each day the questioning had been stopped in the night to allow the appellant to have sufficient rest. He had been allowed to communicate with his lawyer, brother and father from abroad during the interview. His lawyer had visited him in person. He had been informed of his constitutional rights such as right to silence, which he had exercised on some occasions. He also had been allowed to read his interview and suggest any changes. The appellant had not made any complaints of acts of general unfairness highlighted by him in his evidence to anyone that he trusted, Dr. Wood or the Resident Magistrate. In the circumstances, I am not inclined to hold that there had been acts of general unfairness either. I shall now proceed to consider the truthfulness of his confession.

Is the confession true?

[28] The cause of death is asphyxia due to strangulation. Dr.Gounder had performed the post-mortem at 6.00 pm on 03 November 2009, 06 days before the appellant's cautioned interview. The appellant had admittedly pulled her with the kettle cord after putting it underneath her neck while pressing her neck with his right leg. According to Dr. Gounder, injuries No.1, 2, 5, 6, 8, 9 and 11 in the post-mortem report directly relate to the neck injury suffered by the deceased and a smooth kettle cord could cause strangulation and the appellant admittedly used the kettle cord in that process. For injury 8 and 9 to have occurred there must have been compression applied and the

appellant admitted pressing the deceased's neck with his right leg which would have exerted severe pressure on that area to cause those injuries. Haematoma over the 04th cervical vertebra at injury No. 11 would have been caused by compression over the neck. Injuries 5 and 6 were due to asphyxia.

[29] Injury No. 3 is the result of injuries 1 and 2. Injuries 10 and 12 are two large haemorrhages over the right parietal area and over the 06th cervical vertebra. Both were caused by a blunt object, and particularly No. 10 could have been caused by the iron rod found at the crime scene. The appellant admitted that he used the iron rod in the house to attack the deceased's head twice. A severe force should have been used in causing injury No. 10 and would have been very painful and could result in loss of consciousness and substantial amount of blood. According to the appellant with the first blow to her head the deceased sat down and with the second blow she fell on the ground and there was no movement in her thereafter. He said that the deceased was bleeding from the head. No. 10 could not have been caused by falling on the floor with a hard push according to Dr. Gounder.

[30] As per Dr. Gounder, injury No. 7 is a large contusion over the left mandible and the likely cause is a blunt weapon and not by a fall being pushed by someone hard because if the deceased was pushed backwards she would hit the floor on the back of the head but the injury was on the left jaw bone only. The appellant had said at the interview that he kicked the left side of the face of the deceased when she was on the floor. This most probably would have caused this injury as explained by Dr. Gounder.

[31] These detailed explanations of injuries, how they would have been caused and the possible weapons used in causing them, came only with Dr. Gounder's evidence at the trial in 2018. The police would not have been able to fabricate the appellant's confession within 03 days of the incident in 2009 to be so consistent with expert forensic evidence of Dr. Gounder. Thus, the appellant's description of the assault that he carried out on the deceased with an iron rod, using the kettle cord and pressing and kicking her neck with his leg perfectly fit into the medical explanations of each of the injuries found on the deceased's body.

[32] The appellant admits that both he and the deceased ate while coking rice around 7.00 pm on 01 November 2009 shortly before he attacked her and according to Dr. Gounder, the deceased's stomach had semi digested food which means that the deceased would have had food about an hour or two before her death. Thus, Dr. Gounder's evidence on the contents of the deceased's stomach and the time of death tallies with the appellant's narrative in his confession. Dr. Gounder also explained that his estimate of the time of death *i.e.* more than 48 hours before the post-mortem examination and approximately between 08.00pm and 11pm on 01 November 2009 was based on (i) the absence of rigor mortis and (ii) setting of putrefaction and (iii) what D/Constable 3138 Atish Lal said to him that there had been a disturbance inside the deceased's house between 09.00pm and 11pm.

[33] The immediate neighbour of the deceased and the appellant, Ana Ue Babara had said in evidence that she heard arguments during the day between the two and at about 8.00pm she had heard the dragging of furniture across the tile floor at her next-door neighbour's house and chain rattling at the gate around 4.00am on the following morning.

[34] Dr. Gounder had said that it was usual for him as a forensic pathologist to visit the crime scene and he noted a female lying on the floor in a pool of blood behind the head. The appellant had said in his cautioned interview that after he struck the deceased she fell backwards towards the kitchen cabinet facing upwards. This is exactly how the body of the deceased was when the police first entered the house along with the appellant on 03 November 2009 well before the appellant confessed to the murder. Photograph 7 in prosecution exhibit 6 clearly shows this exact position of the body.

[35] The appellant had also said in his cautioned statement that he threw the kettle cord with which he strangulated the deceased in the counter beside the radio and this is exactly where the police had recovered it days earlier. The iron rod which the appellant used initially to attack the deceased's head was recovered at the crime scene when he was taken there for reconstruction of the crime scene in the midst of the interview from the location inside the house where had confessed to have left it.

[36] Therefore, it is clear to me that the appellant's description of what they ate just prior to the incident, how he attacked the deceased, how the deceased fell on the ground and how he disposed of the instruments used in carrying out the attack are in line with independent medical evidence, photographs of and the exhibits recovered from the crime scene. These lend a substantial weight to the truthfulness of the appellant's account in his confession.

[37] Further, when one examines the totality of the cautioned statement containing 363 questions lasting for 03 days, it does not give the slightest impression that it is a fabrication by the police. It has a logical sequence and lots of information which could only be within the knowledge of the appellant. Although the appellant had said that he himself created the first version and the second version (which as I said before is not a separate version by itself) containing falsehood, he had firmly placed himself at the crime scene when he said that the deceased died due to a fall being pushed hard by him. This narrative is materially different to his eventual defence at the *voir dire* inquiry and the trial that he was not involved in her death at all, but the first version is not totally inconsistent with his third version, which he says, was fabricated by the police where again he implicated himself as the direct perpetrator. It is the third version that was the foundation of his conviction where he not only placed himself at the crime scene but also firmly implicated himself for the deliberate act of murder and for taking all possible means to hide his involvement and destroying some evidence such as the deceased's mobile phones and the house keys. His subsequent conduct demonstrates a methodical and clever attempt to distance himself from the deceased's death. It is likely that in order to bolster his defence of total denial, his counsel had informed the trial judge before the summing-up that the appellant was not raising provocation as a defence and the appellant had not said in his evidence anything suggesting such a scenario either. However, the trial judge as required by law had addressed the assessors in the summing-up on provocation and manslaughter as well.

[38] Therefore, I am convinced that what the appellant had divulged in his cautioned interview was a true account and not a fabrication by the police.

[39] In the light of the above discussion, I am inclined to conclude that the appellant's cautioned statement had been duly admitted and relied upon to convict the appellant.

[40] As for the charge statement where he had said that the incident happened out of anger, he entertained no serious intention to kill the deceased and was remorseful of what happened, but he signed it on the advice of D/SGT 1882 Mukhtar promising that he would get leniency from the court is equally incredible. D/SGT 1882 Mukhtar denies that proposition. Since the police already had the appellant's confession, there was no reason for the police to promise leniency by the court (which they could not do anyway) to get another admission in the short charge statement. In my view, it was a voluntary statement given by the appellant without any physical or moral compulsion by the police.

[41] Thus, the second ground of appeal fails.

01st ground of appeal

[42] The appellant's complaint is that the failure on the part of the prosecution to provide him with the documents set out was critical to his defence and the trial judge's failure to stay the trial proceedings pending production of those documents prejudiced his defence. He relies on section 290(1)(c) of the Criminal Procedure Act and several judicial pronouncements.

[43] The respondent's position is that it has provided all the material available and explained the non-availability of certain documents requested by the defence. The State argues that its case was based on circumstantial evidence and admissions in the appellant's cautioned interview and the charge statement.

[44] The appellant's position at the *voir dire* had been (vide his evidence at the *voir dire* inquiry and the *voir dire* ruling[6]) that he was subjected to oppression and unfairness by the police and to avoid that he created false answers and lied to the police. Further he had said that the police on their own fabricated some of the answers from question

[6] **State v Ali** - Voir Dire Ruling [2018] FJHC 493; HAC018.2017 (23 May 2018)

217-363. In the end he simply signed the cautioned statement. The so called false answers the appellant had deliberately given relate to his position that when the deceased took the chair and grilled him against the kitchen sink, he pushed the deceased hard and as a result she fell on the kitchen floor. The other story he says he created, was that there was an argument between the two over the deceased wanting to buy the recharge card when there was not enough money to pay the rent (see Q. 232-238). He had specifically said in his evidence at the trial that up to Q.237 the cautioned statement contains his first version (i.e. *deliberate falsehood created by him*) and from Q.247, all answers were *fabrications by the police* where he had confessed to having struck the deceased with an iron rod twice, stood on her neck pressing her neck, put the kettle cord underneath her neck and then pulled her towards the opposite direction. According to his confession, the reason for his actions were jealousy and anger because of the calls the deceased was receiving on her mobile phone from one William and the build-up of that dispute for a while and her accusing him before the incident that he does not understand the responsibilities of a man and is a freeloader. All in all, he had said that the he did not voluntarily make the cautioned statement. As for the charge statement admitting his involvement in the murder, his position was that he signed it on the advice of D/SGT 1882 Mukhtar promising that he would get leniency from the court.

[45] Until 03 April 2018, the appellant was represented by the Legal Aid Commission (LAC) and since then by a private counsel, Mr. A. K. Singh. The 01st set of disclosures are found from pages 1- 452 of the appeal record (consisting of 7 volumes). On 10 July 2017, the LAC along with *voir dire* grounds had requested some disclosures and among them were copies of CID diary & cell book at Samabula Police station, vehicle running sheet for the vehicles involved in the investigation of the case at Nabua and Samabula police station and meal register book at Samabula police station from 01 to 16 November 2009. Items (i), (ii), (iii) and (vi) referred to under this ground of appeal are more or less the same disclosures. In response, the State had provided among other things copies of *station diaries* at Nabua and Samabula police stations, the *meal book* at Samabula police station (see pages 185/186-385/390/405) and *cell book entries* on 12 November 2009 at Samabula

police station (see pages 389-578). Thus, it appears that items (i), (ii) and (vi) had been given to the defence.

[46] Mr. A. K. Singh had provided a list of further disclosures required by him on 11 April 2018. However, this list is not part of the appeal records though the records had been prepared by Mr. Singh himself who is the appellate counsel for the appellant (and the trial counsel too). At the hearing of the appeal this court requested particularly Mr. Singh and Mr. Vosawale (state counsel) to provide a copy of the same but neither counsel had submitted it to the Court of Appeal Registry. As a result, this court is unable to independently verify what documents Mr. Singh had sought from the prosecution in that list. In addition, on 18 April 2018, Mr. Singh had requested a statement from the photographer. Thus, there is no material in the records before us to show that the defence had requested items (iii), (iv), (v) and (vii) to (ix). However, on 15 May 2018 Mr.Vosawale had informed the trial court that the investigation diary [item (iv)] was not available and the State had provided all the documents asked for by the defence which the police had provided to the DPP. The trial judge had told Mr. Singh that the non-availability of whatever the documents would be considered in deciding the question of voluntariness of the appellant's confession and both parties had proceeded to the *voir dire* inquiry.

[47] Sgt 2848 Rajnesh Prasad had confirmed in May 2018 (page 196) that he could not locate the station diary and the fleet running sheet for November 2009 at Samabula police station (he appears to be referring to the originals) but only the meal register was found. Sgt 2584 Navi (page 200) had confirmed in May 2018 that he could not locate at Nabua police station the station diary for November 2009 (he too may be referring to the original). This explains Mr. Vosawale's clarification to court on 15 May 2018 that originals of station diaries cannot be found but copies had been disclosed.

[48] It is clear that due to the long delay caused solely by the appellant's illegal stay in India avoiding trial in Fiji after being granted bail pending trial for medical treatment, some documents had been lost.

[49] The State had indeed provided station diaries (possibly copies) at Nabua and Samabula police stations to the defence (see page 186 & 390). The appellant's argument is that they would have proved that he was taken to Nabua police station where he was for the first time allegedly assaulted before being taken to Samabula police station. Police witnesses strongly refute this allegation and explained that it took about 30 minutes for them to reach Samabula police station (though the distance was about 03 km) because of heavy road traffic. Even if the appellant had indeed been taken there (as he alleged) and assaulted breaking one of his tooth in half and further assaulted at Samabula police station later, one would expect Dr. Wood to observe serious injuries on him. I have already dealt with this aspect earlier and held that other than the appellant's word of mouth there is no independent material to support the appellant's allegation. The same goes for the vehicle running sheet as well.

[50] Cell book entries at Samabula police station for 12 November 2009 (the day of the arrest) had been provided to the defence (see page 405) but not for the rest of the period of detention. The appellant submits that they would have helped to establish his movements, his condition, injuries to be noted by 'an independent' police officer. However, if the police had ill-treated the appellant in the calculated manner the appellant had claimed, I do not think that a police officer would have made any entries in the cell book. Moreover, they would not have taken the appellant to Dr. Wood at his request without any intervention by any higher authority on 12 November (itself in the midst of the interview) or allowed the appellant to have a one to one meeting with a Justice of Peace on 14 November 2009. In the absence of medical evidence and other circumstances suggesting coercion by the police as I have dealt with earlier, I do not think non-availability of Cell book entries at Samabula police station from 13 to 16 November would have made a big difference to the appellant's defence.

[51] The investigation diary had not been provided as it was not available by the time the matter was taken up for *voir dire* inquiry. However, the contemporaneous statements recorded from all police officers involved have been provided to the defence and those witnesses had been thoroughly cross-examined by the defence to put forward the appellant's narrative that he was assaulted in his stomach and groin area before

and while the interview was being recorded. This aspect again goes to the question of credibility of the appellant's position that he was severely assaulted by the police first at Nabua police and then at Samabula police station, rendering his confession involuntary. I have ruled on this and in the circumstances I have highlighted, the non-availability of investigation diary would not have significantly elevated the appellant's case to a credible one.

[52] The appellant's written submissions have also referred to a medical report dated 15 November 2009 by one Dr. Kiki *or* Mimi of Raiwaqa Health Centre. It is not even listed under this ground of appeal. I see no reference to such an examination in the proceedings at pages 903, 1087 to 1091 or 1094. The reference to the medical report there is VD PE1 which is Dr. Woods' report dated 12 November 2009. DC Namusu had not said that the appellant was examined at Raiwaqa Health Centre on 15 November 2009 and report was made available. Even the appellant had not said so. In any event, Dr. Jone had examined the appellant on 17 November 2009 and made a report which reveal the bruises the appellant had. I have dealt with this in detail before. In any event, he was allegedly assaulted for the second time *i.e.* during the interview after his answer that he left the gate keys at the gate (i.e. Q187 on 13 November 2009) and the police allegedly wanted him to admit that he threw the keys away. However, he never confessed to that on that day and his admission that he threw the keys away came on the following day with his third version where he had confessed to the deliberate murder. Thus, the injuries Dr. Jone saw on 17 November 2009 would have been the same (if present) before his release on 16 November 2009 on bail even on 15 November 2009. No examination on 15 November would have revealed anything new.

[53] The appellant had said that he was not given a report of the DNA analysis on the iron rod, kettle cord and the deceased's clothes. DI Jitoko (page 1267) and Sgt. Sunil Kumar (page 1396) have said that these items were sent for DNA analysis. However, neither of them had said that they received a report from the Forensic Officer. Sgt. Sunil Kumar's evidence suggests that the analysis was still being done.

[54] Therefore, there was no way that the prosecution could hand over a copy of a DNA report to the defence. It is clear that the Forensic Officer had not made a report on DNA analysis even if an analysis was ever undertaken. I have no material to confirm that the defence had in fact asked for a DNA report. As for the appellant's submission that a DNA report would have shed light on the question whether the iron rod was used by the appellant or someone else, it is a different argument altogether from the failure to disclose. On the other hand, a DNA report may have confirmed that the appellant had touched the iron rod. However, since it was always at home, a positive DNA report will not necessarily confirm that he used it for the attack. On the other hand, if the DNA analysis had shown that the iron rod contained traces of someone else other than the appellant and the deceased, that may cast doubt as to the presence of a third party. However, the contamination by investigators also have to be then excluded. Thus, there are so many possibilities. However, the crux of the matter is that there was no such DNA report with the police at any stage.

[55] The appellant also complains of lack of a photograph of the iron rod produced at the trial by the prosecution. DJ Jitoko had explained that they saw the iron rod in the house. Since it did not look suspicious it was not taken as an exhibit or photographed in the first round of the investigation before 14 November 2009 and that was the reason why there is no photograph of it in the photographic booklet (PE6) disclosed to the defence. However, it was only photographed and taken as an exhibit during the reconstruction after the appellant confessed to the iron rod being the murder weapon on 14 November 2009 but DJ Jitoko did not know where that photograph is. The iron rod is not in photo 5 or 6 as they show only part of the kitchen and the iron rod had been recovered on the floor of the bed room. It appears that the prosecution was not in possession of the photograph of the iron rod to be given to the defence as part of the disclosures.

[56] As for not giving the statement of DC Atish Lal who had told Dr. Gounder that there had been disturbance at the appellant's house between 8.00pm and 09.00 pm on the day in question, Dr. Gounder's evidence on this point was not challenged by the defence but the counsel rather made use of it to suggest that he had determined the time of death based on that statement which the doctor denied. I have dealt with this

matter earlier and there is no need to repeat the same discussion here. Therefore, DC Atish Lal's statement, even if available, was not going to make a material difference to the defence case. In any event, DC Sunil Kumar had said (page 1391) that he cannot remember whether a statement of DC Atish Lal was recorded.

[57] In this case the cautioned interview had made out the prosecution case. The question is whether the non-disclosure could have caused any real prejudice to the appellant and the appellant should identify how any of the allegedly missing documents could have assisted his case. The court would not act on speculation that, in some fashion, something might have been drummed up, from the absent documents, to throw doubt on what was otherwise a strong prosecution case.[7] As I have pointed out, I do not think that the non-availability of the documents highlighted by the appellant caused any real prejudice to his defense of total denial and involuntariness and general unfairness of the cautioned interview.

[58] Therefore, I find that the first ground of appeal too cannot be determined in the appellant's favour.

03rd ground of appeal

[59] The appellant complains that there were inconsistencies in the evidence of prosecution witnesses which the trial judge had not considered in its totality but at the same time the appellant also submits that the trial judge in the summing-up had addressed inconsistent evidence but failed to direct the assessors on omissions in the witnesses' evidence. He contends that any evidence omitted in their police statements is fabricated because they could not be expected to remember things from memory due to the lapse of 09 years although the witnesses had admitted having refreshed their memories from their police statements.

[7] In **Jione v State** [2008] FJSC 55; CAV0003. 2007 (27 February 2008)

[60] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015), the Court of Appeal examined several previous decisions on how to approach omissions, contradictions/inconsistencies and discrepancies and laid down the applicable principles as follows:

> *'[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).*
>
> *[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*
>
> *[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra)*
>
> > *"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses……"*

[61] In the first place the proposition that any omission in evidence from a police statement is a fabrication is a misnomer. I have examined the so-called inconsistencies highlighted in the appellant's submissions filed on 24 July 2024 and find them not inconsistencies at all or not material. They would not shake the foundation of the prosecution case or go to its root. The same is true of the alleged omissions as well. Most of the submissions the appellant had made thereafter under this ground of appeal have been dealt with under the 01st and 02nd grounds of appeal.

[62] In any event, the appellant's counsel do not seem to have raised any concerns regarding the trial judge not having directed the assessors on the alleged inconsistencies or omissions when asked for re-directions. In **Prasad v State** AAU0010 of 2014: 4 October 2018 [2018] FJCA 152 the Court of Appeal on this aspect stated as follows:

> *'The appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, the appellate court would not look at the complaints against the summing-up in appeal based on such misdirections or non-directions favorably. The appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in Raj that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and once again reiterated this position in Tuwai v State CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in Alfaaz v State CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.'*

[63] The trial judge had canvassed the totality of prosecution evidence of 13 witnesses at paragraphs 30-42 and the appellant's evidence (only he gave evidence) at paragraph 44 (with 35 sub-paragraphs) of the summing-up. This all-inclusive, succinct and accurate summary includes the positions taken up in cross-examination as well. Thus, the assessors had the benefit of both accounts before them. The trial judge had not omitted anything vital in each of the cases. With correct directions on burden of proof, respective roles of the assessors and the judge, how to assess inconsistencies, elements of the offence to be proved by the prosecution, provocation, lesser offence of manslaughter, medical opinions, circumstantial evidence, cautioned interview and charge statement, the summing-up was a custom-built one based on the nature of the case.

[64] The trial judge had specifically addressed the assessors on how they should approach the cautioned interview and charge statement *vis-à-vis* their voluntariness and truthfulness in line with established legal principles[8] from paragraphs 52-65 and generally on the same topic thereafter. Thus, the trial judge had put the defence case

[8] See **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017); **Maya v State** [2015] FJSC 30; CAV 009. 2015 (23 October 2015), **Volau v State** 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

very clearly before the assessors and directed them in paragraph 79 that if they neither believe nor disbelieve the appellant, still he is entitled to be acquitted. All in all, the summing-up is fair, objective and well-balanced. The summing-up is not devoid of any essential characteristics[9].

[65] For example, at paragraph 79 of the summing-up, the trial judge had directed the assessors as follows on the intermediary position most favourable to the appellant.

> *79. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;*
>
> *(i) You may believe the explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.*
>
> *(ii) Without necessarily believing you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.*
>
> *(iii) The third possibility is that you reject the accused's evidence. But if you disbelieve the accused, that itself does not make him guilty of the offence charged. The situation would then be the same as if the accused had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.*

[66] The Supreme Court remarked in **Kacivakawalu v State** [2019] FJSC 28; CAV0009.2019 (31 October 2019) as to how a summing-up should be as follows:

> *'[33] On perusal of the summing up as a whole I am convinced that the High Court Judge not only had addressed his mind but also had the defence case fairly and completely put to the assessors for their consideration. Further I stress that – always a summing up have to be objective and balanced as observed in R v Fotu (1995) 3 NZLR 129. I would take the liberty to cite the following passages also of Cooke P, in the aforesaid case of R v Fotu which would be of importance.*
>
> *"New Zealand practice has generally accorded with and we cannot do better than adopt the following passage in the speech of Lord Hailsham of St Marylebone LC in R v Lawrence [1982] AC 510, 519:*

[9] See **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017)

> *It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definition is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."*

[67] The trial judge is not expected to repeat everything he had stated in the summing-up in the judgment as long as he had directed himself on the lines of his summing-up to the assessors. When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter. In Fiji, the assessors are not the sole judge of facts. The trial judge is the sole judge of fact 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.[10]

[68] The trial judge in his judgment containing 26 paragraphs had independently given his mind to the alleged inconsistencies, analyzed the question of voluntariness and truthfulness of the appellant's cautioned interview and the charge statement in the light of all concerns raised by the appellant in his evidence. The judge had also stated

[10] **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)

why he would not believe the appellant. In the end, he had concluded that the prosecution had proved its case beyond reasonable doubt.

[69] Keith, J said in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] ……..The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[70] Therefore, I am not inclined to uphold the third ground of appeal as well.

[71] It has been stated many times that the trial court has the considerable advantage of having seen and heard the witnesses. It is in a better position to assess credibility and weight and the appellate court should not lightly interfere.[11] In this case too there was undoubtedly evidence before the assessors and the trial judge that, if accepted, would support the appellant's conviction.

[72] When examining whether a verdict is unreasonable or cannot be supported by evidence, the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence including defence evidence, the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt which is to say whether the assessors ***must*** as distinct from ***might***, have entertained a reasonable doubt about the appellant's guilt[12].

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[11] **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)

[12] **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)

[73] While giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses[13], this court evaluated the evidence and made an independent assessment thereof[14] and I am convinced that the assessors as well as the trial judge could have reasonably convicted the appellant on the evidence before them[15]. My conclusion is no different.

[74] The test for miscarriage of justice is if the appellate court concludes from its review of the record that conviction was inevitable; a conviction will only be inevitable where the appellate court is satisfied that, if there had been no error, there is no possibility that the assessors and/or the judge as the case may be, acting reasonably on the evidence properly admitting and applying the correct onus and standard of proof, might have entertained a doubt as to the accused's guilt[16]. In this respect too I entertain no reasonable doubt of the conviction entered by the assessors and the judge.

[75] Following the usual practice of this court in considering the question of leave to appeal, I have inevitably fully considered and found no merit in the appellant's appeal against conviction and therefore, the appeal against conviction should stand dismissed.

Mataitoga, RJA

[76] I agree with the judgment. I concur with the reasons and conclusions.

Andrews, JA

[77] I totally agree with the reasoning and conclusions set out in the judgment of his Honour Justice Prematilaka RJA.

[13] **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024); **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)
[14] **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012)
[15] **Kaiyum v State** [2013] FJCA 146; AAYU 71 of 2012 (14 March 2013)
[16] **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021)

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Appeal against conviction is dismissed.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL

.....
Hon. Madam Justice P. Andrews
JUSTICE OF APPEAL

Solicitors:

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Office of the Director of Public Prosecution for the Respondent