JACK ANTHONY FRASER v STATE (AAU0018 of 2011)

COURT OF APPEAL — APPELLATE JURISDICTION

CALANCHINI AP, BASNAYAKE and KUMARARATNAM JJA

7, 30 November 2012

Evidence — admissibility — confession — appeal against conviction — conduct of police — oppressive treatment of accused — assault and injury — release and re-arrest — recovery and production — circumstantial evidence — role of independent witness — exclusion of confessions — whether confession obtained voluntarily — whether correct assessment of evidence in voir dire ruling — whether evidence insufficient for finding of guilt — Court of Appeal Act s 23(1)(a) — Criminal Procedure Code — Criminal Procedure Decree ss 237(2), 237(4) — Police and Criminal Evidence Act ss 76(2)(a), 76(2)(b).

The trial judge convicted the appellant of murder and sentenced him to life imprisonment with a non-parole term of 16 years. In doing so, the judge disagreed with the three assessors who had returned a unanimous opinion of not guilty. In his reasons, the judge referred to the accused's confession, which the trial judge had found in voir dire proceedings to be voluntarily and freely given without oppression. He also referred to witnesses whose circumstantial evidence confirmed the contents of the confession. The appellant argued that the trial judge erred in admitting the confession in the voir dire.

Held –

(1) The burden rests on the prosecution to prove beyond reasonable doubt that the statement was not obtained by oppression of the person making it. The prosecution has failed to prove that the statements were obtained voluntarily and the trial judge has erred in allowing the statements of the accused made in the course of the caution interview. The only other evidence outside the confession is insufficient to arrive at an irresistible conclusion to bring home the guilt of the accused.

Appeal allowed and conviction quashed.

Cases referred to

Patel v Fiji Independent Commission Against Corruption (unreported criminal appeal AAU40 of 2011 delivered 28 October 2011); *R v Mushtaq* [2005] 3 All ER 885; *Ram Bali v Regiman* [1960] 7 FLR 80, cited.

Singh v Regiman [1980] 26 FLR 1, considered.

Carl Mason (1988) 86 Crim Appl R 349, followed.

I. Khan for the Appellant

S. Puamau for the Respondent

[1] Calanchini AP. I agree with Basnayake JA that the appeal should be allowed and the conviction quashed.

[2] I venture to add some further observations concerning the reasons for allowing the appeal.

On 14 April 2010 the learned trial judge convicted the Appellant of murder and sentenced him to life imprisonment with a non parole term of 16 years. In doing so the learned trial judge disagreed with the three assessors who had returned a unanimous opinion of not guilty. This he was entitled to do pursuant to s 237(2) of the Criminal Procedure Decree 2009 which states:

"*The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors".*

[3] This provision had been present in similar terms in the Criminal Procedure Code Cap.21 which was repealed by the 2009 Decree. The position had been recognised long ago when this Court observed in *Ram Bali v Reginam* [1960] 7 FLR 80 at 87:

> *'The position may, however, be different in the case of a trial such as this, which is conducted by a Judge with the aid of assessors whose opinions expressed to the Judge are merely advisory, the actual decision resting with the Judge, who is not bound by the opinions of the assessors'.*
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> The circumstances under which a judge may disagree with the opinion of the assessors were discussed by this Court in *Patel v Fiji Independent Commission Against Corruption* (unreported criminal appeal AAU40 of 2011 delivered 28 October 2011).

[4] However when the judge does not agree with the opinion of the assessors, or a majority of them, he is required to give his reasons in writing which must be then pronounced in open court (s 237(4) of the Decree). In his judgment the learned trial judge referred to the confession which in the voir dire proceedings had been found to be made voluntarily and without oppression or assaults. He also referred to witnesses whose circumstantial evidence confirmed the contents of the confession contained in the caution interview.

[5] That the learned trial judge found himself in disagreement with the opinions of the assessors was not surprising. At the conclusion of the trial, the assessors and the learned Judge had before them the confession which had been admitted into evidence following the voir dire (conducted in the absence of the assessors) and the evidence of a number of witnesses called by the State. The Appellant did not call any evidence. No matter how astutely leading questions may be asked by Counsel cross-examining prosecution witnesses, the material in the leading questions does not become evidence unless adopted or accepted by the witness. In the present case the assessors formed an opinion that the Appellant was not guilty. Certainly it is correct to say that after the learned trial judge determined the admissibility of the confession in the voir dire, the truth of the confession and the weight to be attached to it was a matter for the assessors, after taking into account *all the evidence.* However, in this case there was no evidence called by the Appellant for the assessors to consider and weigh.

[6] In his summing up to the assessors the learned trial Judge discussed to the evidence given by the two witnesses whose evidence confirmed the caution interview confession. The first witness was a neighbour who lived near the deceased's home. He heard a scream and looked across to the deceased's home. It was between 8.00 and 8.10pm and he saw a car taking off at high speed. The second witness stated that the Appellant, on the same night approached him and asked him to dispose of bloody clothes, number plates and a knife with blood on it. The witness said that he threw the knife and the number plates into the river. He burned the jacket and the cardboard number plates. He kept the pants and the canvas shoes.

[7] The learned trial Judge then referred to the evidence of the police witnesses who gave evidence concerning the arrest of the Appellant, his detention in the Police cells in Nadi and the caution interviews conducted between 3 and 7 October 2006. As I indicated earlier, the Appellant did not call any evidence at the trial although he gave evidence and called witnesses in the voir dire proceedings. Therefore the evidence before the assessors and the Judge consisted

of the admitted confession, the circumstantial evidence of the two witnesses and the police evidence. The only way either the circumstantial evidence or the police evidence could have been discredited was not by questions but by answers given in cross examination. To the extent that it is necessary to decide the point I am satisfied that on the basis of the evidence that was before the Court at the conclusion of the trial it was open to the learned trial judge to be satisfied beyond reasonable doubt that the Appellant was guilty and should be convicted.

[8] It is apparent, however, from what has been said above, that the evidence upon which the learned judge relied in order to find the Appellant guilty was the confession made in the caution interview conducted over the period 5 and 6 October 2006. It is quite clear, as Basnayake JA has concluded that the circumstantial evidence alone could not support a finding of guilt beyond reasonable doubt.

[9] The admission of the confession into evidence represented the principal ground of appeal. The question is what approach should be taken by an appellate court to an appeal that challenges a confession which the trial judge, in voir dire proceedings, has found to be made voluntarily, free, without oppression and without violence or the threat of violence. In *Singh v Reginam* [1980] 26 FLR 1 this Court said at 9:

> "It is also set out in (*Director of Public Prosecutions v Ping Lin* [1975] 3 All ER 175) as has frequently been said that an appellate Court should not disturb a Judge's findings unless it is satisfied that a completely wrong assessment of the evidence has been made, or the correct principles have not been applied".

[10] The learned trial Judge has correctly identified the legal test to be applied by him in determining whether, at the conclusion of the voir dire, the confession made during the course of the caution interview should be admitted into evidence. At page 2 he stated:

> "The Fiji Court of Appeal in *Ganga Ram and Shiu Chandra v R* 146 of 1983: 13 July 1984 outlined the two part test for the exclusion of confessions at page 8.
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> 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 of prejudice or inducement by offer of some advantage–which 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.
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> Secondly, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which police behaved, _ _ _ by trickery or by unfair treatment. (*R v Sang* [1980] AC 402 @ 436). This is a matter of overriding discretion and one cannot specifically categorise the matters which might be taken into account".

[11] The issue in this appeal is whether the learned Judge has made a wrong assessment of the evidence in his voir dire ruling. This is the issue which has been considered at length by Basnayake J in his judgment and with whose conclusion I am in agreement.

[12] The one matter upon which considerable reliance must be placed is the role of an independent witness who testified in the voir dire proceedings that he attended at the police station for twenty minutes and allegedly conversed with the Appellant to determine whether there were any complaints and how he had been treated. Further evidence adduced during the voir dire included a log book kept

at the police station which indicated that this independent witness in fact remained at the police station for one minute. It is not clear from the record to what extent and how effectively this material was dealt with by Counsel during the voir dire. However when considered with the evidence from the medical report and the detention of the Appellant over the period 3 – 8 October 2006, it is apparent that the State has not established beyond reasonable doubt that the confession was voluntary. As a result the confession should have been excluded.

[13] If the confession is excluded, then what is left is the circumstantial evidence of Subramani Naicker and Eremasi Vunivalu. I agree with Basnayake JA that the circumstantial evidence alone did not establish that the Appellant was guilty beyond reasonable doubt and without the confession there was insufficient evidence for the Learned High Court Judge to have arrived at a guilty verdict.

[14] The appeal should be allowed on the basis that the conclusion cannot be supported having regard to the evidence pursuant to s 23(1)(a) of the Court of Appeal Act. The conviction should be quashed.

[15] **Basnayake JA.** The accused appellant (accused) was indicted in the High Court at Lautoka with two others for the murder of Kamalesh Narandass Nanda (on 18 September, 2006). The trial was before a High Court Judge sitting with three Assessors.

[16] After a *voir dire*on an application made, the 2nd and 3rd accused were acquitted. The trial thereafter proceeded against the 1st accused. On 14 April, 2010 after the summing up, the Assessors unanimously found the accused not guilty. However the learned High Court Judge in the Judgment, found the accused guilty and imposed life imprisonment on the accused with a minimum of 16 years in prison. The accused appealed against the conviction and the sentence on the following grounds, namely:-

- The learned High Court Judge has erred in admitting the confession in the *voir dire*.
- Overruling the verdict of not guilty by the assessors.
- Has erred in law and in fact in holding that the case against the accused was overwhelming.
- Misdirected in holding that the evidence of items allegedly given to witness Eremasi was linked to the crime, when there was no evidence to support the same.
- The items recovered not being produced in evidence.

[17] The learned counsel for the accused submitted that the confession has been wrongly admitted. It was further submitted that the learned Judge has himself observed the injuries of the accused and brushed them aside as being exaggerated. The learned counsel submitted that there was no examination as to how the accused came by his injuries. According to the police witnesses the accused was never beaten by the police.

Reasons for conviction

[18] The learned Judge setting forth the reasons for convicting the accused said in paragraph 2 of his judgment:-

> '*You confessed to this murder in a statement under caution which I found in a voir\dire proceedings to be voluntarily and freely given without oppression. A lot of other evidence before the court confirmed what you said in that statement. For example, witness confirmed what you said about the dealing with evidence of the crime after the murder at Natabua seaside- independent witness saw your vehicle at the murder scene'.*

In paragraph 5 he said:

> *'The case against the accused is overwhelming ' (emphasis added).*

Voir dire

[19] The learned High Court Judge in his Ruling on the *voir dire* revealed three interviews the police had had with the accused. The 1st interview was held on the 3rd and 4th of October. The 2nd interview was on the 5th and 6th and the 3rd interview was on the 7th of October, 2006. The interview held on the 3rd and 4th of October were not sought to be led in evidence. At the 2nd interview the learned Judge held that the accused made a detailed confession.

The assault and injuries

[20] The accused said in evidence at the *voir dire* that two policemen entered the house (on 3 October 2006) and pulled him out. The Inspector had then punched him on the stomach to which he fell down and got his leg scratched. He was then handcuffed. Inside the vehicle his neck was choked by a policeman who said '*how does it feel to die'?* At the police station he was hit on the head with a telephone directory. He said that he was hit in the presence of his wife on the 5th October. Again on the 7th October he was hit on the head and legs. He said that on his complaint to the Magistrate regarding the assault by the police, he was taken to the hospital for examination.

[21] The police had observed scratches on the legs of the accused at the time of his arrest on 3 October, 2006. However they failed to make a note to that effect. The two policemen who took part in the arrest, namely, Corporal Peni Tuivaga (pgs 85 & 170) and DC 4695 Edward Aca (pgs 91 & 175) stated that when they went to the house of the accused's sister, the accused escaped through the back door, jumped over the fence and was caught while hiding behind the banana bushes. Then he was arrested and brought to the jeep. Another policeman (Corporal Yagavito (pgs. 95 & 177) who took part in the raid said that he stayed near the gate and the other two police constables entered and after minutes the accused was brought to the gate and was handcuffed. If the accused had escaped and the police had to give chase, it would not have been possible for the police to bring the accused to the jeep so quickly. The accused at the *voir dire* said that he was arrested while in the house. He was not questioned with regard to an attempted escape.

[22] Did the police invent the story with regard to an attempted escape to justify as to how the accused got his injuries? Corporal Tuivaga said that the accused, while being brought back from hiding, jumped again over the fence. Constable Aca Bibi said that while coming back the accused walked through the gate. Considering the evidence of the accused (at the *voir dire*) and the injuries, the accused's version with regard to how he was arrested seems more plausible. If that is so, the evidence of the police witnesses has to be rejected as untruthful.

[23] None of the prosecution witnesses witnessed an assault of the accused by the police. According to the police witnesses the accused was not assaulted and he was treated well. The accused said in evidence that he complained to the Magistrate of assault by the police and he was produced before a Medical Officer for examination. The accused was produced for a medical examination on the 8th October, 2006. The medical history as related by the accused was that the accused was assaulted by three police officers on 7 October 2006 because he gave a false statement. He states that he was beaten by a stick and kicked on the chest.

[24] The medical report reveals that the accused had bruises on the chest, tenderness felt during palpitation, tenderness on the right side of the head and swelling noted. The injuries were caused by a blunt object. These injuries are compatible with the evidence of the accused of assault by the police.

Robin Ali's certificate of the good conduct of the police

[25] The learned Judge stated in his ruling on *voir dire* (pg 23) that the evidence of the police was consistent and that nothing improper had occurred during the taking of the two statements. Having referred to the evidence of Mr Robin Ali, CEO of Nadi Town Council the learned Judge has rejected the complaints of the accused of assault by the police as being exaggerated and unacceptable.

[26] Mr Robin Ali said that the investigating officer, Timoci, on 8 October 2006 called him on the phone and requested him to talk to the accused and to inquire as to how he was treated at the police station. Mr Ali said that as requested he met the accused at the police station for 20 minutes. He said that the accused had told him that he was not assaulted and had no injuries and that he was treated well by the police.

[27] If no injuries had been caused by the police, why did the investigating officer telephone Mr Robin Ali to talk to the accused at the police station? The learned counsel for the accused submitted that according to the police entries Mr Ali was in the police station for less than a minute. Why did MrAli say that he spent 20 minutes with the accused when the police record shows that the time he spent with the accused was less than a minute? The accused was taken in to custody on 3 October 2006. He was produced before a Magistrate on 8 October 2006. During this period the accused was in the custody of the police. The accused was interviewed by the police on three occasions. First he was interviewed on the 3rd and 4th. According to the police records on the 5th October early morning the accused was released. That was for half an hour.

[28] It is abundantly clear in this case how the police have been giving evidence and making entries to show that everything was done according to law. However, when one scrutinises the notes with the evidence, it becomes abundantly clear of their irregularities. The accused had injuries when arrested. The police observed the injuries. No entry was made to that effect. Out of the three policemen who took part in the raid, two policemen state that the accused attempted to escape and arrest was made after a chase. One police witness (Constable Aca Bibi at pg 91) says that the accused's sister opened the door and said that the accused was not in the house. Within minutes the accused was arrested and brought near the gate. The accused said that he was arrested in the house and having brought him out he was assaulted and that's how he got the injuries on the legs. This is with regard to the injuries caused on the 3rd October, 2006. The accused was taken to Lautoka police station which is about a half an hour's drive. When being locked up in the station no note was entered with regard to any injuries. According to the police the accused was not assaulted by the police.

[29] The accused complained that he was kept in the police station from the 3rd of October to the 8th of October, 2006 (Evidence of the last witness for the prosecution, Sergeant 2272 Elisa Waqanidrola said he was kept until the 7th October (High Court Record Vol 1 Pg 184)). According to entries made, the accused was kept only for 48 hours at a time. The police made false entries in the books. The accused was produced before a Magistrate on the 8th of October, 2006. When he was produced before the Magistrate, the accused had complained of assault by the police and he was ordered to be examined by a doctor. A doctor had examined and a report made showing injuries caused by blunt objects. The Police state that the accused had no injuries; that they do not know how the accused came by his injuries.

The explanation by the police with regard to injuries

[30] There is one police witness who was able to give an account as to how the accused came by his injuries. That is by scratching legs with a stick about one meter in length. How could it be that the other police witnesses did not see it? However he further states that the injuries were noted on the 8th October. He did not have injuries on the 7th October (pg 188). Again the accused was not questioned about injuring himself with a stick. The accused was on a charge of murder. He was in the police custody. He was brought to the police station after arrest, handcuffed. Five policemen including an Officer took part in the arrest. Could one believe the evidence that the accused was allowed to be armed with a stick while in police custody? At the end that is how the police explained the injuries on the accused. The police could not deny the injuries as they were evident in the Medical Report.

The release of the accused by the police between the 3rd and 8th October, 2006

[31] The learned counsel for the accused submitted that the accused was never released although the records are to that effect. The prosecution admitted that this release was only to overcome a legal technicality. If the police cannot conclude the investigation within the permissible time should they not seek approval from a Magistrate. This was not done. Have the police been fair by the accused? The police had conducted three interviews on the accused by then. Two of them are said to be statements made under caution, which would be used against the accused. The police would have contemplated that at the time these cautionary statements were made, the accused may complain of assault. In that case the statements made under caution may be jeopardised.

An accused in police custody exceeding 48 hours

[32] The accused was arrested in the morning of 3 October 2006. According to a witness (retired police constable) Ishwar Chand (pg 102 of the High Court Record) on 5 October 2006, that is two days after the arrest, he received instructions to release the accused and he did so. After he was released the accused went out and relaxed. 10 to 12 minutes later he received another call with instructions to re-arrest. Then the accused was rearrested. The witness admitted that the accused was released in the middle of an interview. This is the caution interview commenced on 3 October 2006. The witness admitted that the accused was released in order to meet a legal requirement. At that time the accused was a suspect and the police were able to keep a suspect in their custody only for a period of 48 hours.

[33] Entry No 28 for the 5th of October 2006, of the entry register maintained at the Lautoka police station (High Court Record volume 2 pg 493) is with regard to an order to release and re-arrest the accused. Accordingly at 6.01 am the accused was released and rearrested at 6.37 am The order to release and re-arrest was contained in a single entry. The order to release and re arrest was made simultaneously. In that event the evidence of witness Chand that he received two messages at two different times cannot be true. The learned counsel for the accused submitted that although the entries at the police station reveal that the accused was released, it was not so. In evidence later the police admitted that the police never released this accused from custody and held him from the 3rd to 7th of October (Sgt Elisa Waqanidrola at pg 184).

Sections 76 (2) (a) & (b) of the Police and Criminal Evidence Act 1984 (PACE)

[34] The court shall not allow a confession to be given in evidence against him unless the prosecution proves beyond reasonable doubt that the confession was not obtained (a) by oppression of the person who made it (b) in consequence of anything said or done which was likely, in the circumstances existing at the time to render unreliable any confession which might be made by him in consequence thereof.

> *"If in any proceedings where the prosecution proposes to give in evidence a confession made by the accused, it is represented to court that the confession was or may have been made in consequence of oppressive treatment of the accused or in consequence of any threat or inducement, the court shall not allow the confession to be given in evidence by the prosecution except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true)-(a) was not obtained by oppressive treatment of the accused; and (b) was not made inconsequence of any threat or inducement of a sort likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof"*
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> (Clause 2 (2) of the draft Criminal Evidence Bill quoted by Lord *Hutton in R v Mushtaq* [2005] 3 All ER 885 at 893.

[35] In ***Carl Mason (1988) 86 Crim Appl R 349*** the conviction was quashed for the reason that the police practiced a deceit upon the appellant and his solicitor. Referring to the conduct of the police Watkinson LJ held:

> "that was a most reprehensible thing to do. It is not however because we regard as misbehaviour of a serious kind, conduct of that nature, that we have come to the decision soon to be made plain. This is not the place to discipline the police. That has been made clear on a number of previous occasions. We are concerned with the application of the proper law. The law is, as I have already said, that a trial judge has a discretion to be exercised of course upon right principles to reject admissible evidence in the interests of a defendant having a fair trial. The Judge in the present case appreciated that, as the quotation from his ruling shows. So the only question to be answered by this Court is whether, having regard to the way the police behaved, the judge exercised that discretion correctly. In our judgment he did not. He omitted a vital factor from his consideration, namely the deceit practised upon the appellant's solicitor (emphasis added) (pg 354)".

[36] The burden rests on the prosecution to prove beyond reasonable doubt that the statement was not obtained by oppression of the person making it. For the reasons given above I am of the view that the prosecution has failed to prove that the statements were obtained voluntarily and the learned Judge has erred in allowing the statements of the accused made on 5 October 2006 and 7 October 2006.

Evidence outside the confession

[37] Admittedly, the only other evidence outside the confession is that of Subramani Naicker (pg 164) and Eremasi Vunivalu (pg 165/6). Subramani owned a shop at Nasoso. His shop is at Sangayam road facing the road. The crime also took place at Sangayam road at about 8 pm on 18 September 2006. Subramani was with his friends drinking grog. On 18 September 2006 soon after 8pm he had seen a vehicle coming. It had been a light coloured one; off white. The number plate had been one made of cardboard.

[38] Eremasi is a resident at Natabua seaside. On 18 September 2006 at about 8 pm while he was at home, the accused had come and given a jacket, long pants and a dagger knife wrapped inside, a pair of canvas shoes and two number plates and a card board number plate. He had asked him to keep them and that he will collect them. Hurriedly they had been kept under his bed. He had come in a small Toyota Corolla car. He said that he could not tell the colour of the car. He had been with a dark Indian man. He did not identify the other person. The accused was one of his best friends.

[39] In the morning he had had a look at what was kept under the bed and had seen blood on the pants and the knife. The knife had contained flesh. He said that he was afraid. He said that he was afraid of the accused. He had washed the pants, shoes and the knife. He had kept the pants and the shoes for himself and had thrown the knife and two number plates into the river and burnt the jacket. He said that on Friday the accused told him by phone and instructed him to throw the knife and the number plates into the river and to burn the stuff. He had also said that his wife will give him money. Later he said the accused's wife met him and gave an envelope with $200.

[40] About a month later the police had met him and asked for the pants, shoes, jacket and the knife. He only had the pants and the shoes which were given to the police. He has told the police what he had done with the rest. Thereafter he had accompanied the police to the river wherein the accused was present. The number plate was found but not the knife.

None of the items recovered were produced for identification.

[41] Can one consider the above evidence as being overwhelming to convict the accused for murder? According to the above evidence Eremasi had kept for himself a pair of pants and canvas shoes and given them to the police. Eremasi said that the police found one of the number plates. Why did not the prosecution produce these items at the trial? Were they not useful? Detective Sergeant Davendra Vijay (p 187) stated that the productions are missing.

[42] According to Eremasi the accused had come with another man. Originally there were three accused in this case. Two of them were acquitted by the learned Judge for want of evidence. Now the charge is only against the accused. Could it be said that the material available is sufficient for a conviction? Could it be someone else who committed this murder? What did the police do with the items recovered? Did the police try the shoes on the accused? Did the pants fit the accused? Did the number plate match with the vehicle of the accused? Why did not the prosecution adduce evidence on these matters? There is no evidence of any vehicle owned or used by the accused. There is no evidence to prove that a vehicle belonging to or used by the accused was seen at the murder scene. A witness has seen a vehicle with a cardboard number plate. He did not give evidence identifying the registration number of the vehicle. This witness did not identify even the colour of the vehicle. Could the above evidence lead to the irresistible conclusion that it was the accused who committed this murder?

[43] I am of the view that the evidence available is insufficient to arrive at an irresistible conclusion to bring home the guilt of the accused. Hence I allow the appeal and quash the conviction. Kumararatnam JA

[44] I also agree with Basnayake JA that the appeal should be allowed and conviction quashed.

[45] Orders of Court

1. *Appeal allowed.*
2. *Conviction quashed.*

Appeal allowed.