

No. 46 of 1970.

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

B E T W E E N :

NIRMAL son of Chandar Bali Appellant

AND

THE QUEEN Respondent

AND B E T W E E N :

10 THE QUEEN Appellant

AND

NIRMAL son of Chandar Bali Respondent

CASE FOR THE RESPONDENT

RECORD

20 1. This is an appeal by special leave in forma
pauperis from the Judgment of the Fiji Court of
Appeal (T.J. Gould, V.C., and J. D. Hutchison
and C.C. Marsac, JJ.A.) dated the 7th day of
November, 1969 which quashed the Appellant's
conviction in the Fiji Supreme Court (Moti
Tikaram, AG.J., with five Assessors) on the
13th day of March, 1969 on a charge of murder
upon which the Appellant had been sentenced to
imprisonment for life. This is further a cross-
appeal by special leave from the said Judgment
of the Fiji Court of Appeal. The Appellant
appeals against that part of the said Judgment
which ordered a new trial and the Respondent
cross-appeals against that part of the said
30 Judgment which quashed the Appellant's
conviction.

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2. The appellant was charged on information that he, on the 4th day of September, 1968 at Koronubu, Ba, in the Western Division murdered Davendra Sharma son of Ram Singh Maharaj. The Appellant was tried together with two others (Jagendra Sharma and Mehesh); Jagendra Sharma, the second accused, was also convicted and sentenced to imprisonment for life. The third accused, Mahesh, was acquitted.

3. The trial took place in the Supreme Court of Fiji at the Lautoka Criminal Sessions (Moti Tikaram, Ag.J., with five Assessors) between the 3rd day of February and the 13th March, 1969. The prosecution called material evidence establishing that the body of Davendra Sharma was found at about 3.00 a.m. on the morning of the 5th September 1968 lying face downwards near the tramline at Koronubu. The Police arrived at the scene at 4.15 a.m. The found a vaivai stick lying near the head of the deceased. Dr. Mangal Singh was called and after viewing the body expressed the opinion that death had occurred between 9.30 p.m. and 11.30 p.m. on the evening of the 4th September, 1968. Dr. Holmes carried out a post mortem examination and concluded that death was due to multiple wounds of the head, face and neck; at least three of the wounds being inflicted by a sharp instrument. There was also a wound on the front of the deceased's left leg which was consistent with the deceased being struck by a blunt instrument. Jagat Singh, who was the last prosecution witness to see the deceased alive on the night of the 4th September, 1968 gave evidence that he had walked along the Koronubu tramline with the deceased until they reached the junction of the Nabatolu Road at 11.00 p.m. when they separated. The deceased then walked along the tramline towards his house.

Evidence was given by two Fijians that on the night of the murder after 10.30 p.m. a man was heard to yell out in a 'scared' manner and five to ten minutes later the Appellant and Sharma the second accused were seen approaching Sharma's house from the direction where the deceased's body was later found - a distance of 27 - 31 chains from the house.

The evidence against the Appellant was founded almost entirely upon two written statements made by the Appellant to the Police on the 11th September, 1968 at Koronubu and amounting to a full confession of guilt.

4. At the appropriate stage in the trial, objection was taken to the admissibility of the alleged confessions on the ground that they were not made voluntarily. The trial judge held a trial within a trial in the absence of the five Assessors. In the course of the trial proper, Dr. Mangal Singh had given evidence that he had examined the Appellant unclothed 'from head to toe' in the evening of the 11th September, 1968 for at least ten to fifteen minutes; he said that it was a very thorough examination and that he found no fresh injuries on the Appellant nor any signs indicative of recent violence upon him. It was not suggested to the witness in the course of cross-examination that the Appellant had made any complaints of violence being used upon him; in re-examination, the witness said that he did not remember any such complaints. In the course of the trial within a trial, three witnesses gave evidence for the Prosecution. Detective Sergeant Rameshwar Prasad, Ex. Police Constable Mahendra Singh and Inspector Muniappa Swamy.

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(a) Detective Sergeant Rameshwar Prasad said that on the 11th September, 1968 at 9.15 a.m. he, Detective Constable Jese and Detective Ex. Constable Mahendra Singh formed an interrogating team based in a tent near the compound of the deceased Davendra Sharma; the interview of the Appellant started at that time. In the course of questioning after caution, the Appellant denied that he had been near the house of the second accused Sharma at 10.30 p.m. on the night of the deceased's death. The Appellant said that he had spent the night sleeping at home. At about 10.00 a.m. Constable Jese left the tent and returned at 10.30 a.m. with two Fijians, Ifereimi Raiqisa and Rupeni Naisua; the first Fijian Ifereimi Raiqisa said in the

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<p>p.28 11. 21-22</p> <p>pp.29-34 pp.168-172</p> <p>pp.34-35</p> <p>pp.172-176</p> <p>p.35 11.37- end.</p> <p>p.36 11.11- 22</p> <p>pp. 36-37</p> <p>p.42</p> <p>p.49 11.23- 25</p> <p>p.49 11.26- 31</p> <p>p.49 11.36- 38</p> <p>p.50 11.9- 11.</p>	<p>presence of the Appellant that he had seen him running with the second accused Sharma from the back of Sharma's house at the material time and that the Appellant came up to him and asked for some tobacco. The witness asked Nirmal if it was true that he ran with Sharma, the second accused from Sharma's house and the Appellant replied 'Yes I was with Jagendra' (the second accused). The Fijians then left the tent at about 10.45 a.m. After further questioning, the witness then recorded the Appellant's narrative on a yellow wireless form marked 'F'. Having recorded the Appellant's statement on the yellow wireless form the witness left the tent and returned with some statement forms. The witness then transcribed the statement F from the wireless form onto the statement form 'G'; this was done by the witness reading the statement F line by line, the Appellant approving each line and the witness writing out each line as it was approved. The Appellant read through the statement G and then signed it. The statement F was thus identical to the statement G. The witness denied that he at any time assaulted the Appellant or held out any inducement to him to obtain either statement. Under cross-examination, the witness said that the statement F.1 commenced at 11.00 a.m. and concluded at 1.15 p.m.; the statement G commenced at 1.15 p.m. and concluded at 3.15 p.m. The witness denied that at one stage the Appellant attempted to leave the tent and that the witness pushed him back; he denied that Detective Senior Inspector Muniappa Swamy called at the tent on a number of occasions and on every occasion either punched the Appellant or abused him. He denied that Inspector Muniappa told the Appellant that if he did not confess he would be killed. He denied that Inspector Muniappa threatened the Appellant with a dagger. The witness denied that he pulled the Appellant's hair or that Mahendra Singh took hold of the Appellant's hand and</p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p>
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RECORD

<p>10</p>	<p>put it behind his back. He denied that Inspector Muniappa undid the Appellant's trousers or that the Appellant shouted and Inspector Muniappa put his hand in the Appellant's mouth. He denied that Inspector Muniappa stripped the Appellant or hit him in his back and stomach with the edge of the palm of his hand. He denied that the Appellant was asked to sign blank statement forms. In re-examination, the witness said that the statement F.1 had been altered on some sixteen occasions; on each occasion the Appellant had initialled the alteration on the statement form.</p>	<p>p.50 11.21-26</p> <p>p.50 11.27-32</p> <p>p.51 11.19-26</p> <p>p.52 11.3-5</p> <p>p.53 11. 24-28</p>
<p>20</p>	<p>(b) Ex. Police Constable Mahendra Singh said that on the 11th September, 1968 he was in one of the investigating teams led by Detective Sergeant Rameshwar Prasad with Constable Jese. The witness said that he was present at the interview of the Appellant in a tent near the deceased's house. He denied that he or anyone else at any time assaulted or threatened the Appellant. The witness denied that Muniappa Swamy inflicted violence on the Appellant or subjected him to any indignities. The witness supported the last witness in his account of the taking of the two statements. In cross-examination, the witness said that he saw the Appellant's mother in the compound after the interview had started; he saw her from the interviewing tent going down towards the river. He did not hear anyone tell her to go towards the river. The witness said that the sides of the tent were lifted up. He said that Inspector Muniappa visited the tent twice for about two or three minutes; he did not see a dagger in his hand nor a small knife. He said that Mr. Sutton visited the tent for about fifteen to twenty minutes; he could not recall whether the Appellant spoke; Mr. Sutton did not speak. He said that Inspector Muniappa called at the tent before the confession by the Appellant was made but that Inspector Muniappa was not present when the confession was made.</p>	<p>pp.53-69</p> <p>pp. 54-55</p> <p>pp.55 11. 16-19</p> <p>p.55</p> <p>pp.57-58</p> <p>p.59</p> <p>p.60 11.10-21</p> <p>p.63 11.23-30.</p>
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- pp.63-65 He supported in detail the evidence of the taking of the two statements given by the previous witness. He denied that anyone had threatened assaulted or abused the Appellant and in particular denied detailed allegations of violence against various Police officers.
- pp.66-68
- pp.69-80 (c) Detective Senior Inspector Muniappa Swamy said that on the 11th September, 1968 at Koronubu he together with other Senior Inspectors were in a floating team of Police officers visiting various interviewing teams. He denied that he at any time threatened the Appellant with a dagger or that he threatened to kill him or that he subjected him to any indignities. In cross-examination he said that he did not hear the Appellant's mother making any complaints to any Police officer nor did he see any Police officer order her away from the tent. He said that he first became aware that the Appellant had made a confession when Sergeant Rameshwar came and told Mr. Sutton; he was nearby at that time. He denied various detailed allegations that he had practised violence upon the Appellant in order to force him to make a confession.
- p.70 11.10-15
- p.74 11. 11-16.
- p.75 11. 1-11.
- pp.77-79
5. The Appellant and four witnesses on his behalf then gave evidence in the trial within a trial.
- pp.81-109 (a) The Appellant said that on the 11th September, 1968 the Police called at his house in connection with the murder of the deceased; they called at about 6.30 or 7.00 a.m. and took him to the compound of the deceased where he was made to sit under a tree. At about 9.00 a.m. they took him to a tent and Corporal Rameshwar started to interview him. He said that Constables Mahendra and Jese were present. He said that he was questioned for about an hour by Sergeant Rameshwar before the Fijians arrived. He said before the interview started Sergeant Rameshwar administered a caution which was written down in a book and signed by him (the Appellant). The Appellant said that
- pp.81-82
- pp.82-83
- p.83 11.32-33
- p.84 11. 7-12.

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10 he was questioned by Sergeant Rameshwar, that the two Fijians were brought to the tent, that one of them Ifereimi Raiqisa made certain allegations against the Appellant and that the Fijians then left. The Appellant said that he was questioned further by Sergeant Rameshwar. The Appellant said that he made no admissions of any kind. He said that five minutes after the Fijians left, Inspector Muniappa came to the tent and told him to open his mouth. He opened his mouth and Inspector Muniappa spat into it, said abusive words about his mother and brought a dagger which he had in his hand up to the Appellant's mouth saying that he would kill the Appellant if he was not going to confess. He said that Inspector Muniappa tried to open his trousers and struck him with the side of his palm in the stomach while Sergeant Rameshwar was pulling him by his hair and Mahendra Singh was twisting his arm; he said that he called out 'Save me they are assaulting me'. He said that Mahendra Singh then put his hand on the Appellant's mouth. After that Inspector Muniappa left and Sergeant Rameshwar pushed the Appellant back in his chair. Mr. Sutton came to the tent and the Appellant said that he complained to him that the Police had been assaulting him. Then Rameshwar and Mahendra started to force the Appellant to admit that he had killed the deceased. He said that Rameshwar then left the tent for about half an hour at the end of which time Rameshwar and Inspector Muniappa returned to the tent. Muniappa then started to assault the Appellant with the edge of his palm about the Appellant's stomach and neck and then all three officers stripped the Appellant. The Appellant then said that Muniappa by pressing the Appellant's testicles forced him to put cross marks at several places on a yellow sheet of paper and to sign at those places; in some of the places there was writing and in others the places were

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pp.84-86

pp.86-87

p.87 11.27-end

p.88 11.1-12

pp. 88-89.

p.89 11.12-13.

p.89 11.24-29.

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p.90 11.6-20.

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pp. 90-91
p.91 11.27-
end.

p.93 11.15-
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pp. 94-95
pp.95-96

p.99

p.101 11.4-
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p.101 11.24-
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p.101 11.1-
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blank. The Appellant said that he yelled out again, "Save me, police are assaulting me." The Appellant said that he could not bear the pain so he signed the yellow pieces of paper. He said that there were two or three sheets of white paper which were blank which he signed in various places. He said that after Muniappa left he put on his clothes. He said that he then had lunch and sat in the tent for about two hours. He said that he then sat outside the tent for about half an hour while it was being dismantled. During the two hours he sat in the tent after lunch Muniappa came into the tent on a number of occasions and slapped him and used abusive words about him. The Appellant denied that he had made any statement such as those set out in the statements F and G and denied the detailed accounts of the Police Officers as to the taking of the two statements. The Appellant said that when he saw Mr. Govind his solicitor he complained about the treatment of him by the Police and that he further complained to Billy Obed a Justice of the Peace. He said that he further complained to Inspector Tevita. In cross-examination the Appellant was shown the statement F and agreed that he had written his name in full at a number of different places in the course of the statement. He denied that various part of the statement had been written up in his presence. When shown the statement G the Appellant agreed that he had signed the statement after the cautionary words; he denied that the cautionary words were on the statement when he signed his name. He further denied that the certificate on the statement was there when he signed his name. He said that Mahendra indicated on the statement with a pencil where he should sign. He said that the signature at the foot of the statement page was made when the sheet preceding his signature was completely blank. He said that when he signed at the bottom of page 3 of the statement G that the page was completely blank. He said that both

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10	<p>statements F and G were fabricated by the Police. He said that the assault on him by Mahendra Singh consisted of eight to ten blows in the stomach and on the neck with the sides of the palm of his hands; he said that the blows were painful and continued to hurt him for some length of time, he said that they hurt him slightly in the evening, he said there were no bruises whatsoever; he said that further blows were inflicted to his stomach after he had had his clothes removed. He said that four or five hard blows were struck; he said they left reddish marks on his abdomen. He said that Inspector Muniappa hit him on his neck three or four times so hard that he could not turn his head in the evening. He said that there was no swelling on the neck but that his muscles were hurt. He said at first, that the Doctors did not examine him; he then said that the Doctors only looked at his chest. He then said that the doctor looked at his foot but there was no injury there. He said that it was not a very thorough examination. He said that the Doctor examined him by touching him here and there, that he made complaints to the Doctor but the Doctor paid no attention to them.</p>	<p>p.103 11.14-16.</p> <p>p.103 11. 22-end.</p> <p>p.104 11.1-8</p> <p>p.104 11.20-26</p> <p>p.105 11.14-end</p> <p>p.106 11.1-4</p> <p>p.108 11.1-14</p>
20	<p>(b) Inspector Tevita Nadalo said that on about the 11th September, 1968 at the Ba Police Station he saw the Appellant. He said that after he had cautioned the Appellant the Appellant said to him that he had been assaulted by the Police when making a statement; he said that the Appellant named a Police Officer but that he could not recall the name. He said that the Appellant had told him that he had been given a punch in the stomach. He said that the complaint was made close to 9.00 p.m. In cross-examination the witness agreed that the Appellant made the following written statement to him after written caution 'The statement that I have given to Inspector Prakash is my true</p>	<p>pp.109-113</p>
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RECORD

statement. The statement which Sergeant Rameshwar took from me is false - he deceived me, he threatened me and assaulted me and forced me to sign. Mahendra pressed my chin backwards while I was sitting and Rameshwar punched me on my stomach. But I received no visible injuries but my stomach was paining. I know nothing about the murder of Davendra, That is all.' The witness said that the Appellant made no complaint about Inspector Muniappa having assaulted him on his neck with the edge of his palm and that he made no complaint in relation to any officer pressing his testicles. The witness said that he started to enquire into the case as a result of the Appellant's complaint to the Justice of the Peace.

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pp.113-114

(c) Billy Obed, a Justice of the Peace, said that on the 11th September, 1968 at Ba Police Station he saw the Appellant and asked him if he had any complaint to make. The witness said that he could not distinguish between the Appellant and the other accused men but he said that one of the accused said he had no complaints. He said that two of the accused men had "almost similar" complaints to make that the Police had assaulted them, punched them, and one of them said spat in his mouth; they both said that their statement were made under pressure and that they were forced to sign.

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pp.114-117

(d) K. N. Govind said that on the 11th September 1968 he saw the Appellant at the Ba Police Station. He said that the Appellant made complaints of ill-treatment by Police officers. He said that the Appellant mentioned the name of Inspector Muniappa. He said that the Appellant had told him that the Police officers had assaulted him when they were taking statements from the Appellant. He said that the complaint was made between 8.00 and 9.00 p.m. In cross-examination he said that he was acting as solicitor to the Appellant at the time. He

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said that after the Appellant had complained he went and saw the Senior Police Officer there with the result that Inspector Tevita took down a written complaint.

- 10 (e) Shiu Devi, the mother of the Appellant, said that on the 11th September, 1968 the Police called at about 8.00 or 9.00 a.m. and took her to the river side; she said that the Police took her there and made her sit down. She said that after a long while her son yelled out from a tent about a chain away 'Somebody assaulting, save me'. She said that she heard these words at about 11.00 a.m., She said that those were the only words she heard and that she did not hear any other screams from her son, the Appellant. She said that as a result of what she heard she called out
- 20 'Why are you people assaulting my son?' She said that a Police officer moved her from where she was and took her further away from the tent. She said that when she asked the Police officer why her son was being assaulted he replied 'It is usual to assault boys like that. Don't make noise.' She said that she later related the incident to another Police officer. In cross-examination she said
- 30 that she was placed by a Police officer out of sight of any other person about 1 chain away from the tent where her son was being interviewed. She said that one side of the tent was open and that she could have looked into the tent if she had walked up a slope. She said that she did not go to the tent when her son called out because 'I thought somebody would make a noise about it and I just called out from
- 40 there'.

pp.118-122

6. After hearing addresses by Counsel for the Appellant and the Respondent as to the admissibility of the statements F and G the trial Judge then delivered his ruling. Having summarised the complaints made by the Appellant that the statements were fabricated by the Police

pp.122-125

pp.126-130

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and that the Appellant was forced to attach his signatures under threat, violence and torture, the trial Judge said that the Prosecution had satisfied him beyond any reasonable doubt that the statements in question were not fabrication. The trial Judge then considered whether the Prosecution had shown affirmatively that the statements were made without the Appellant being induced to make them by any pressure or force or by menace or violence or terror. He said that the Prosecution had satisfied him beyond any reasonable doubt that the statements were 'voluntary' and free and were not obtained from the Appellant by fear of prejudice or hope of advantage or by oppression. He did not find any cogent reasons why the statements should be rejected on the ground of any alleged unfairness. He said that the Appellant gave him the clear impression of giving fabricated evidence; he found the evidence of the Appellant's mother suspect. On the other hand, he was impressed by the evidence of the Police Officers who denied applying any threat pressure or force on the Appellant. He said that he was further satisfied that the Appellant had no injuries on his person. Accordingly, the trial Judge ruled that the statements were admissible in evidence.

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pp.131-144

7. The trial proper continued and after the conclusion of the evidence and the addresses of Counsel, the trial Judge summed up to the Assessors. On the 12th March, 1969 the five Assessors returned a verdict against the Appellant of guilty of murder, as charged. On the 13th March the trial Judge delivered judgment and sentenced the Appellant to imprisonment for life.

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pp.144-145

pp.146-156

8. The Appellant applied for leave to appeal against his conviction to the Fiji Court of Appeal (T.J. Gould, V.C. and J.D. Hutchison and C.C. Marsac, JJ.A.) sitting as a Court of Criminal Appeal. On the 7th November, 1969 the Fiji Court of Appeal quashed the Appellant's conviction and ordered a new trial.

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p.164

pp.160-164

The Judgment of the Court was delivered by Hutchison, J.A., who said that the main argument for the Appellant was that the trial Judge was

wrong in submitting evidence of oral and written statements amounting to a confession made by the Appellant to the Police on the 11th September, 1968. After summarising the effect of the trial Judge's ruling the learned Judge of Appeal said that the trial Judge fell into the error of endeavouring to assess the credibility of witnesses by their demeanour and by the way in which they gave their evidence and by that alone; he said this was wrong if it could be avoided. He said that the Court adopted a passage from the Judgment of the Court of Appeal of East Africa in Uganda and Khimchand Kalidas Shah & Ors., (1966) East African 30 at page 31 -

"Of course a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject."

The learned Judge then summarised the circumstances in which the confessions were alleged to have been made. He said that some facts appeared to give the Appellant limited support in his contentions that he had called out once while being interrogated and that he had asked for a Senior Police Officer to whom he could complain; he said that the Appellant had complained afterwards at the first opportunity and had done all that could be expected of him in the circumstances. The Court of Appeal did not think that the evidence justified the ruling that the Crown had discharged the onus lying on it of showing that the written statements made by the Appellant were voluntary ones and that on the case as presented the trial Judge should have ruled the statements inadmissible.

The Court of Appeal found that it would be impossible to say that there was no miscarriage of justice when a piece of evidence as important as the statements was admitted when, in its view, it was wrongly admitted. The Court of Appeal quashed the conviction and ordered a new trial.

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pp.165-166

9. The Appellant was given special leave to appeal in forma pauperis by the Judicial Committee on the 11th November, 1970, against that part of the Judgment of the Fiji Court of Appeal which ordered a new trial.

pp.167-168

10. The Respondent was given special leave to cross-appeal by the Judicial Committee on the 25th May, 1971, against that part of the said Judgment which quashed the Appellant's conviction.

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11. The Respondent respectfully submits that this appeal should be dismissed and the cross-appeal herein should be allowed and the Appellant's conviction restored. It is submitted that the Court of Appeal erred in holding that the trial Judge had wrongly assessed the credibility of the witnesses by their demeanour and the way they gave their evidence and by that alone. It is respectfully submitted that the trial Judge properly weighed all the evidence and decided what to accept and what to reject at the conclusion of the evidence which point was reached for this purpose at the conclusion of the trial within a trial. It is submitted that the trial Judge correctly stated the relevant law in his ruling and properly applied the same in reaching his conclusion that the two statements F and G were admissible in evidence.

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12. It is further submitted that, while the trial Judge did not deal specifically with the contentions that the Appellant had called out once while being interrogated, that he had asked for a senior officer to whom he could complain and that he had complained afterwards at the earliest opportunity, there were ample grounds to justify his conclusion that the Respondent had discharged the onus upon it of proving that the statements were made voluntarily. It is submitted that the reasons given by the trial Judge for admitting the two statements are correct and that the Court of Appeal erred in holding the statements inadmissible.

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13. If, contrary to the foregoing submissions, the two statements should not have been admitted

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in evidence, it is submitted that the Court of Appeal correctly exercised its discretion under section 23 (2) of the Court of Appeal Ordinance (Cap. 8, Laws of Fiji, 1967) to order a new trial.

14. The Respondent therefore respectfully submits that this appeal should be dismissed and this cross-appeal allowed and the Appellant's conviction and sentence restored for the following among other

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R E A S O N S

1. BECAUSE the two statements made by the Appellant were correctly admitted in evidence at the trial.
2. BECAUSE in the alternative, the Court of Appeal correctly exercised its discretion to order a new trial.

MERVYN HEALD

STUART N. McKINNON

No. 46 of 1970

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FIJI COURT OF APPEAL

B E T W E E N:

NIRMAL son of Chandar Bali Appellant
and
THE QUEEN Respondent

AND B E T W E E N :

THE QUEEN Appellant

and

NIRMAL son of Chandar Bali Respondent

CASE FOR THE RESPONDENT

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Hale Court,
Lincoln's Inn,
W.C.2.