IN THE SEYCHELLES COURT OF APPEAL

[Coram: Domah J.A, Fernando J.A, Msoffe J.A]

Criminal Appeal SCA 14/2012

Appeal against Supreme Court decision CR 50/2011

Francis Azemia **APPELLANT**

VS

The Republic **RESPONDENT**

Heard: 02nd December 2014

Counsel: Mr. N. Gabriel for the Appellant

Mr. H. Kumar, Assistant Principal State Counsel, for the Respondent

Delivered: 12th December 2014

JUDGMENT

A. F. T. FERNANDO JA

1. The Appellant appeals against his conviction for the offence of murder by the Supreme Court.
2. This was the brutal killing of a 51 year old woman who was on her way to work at around 2.25 am on the morning of the 21st of October 2011. This was a homicide which created a huge uproar and social revulsion among the community, resonating in a resounding call by the community for the perpetrator of the crime to be brought to justice and dealt with appropriately. It is this type of case, especially in a small jurisdiction like ours, which puts the Judiciary under severe social pressure and puts it to its utmost test in having to maintain its impartiality, independence and its commitment to uphold the principles of the rule of law and due process, and to always act in accordance with the law.
3. As per the facts of the case, as narrated by PW Eddie Vel, a security officer at Expol Company, had heard a woman screaming and also seen a man kicking a woman who was lying on the ground, with force, near the Amusement Centre from the light, shed by electric poles, around 02.15 AM

on the day of the incident, namely the 21st of October 2011. He had called the police and informed them of what he was witnessing. After kicking her, the man had taken hold of the woman from under her arm and dragged her onto the other side. The man had thereafter got on top of her and made some movements as if he was having sexual intercourse with her. Having acted in that manner for about two minutes the man had kicked the lady again two or three times and gone towards the Amusement Centre hurriedly. According to Vel when the person who attacked the deceased left the scene "He had all his clothes on". PW Vel had then gone up to the woman and seen that she was making some bodily movements suggestive that she was in the process of dying. Since he could not see any other person around he had gone in the direction of the Amusement Center and queried from the security officer there, whether he had seen anybody going past the Centre. He had then been informed that a 'bald headed' man had run towards the 'Nation' car park. Thereafter the police had arrived. His explanation as to why he had not gone to the rescue of the woman during the assault was because he had no weapon to defend himself in the event the man turned against him and fear that he will be implicated in the incident in the event the man who attacked the deceased had run away by the time the police arrived. He had categorically stated that he did not see the face of the person and therefore unable to identify him. He had however described the person who was kicking the woman as someone not that tall about 170 cm in height, not big or fat and having a dark complexion with a short hair cut**.** The man had been wearing dark clothes, a pair of trousers, which he thought was blue in colour. Witness had not seen whether the man who attacked the lady was wearing any shoes. From the force with which the person had kicked the lady, witness had assumed that the person was young, strong and very energetic.

4. PW Samuel Julie, a security guard at the Amusement Centre had stated he was in the company of Juliana and Nelly when he saw the deceased going towards the pier at around 2 AM on the day of the incident, and seeing her pass by around this time for him was a usual sight. But on that day she was being followed by a man. About five to ten minutes thereafter he had seen the same man come running back and going in the direction of the 'Nation' car park. His description of the man was almost identical to that of PW Eddie Vel, save for the fact that he had not in his testimony given a description of the man's hair nor being questioned about describing the man to PW Vel as a 'bald headed' person. He too had said that he was unable to identify the person. He had not been able to give a description of the colour of the clothes the man was wearing or been in a position to say whether he was wearing shoes. The evidence of Juliana and Nelly had been similar to that of PW Samuel Julie and the important fact been both of them had also said that they were unable to identify the person.

5. The CCTV cameras located at the scene had captured images of a woman walking towards the fishing pier and a man following behind her around 2.15 AM. About 10 minutes thereafter a man had been captured by the camera running in the direction of Victoria and going into the car park towards the Marine Charter. From his clothing, P.W. Gareth, a Security

Consultant and the person in charge of CCTV cameras had concluded that it was the same man that had been following the lady. Gareth had said that from the CCTV video footage he cannot make an identification of that person. Gareth's answers to questions posed by Counsel for the Defence and to Court, on four separate occasions, as regards whether the person who was running was wearing shoes is noteworthy and we quote: "I will say no shoes", "….but looking at it again I can say that he had no shoes on", "Looking from here no, no shoes, The foot colour is the same as the hand and head so I would say no shoes", and "It could be bare foot or slippers but it is not shoes, definitely no shoes, there is no heel.' These answers had been given by looking at the video footage that was played in Court. Counsel for the Respondent invited us to view the video footage in regard to this matter during the hearing of the appeal, but we declined to accede to the request as we are of the view, that our observations could not be any better to that of Gareth who is the Security Consultant and the person in charge of CCTV cameras. According to Gareth the CCTV cameras did not cover the area where the incident occurred.

6. PW Roger Furneau and Hugh Pierre, employees of IOT had seen the deceased who was known to them walking towards IOT followed by a man when they passed by her in a vehicle. The man on seeing the approaching vehicle had covered his face with the front of his shirt by pulling the front of his collar over his face. According to Furneau he had switched on the head lights when he was passing the man. Both Furneau and Pierre had not been able to identify the person who was following the deceased.

7. ASP Justin Dogley had arrested the Appellant while he was sleeping at a bus shelter at Plaisance at 5.10 AM, i.e less than three hours after the attack on the deceased. At the time of his arrest the Appellant had been wearing a brown pair of trousers that was wet and had no shirt on him. There had been a red stain at the bottom of his trousers. He had been wearing a white pair of shoes. Dogley does not state there were any stains which looked like blood on his shoes. The Appellant had scratch marks on his body and left fingers and his hands had been dirty. The Appellant has identified himself as Francis Azemia, a soldier based at Coast Guard and residing at Gaza Estate. PW Constable Clive Noris Stephen who was involved in the arrest of the Appellant had given a slightly different version as to the colour of the Appellant's trousers, namely that it was of a grayish black and also that the Appellant had blood on both his arms and some injuries on his fingers. He too does not speak of having seen any stains on the Appellant's shoes.

8. Dr. Commetant, who examined the Appellant at 10.24 AM on the morning of the incident had found small scratch marks of 0.5 cm on his left hand, the 3rd, 4th and 5th fingers of the left hand, 0.5 cm abrasions on the left upper arm and in the area above the clavical, 1 cm abrasions on the left elbow, lateral malleolus and ankle and 0.5 cm abrasion in the area above the umbilicus. It had been the evidence of Dr. Commetant that the pathologist Dr. Betsy Chavez had taken a swab from the penis of the Appellant. Dr. Commetant had not mentioned of having seen any injuries on the feet and toes of the Appellant. It is appalling that the Prosecutor

has failed to question the doctor as to how the injuries on the Appellant could probably have been caused, especially in view of the fact that all the injuries found on the Appellant had been on the left side of his body. Had Dr. Commetant been questioned in this regard the Jury could have had a better understanding of the Unsworn Statement made by the Appellant that he had got into a fight with four other men in the early hours of that morning at Mont Fleuri and as to how the injuries on the deceased had been caused. At the very outset a doubt arises in our minds that if the Appellant had been kicking the victim with such force as described by PW Eddie Vel and if he had been without shoes as described by the prosecution witnesses who saw him running away from the scene soon after the incident why there were no injuries on the feet and toes of the Appellant, save for the abrasions on his lateral malleolus and ankle.

9. Dr. Juan Carlos Rodriguez who assisted Dr. Betsy Chavez in the post mortem examination of the deceased, had testified in Court and produced the post-mortem report signed by her, as Dr. Chavez was out of the country and on leave. According to the medical evidence there were several external and internal injuries on the body of the deceased. The more serious injuries were on the head, neck, face and chest. The severe injuries to the neck and nasal bone and the fracture of the hyoid bone and the bleeding which resulted from them would have in the opinion of the doctor blocked her respiration and brought about her death. The head injuries had resulted in subarachnoid hemorrhage. Dr. Mohamed who examined the body of the deceased when it was brought to the hospital, had noted in his report that was produced by the prosecution, that “The head was smashed”. In his testimony before the Court it had been his evidence: “When the police brought the body, the face was smashed, the features was not clear, the eye feature was obliterated like cracking upside down. We couldn’t see the left eyeball in examination at all. A lot of blood was covered in the face, hair and the head, it was all disturbed.” (verbatim) The fracture of the 2nd and 3rd ribs would have caused subcutaneous hemorrhage resulting in respiratory failure. According to the post-mortem examination report that was marked as exhibit P1 the cause of death has been described as “Polytrauma (Head, neck and chest injuries) by “blunt force”. The Post Mortem Report reveals “2 superficial lacerations in the rectum 10cm from the distal margin (anus) measuring 1.5 cm,” and “Vaginal wall 2 bruises in the lateral wall, for 1cm approximately. Cervix bruise 0.8 cm in diameter.” In answer to a question from the Jury as to whether there were any signs that the victim had been sexually assaulted, his answer had been “I did the body analysis but it was negative.” In the opinion of the doctor the deceased had been subjected to a severe attack and that it was possible that more than one person had attacked the deceased. It is appalling in our view that the prosecutor had not questioned the doctor as to what possibly had caused the severe injuries on the deceased. We fail to understand how the Learned Trial Judge could not have realized the importance of such evidence, especially in view of the fact that the testimony of the only eye witness to the assault had been to the effect that the deceased was kicked by the person who attacked her. As a result we are in doubt as to whether the severe injuries on the body of the deceased could have been caused by kicks and further

if that had been the case would not the Appellant have some injuries on his feet and toes, if he was the one who attacked the deceased especially in view of the evidence that he had no shoes on him when he was fleeing from the scene of crime.

10. Exhibit P 7 prepared by S. I. Quatre shows that blood, hair samples and vaginal swabs had been taken from the deceased. It also shows swabs from red substances found on the body of the Appellant and urethral swabs from his penis had been taken. Further fibre and hair samples had been lifted from the trousers the Appellant had been wearing. The Learned Trial Judge in his Summing Up to the Jury had rehearsed at length, going to almost two A4 pages,(pages 26 to 28 of the Summing Up) the evidence of Sub Inspector Aubrey Quatre of the Scientific Support and Crime Research Bureau who testified on behalf of the Prosecution on DNA evidence. The Learned Trial Judge in his Summing-up had stated that Sub Inspector Quatre had taken swabs of a red substance which appeared like blood from the belly, chest and finger nail of the Appellant. He had gone on to state that S.I Quatre had received from Dr. Betsy Chavez 3 swabs taken from the penis of the Appellant and 3 vaginal swabs taken from the deceased and that S.I. Quatre had lifted fibre and hair samples from the trouser of the Appellant. The Trial Judge in his summing up had then stated referring to the evidence S.I. Quatre: “He stated he had personally handed over all the exhibits to Dr. Mohapatra when he was in the Seychelles and had together with the request letter and Dr. Mohapatra had taken the exhibits to India for analysis”(verbatim).

11. The Report of Dr. Mohaptra had been marked as item 2 but had not been produced as an exhibit and shown to the Jury in view of the objection taken by Counsel for the Appellant at the trial. Having gone at length in his summing up on the blood and penile swabs taken from the Appellant and the blood samples and vaginal swabs taken from the deceased the Learned Trial Judge had then attempted to summarily dismiss that evidence by saying: “It is to be borne in mind although the prosecution led evidence that certain items and swabs had been taken for DNA analysis and a DNA report was marked as an item, on the instructions of court it was not shown to you the members of the Jury and no evidence was led on the contents of the report. It is my duty to warn you ladies and gentlemen of the Jury that the prosecution in this case has not sought to establish any DNA evidence against the accused **as the DNA analyst failed to appear and give evidence in this case**. Therefore you must disregard the fact that there is evidence relating to DNA analysis against the accused as mentioned by learned prosecution counsel in his opening address in coming to your conclusion in this case. Further though there was evidence that blood like substances was found on the accused there is no expert evidence to prove it was blood or to identify its DNA”(emphasis added by us). This warning in our view was of no use as the Learned Trial Judge had permitted the prosecutor to lead the evidence of S.I. Quatre without verifying whether Dr. Mohapatra would be able to testify in this case and the huge prejudice that would have been caused to the Appellant as a result of it. Furthermore we simply cannot understand why the Learned Trial Judge had gone at length to refer to the evidence of S.I.

Quatre in regard to DNA in his Summing-Up, because he knew by that time that any reference to such evidence would only cause grave prejudice to the Appellant. All that he should have done is to warn the Jury that whatever evidence pertaining to DNA given by S.I. Quatre should be wholly and completely disregarded. This in our view was a fatal error on the part of the learned Trial Judge in his Summimg-up.

12. We find from the record that on the 27th of June 2012 the Prosecuting Counsel has moved for an adjournment of the case for the 6th of July to call Dr. Mohaptra as a witness on the basis that his evidence is crucial to the Republic and not granting an adjournment will prejudice the prosecution case. The application for an adjournment had been resisted by the Counsel for the accused. The Learned Trial Judge had ruled granting the adjournment. On the 6th of July the Prosecuting Counsel had informed Court that his witness was not available. It has been his submission that since the witness can make himself available only in another two weeks time he had decided to forego his evidence and continue with the trial without calling Dr. Mohaptra. We are in a difficulty to understand why the Prosecuting Counsel failed to seek a further adjournment by another two weeks, having already lead evidence of the taking of samples for DNA profiling and because it had been the position of the Prosecution all throughout that the DNA evidence supported the case for the prosecution. The Prosecutor in his opening remarks had stated: "The DNA analysis done by the Analyst at the request of the Police on the DNA profile generated from the source of the exhibits which were taken from the scene, and also which were taken from victim Jeannette Nourrice and also which were taken from the accused Francis Azemia clearly supports the Prosecution case." The evidence of S.I. Quatre mostly on DNA evidence has been recorded from pages 265 to 372 going to over 100 A4 pages, only to be dismissed at the end by the Learned Trial Judge by asking the Jury to disregard such evidence.

13. It is to be noted that according to the evidence of PW Eddie Vel the man who mercilessly kicked the deceased had at a certain stage got on top of her and made some movements as if he was having sexual intercourse with her. According to the police evidence when they arrived at the scene the deceased clothing had been pulled up to her waist and she was without any underwear. Photographs 14, 15 and 21 taken at the scene of crime and produced as exhibits confirm this. The post mortem examination that had been produced reveals that that there was bruising in the vaginal wall and cervix and superficial lacerations in the rectum. Further the evidence revealed that vaginal swabs from the deceased and penile swabs from the Appellant had been taken and sent for DNA analysis and the DNA Profiling Report had been marked as an item at the trial. In view of this evidence it would have been humanly impossible and amount to mental gymnastics for any Jury to disassociate from their minds the possible connection between that evidence and the DNA evidence as referred to in the opening remarks of the prosecutor, namely that the DNA analysis done by the Analyst on the DNA profile generated from the deceased and what was taken from the Appellant clearly supports the Prosecution case. Further the reason given by the Learned trial Judge to

disregard the DNA evidence in his Summing Up is only because the “DNA analyst failed to appear and give evidence in this case”. It is unlikely that a Jury would disregard a very important item of evidence on which the Prosecutor and Judge had laid so much stress upon until the final stages of the Summing Up, merely because of a technical reason as to admissibility of such evidence.

14. Thus we find that there is no identification of the Appellant, from witness testimony, as the one seen at the scene of crime or the one seen running away from the scene of crime nor is there any DNA evidence placed before court to link the Appellant to the crime.

15. The only evidence in this case is a confession that is claimed by the police to have been voluntarily made by the Appellant and the fact that at the time of his arrest at around 5.10 AM, at a bus shelter at Plaisance, the Appellant had injuries resembling scratch marks. The Appellant had both repudiated and retracted the confession.

16. The confession made by the Appellant had been admitted as evidence after a voire dire. S.I. David Belle testifying at the voire dire had said that he had cautioned the Appellant, namely by informing the Appellant of the offence for which he was being arrested, that he was not obliged to say anything unless he wants to, and that if he were to say anything it could be used as evidence and explained to him his constitutional rights, namely the reason for his arrest, his right to be represented by a lawyer and right to remain silent, at 13.00 hours. He had started recording the statement at 13.01 hours, which ended at 13.32. The fact that the recording of the confessional statement had started within one minute of the caution in our view indicates that the caution is more of a babble which was not meant to be understood by the Appellant and acted upon. We are of the view that an accused person should be given sufficient time to reflect upon the caution before recording his confession. We cannot ignore the fact that the Appellant had been arrested at around 5.10 AM and had been at the Central Police Station since 6.05 AM according to the evidence of S.I. David Belle. Thus he had been at the police station for a period of 7 hours before his confessional statement came to be recorded. The Appellant in his testimony at the voire dire had said: “When I was there it was early in the morning and when I regained consciousness there was a state officer there with me. Then there was a male C.I.D officer, and there was no other person there and he insulted me cunt of your mother you have killed a lady there at the jetty” (verbatim). The Prosecution has failed to contradict this evidence in view of the fact that there is no evidence as regards, in whose custody the Appellant was placed or where he was kept from 6.05 AM up to the time he was cautioned at 13.00 hours. There is no evidence as to whether the Appellant had been given anything to drink or eat from the time of his arrest up to the time he was cautioned and his statement recorded. The Appellant had stated that he “had lunch after the statement.” It had been the defence position in cross examination of S.I. David Belle that the police had deliberately delayed in taking the statement from the Appellant “knowing full well that he will sap, he will crack and he will talk…..” We have perused the Ruling of the Learned Trial

Judge on the voire dire and are surprised to find that the Learned Trial Judge had failed to advert to any of the fundamental matters referred to above in his Ruling which necessarily in our view should have been addressed in making a determination as to the voluntariness of the confession. His failure to do so makes the confession inadmissible.

17. However we have decided to make reference to the confession of the Appellant and his unsworn dock statement. The two statements are referred to below.

TRANSLATED STATEMENT UNDER CAUTION OF FRANCIS VINCENT AZEMIA OF GAZZA ESTATE

I wish to say that yesterday Thursday the 20th October, 2011 around 19.15hrs I left home and went to wait for the bus at the Aux Cap bus stop, to travel to barrel discotheque to relax a bit. I arrived in town around 20.00hrs – 21.00hrs but don't know the exact time. In town I went to barrel bar, I bought a pint of guiness and drank it. Afterward when the discotheque opened, I bought a ticket SR50 and went inside. I did not consume any alcohol again once inside. During the time that I was there inside the discotheque, I saw a man from Pte Aux Sel whose name is Steve Cole. I asked him for a lift to go home after the disco, but he told me that his wife is with him. I don't recall but it was after midnight. Today Friday the 21st October 2011 I left Barrel. I went down by passing in front of the Central Police Station then went to Amusement Centre just to have a look over there. Upon arriving there amusement Centre was closed. There was nobody there also. I saw a woman going in the junction towards I.O.T. I followed the woman to tease her. Arriving in the bend behind the woman, she told me why I am following her. I did not answer her. She swore at me and I became angry. I grabbed her but don't know where, we struggled together and she fell down. There I kicked her several times in her face. (When I was kicking the woman she did not tell me - in handwriting) While kicking the woman my shoes were in my feet. Afterward I stopped kicking the woman. I left by a foot via the Bois-de Rose road. I was going to sleep at the Coast guard base but then I decided not to go under the bus stop at Plaisance to sleep then to catch the early bus to go home. Shortly after I have arrived there under the bus stop, the police came in a transport and arrested me. During that time I was without my shirt but in my trouser and a white trainer. I was brought at Central Police Station where I was detained. I wish to say that the woman I kicked, I don't know her. The Police have told me that in the early morning I have beaten a woman and she is dead. I wish to say that it was not my intension to beat her to death, but it was my anger.

Sgt Francis Vincent Azemia" (verbatim from the Court of Appeal Brief – produced as exhibit P37a).

Dock Statement of Appellant

"My name is Francis Azemia, I was arrested concerning a murder case. Before I was arrested I went to barrel. It is true that I had some drinks at the barrel, I enjoyed myself and then I went out. I went towards Mont Fleuri to hitch a ride and when I reached Mont Fleuri I got into a fight with 4 other men. That is when I ran to Plaisance and when I arrived at the bus stop I fell asleep there. When I was arrested by the police I was not conscious. It was just on the next day early

in the morning when I woke up I was in the CID office. They told me that I have killed a woman at the pier. I saw SI Belle explained to me that he had received information concerning the case and at the same time when he was talking to me he was writing. What I recalled is that when he finished writing down the statement he asked me to sigh it but I did not sign. And then in the afternoon we went to court and he forced me to sign the statement in court. Then I signed the statement and I was remanded for 14 days at the Beau Vallon police station. I do not recall anything about going to the pier. I have never been to the long pier. Then we came down to court again for my remand. I was remanded at the Beau Vallon and then I came down to court to be remanded. And now the case is going on just the way you can see. That is all."

18. There is a difficulty in understanding the confessional statement in this case. The evidence in this case does not fit in with the confession. If the confessional statement is to be acted upon this is an incident that had sparked off merely as a result of the Appellant getting angry when the deceased swore at him for following her, indicating an unplanned attack. The brutality with which the killing had taken place, the injuries on the genetalia of the deceased and more so that the person who had been following the deceased had covered his face with his shirt when PW Roger Furneau flashed the lights of the van on him coupled with the version of the bald headed man who ran away past the Amusement Centre soon after the alleged assault on the woman, as told to Eddie Vel by Samuel Julie is indicative of an attack by a person who had already decided to attack the deceased at the time Furneau and Pierre saw him. It is difficult to comprehend that a person who takes precautions to hide his face from ongoing traffic before the attack, and having run away from the scene of crime after the attack, would decide to sleep at a bus halt on the main road, not too far away from the scene of attack.

19. The Learned Trial Judge having correctly directed the Jury: "If you are satisfied the confessionary statement has been given voluntarily, you may accept it subject to the material facts being corroborated by some independent evidence" has gone on to point out the evidence which he believed to be corroborative of the confession. The Learned Trial Judge had said: "It is to be observed the confessionary statement contains certain facts like the accused going to the barrel discotheque, drinking and meeting his friend Steve Cole and asking for a lift home which facts would only have been known by or facts within the personal knowledge of the accused who himself admits in his unsworn statement, he went to the Barrel discotheque and had drinks" and again: "When one considers the sequence of events as set out in the confessionary statement, the material facts that the accused states he went near the Amusement Centre, the fact that he states he followed the victim, the general time period mentioned in his statement that Amusement Centre was closed, the fact that he attacked the woman and when she fell he had thereafter began to kick her and the fact that after the incident he had gone away on foot are all facts and events which have been witnessed by several independent witnesses namely Eddie Vel, Samuel Julie, Nellie Ernesta, Juliana Padayachy, Roger Furneau and Hugh Pierre who all gave evidence in my view corroborating this sequence of events, the time and place mentioned

by the accused in his confessionary statement." In our view material facts would be those connecting the Appellant directly to the crime like DNA or fingerprint evidence and evidence of facts of what took place before, at the time and soon after the incident at or near the scene of crime. "The accused going to the barrel discotheque, drinking and meeting his friend Steve Cole and asking for a lift home" in our view are not material facts. We are also of the view that there cannot be 'independent' corroboration of a confession by an unsworn exculpatory statement from the dock, for it is not independent but flows from the same source. Further to do so would amount to an indirect breach of article 19(2)(g) of the Constitution which states: "Every person who is charged with an offence shall not be compelled to testify at the trial or confess guilt." To make use of an exculpatory statement to corroborate a confession amounts to extracting by insidious means a confession. In **DPP V Hester(1972) 3 AER** Lord Morris said; "The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it is completely credible." In this case the confession is retracted and repudiated. Evidence of witnesses Eddie Vel, Samuel Julie, Nellie Ernesta, Juliana Padayachy, Roger Furneau and Hugh Pierre no doubt gives the sequence of events that unraveled at the scene of crime but their failure to identify the Appellant outweighs the probative value of their evidence from the prejudice that it causes. We are of the view that the Learned Trial Judge made a fatal error in his summing up when he said: "Further all gave descriptions of the person they saw committing these acts which you may observe fits the description of the accused", for there was no significant physical feature that emerges from their evidence that fits the description of the Appellant. The description of the Appellant as given by the witnesses would fit the description of many other persons of the Appellant's age and physique. We are of the view that this type of statement which is wholly unsubstantiated is dangerous and its effect cannot be erased by the Judge asking the Jury to disregard his views on the facts.

20. We also find that the Learned Trial Judge was in error when he said in regard to the voluntariness of the confessionary statement: "One ground urged by learned counsel for the accused in his cross examination of SI Belle was that the constitutional rights and caution were not explained to the accused at the time his statement was recorded. But in his unsworn statement the accused does not complain that his constitutional rights or the caution was not administered to him. He does not complain that he was subject to any threat, inducement or promise at the police station while the statement was being recorded or that as SI Belle knew the family of the accused he had induced him into giving a statement though such suggestions were made by his learned counsel to SI Belle and Corporal Payet." It is to be noted that the Appellant made his unsworn statement after the learned Trial Judge had made his Ruling on the voire dire admitting the confession as having been made voluntarily and after a defence had been called for at the close of the prosecution case. The Appellant had certainly complained of his constitutional rights and the

caution not been administered to him at the voire dire. To complain again of the matter at the trial before the Supreme Court would have amounted to a challenge of the Learned Trial Judge's Ruling on the voire dire admitting the confession. The challenge to the Ruling on the voire dire is available on appeal.

21. We have stated at the outset, that it is this the type of case, especially in a small jurisdiction like ours where every citizen is alive to what goes on around him, which puts the Judiciary under severe social pressure and puts it to its utmost test in maintaining its impartiality and independence and its commitment to always act in accordance with the rule of law. When there is a conviction by a Judge sitting with a Jury, the task of the Court of Appeal becomes more difficult since the ordinary citizens may not understand the technicalities of the legal process. We are as concerned as anyone else with the brutality of this crime and the need to deal with the perpetrators of such crimes, but are unable and unwilling to sacrifice the sacrosanct principles of this court, when the Prosecution has failed miserably in its duty to conduct a proper trial and the learned Trial Judge had gravely erred in his Summing-up to Jury. We simply cannot understand why the Prosecutor who conducted the trial failed to question the doctor who testified as to the Post mortem examination, as to how the injuries on the deceased could have been caused and how the scratch marks found on the Appellant were likely to have been caused. We cannot understand why the Prosecution failed to make a further application for an adjournment to produce the DNA evidence in order to corroborate the prosecution case. We fail to understand why the Learned trial Judge dealt at length with an item of evidence in his Summing-up, namely the DNA evidence, when he knew that such evidence cannot be made use of against the Appellant.

22. We need to say that the present outcome of this case is not delivered with a *gaiete de Coeur* at our level. However as impartial and independent judges sitting at the Court of Appeal, the highest court of the land, we owe it to ourselves that we own and operate a justice system in our democratic society that works properly with each and every component of the system, discharging its duties and responsibilities properly and professionally. If that is not so, the risk is not only for a defendant who may be imprisoned for life but is also for the nation that is imprisoned for life, through a flawed system that will not uphold the principles of due process and the rule of law, in their courts of law.

23. Our people desire, and deserve a justice system that is flawless at all critical levels and stages: whether it be at the investigation stage, at the stage of arrest and detention, at the prosecution stage, at the trial stage, at the verdict stage, at the appellate stage or any other relevant stage for that matter. They do not want lapses. Lapses that do not go to the root of the system may be excused and ironed out but lapses that go to the root cannot be condoned. The price to pay is too high.

24. Our constitutional and professional responsibility as impartial and independent Judges require that we satisfy this aspiration of the people not only for a fair justice system but for a fair justice system that operates

fairly throughout. One criminal who has escaped the system is one criminal too many. One wrong person convicted is one too many. We owe it to our people, to ourselves and to every single individual: that every single case that comes to us should pass the test of utmost credibility and integrity according to the established principles of law.

25. We uphold the sanctity of the Rule of Law in our courts. When cases such as this end up this way, it is a time for learning from the mistakes, carrying out the necessary audit, filling the gaps and addressing the weaknesses of the prosecution and the conduct of the case. We cannot condone the brutality of this crime, however at the same time we cannot hold the facts of this case against the need to ensure that due process has been carried out and that the case has been conducted properly in our courts.

26. In the circumstances we are left with no option but to quash the conviction and the sentence of the Appellant. However in view of the circumstances of this case and in exercise of our powers under rule 31(5) of The Seychelles Court of Appeal Rules we order that the Appellant be kept in custody and produced before the Supreme Court at the conclusion of 15 days leaving it to the discretion of the Attorney General to take action which he deems appropriate under article 76(4)(a) of the Constitution.

A.F.T. FERNANDO

JUSTICE OF APPEAL

I concur:

S. Domah

JUSTICE OF APPEAL

I concur:

J. Msoffe

JUSTICE OF APPEAL

Signed, dated and delivered at Palais De Justice, Ile du Port on this 12th day of December 2014.