IN THE COURT OF APPEAL

AT MOMBASA

(Coram:Kneller, Hancox JJ & Nyarangi Ag JA)

CRIMINAL APPEAL NO. 86 OF 1983

BETWEEN

1. ANUPCHAND MEGHJI RUPA

2. VIJAY KUMAR MEGHJI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

Anupchand Meghji Rupa Shah (Anupchand) and Vijay Kumar Meghji (Vijay), the appellants, were convicted on July 5, 1983 of jointly murdering Kaushik Govinji (Kaushik) and his wife Ranjan Govindji (Ranjan) during the night of May 3, 1982 at Shanzu and sentenced to death (presumably for the first offence) by Mr Justice Bhandari. Kaushik had been married to Ranjan for 2 years and they were in their early thirties. Anupchand was 28 and Vijay 31 and the sons of Rupa Shah who has a grinding mill for wheat and spices down by the railway station. Anupchand and Vijay ran a family retail shop under the family's business name of 'Tanga Trading Company' which from 1963 until about 1976 had most of the local and tourist trade in whole and ground spices.

Kaushik spent 7 years in England studying accountancy and business management and when he returned to Mombasa in 1976 he opened a shop next door to these Shahs in their "Tanga Trading Company" one in a street on the south side of the Mackinnon vegetable market. He gave it his nickname 'Kaykay' and from there he and his brothers, Maganlal and Hansmukchandra, traded in spices so successfully that in early 1976 they had taken 25% of the Tanga Trading Company's customers from them and 75% by the end of 1977. Anupchand and Vijay packaged and labeled their ground spices for the tourists, advertised them in Europe, put up signs in German and French outside their shop, stocked it with local tea and coffee, batiks and jewellery, and Kaykay did the same. Kaushik also undercut Anupchand and Vijay's prices. He employed touts (rather oddly called beach boys) who lured and shepherded flocks of tourists gawping at the market and the Jain temple past Anupchand and Vijay's spices to those of Kaushik.

Anupchand and Vijay sent for the police about 5 times in as many years, complained to the Mombasa

Chamber of Commerce, and to the Registrar of Business Names and prodded Mr Parker, their advocate, into sending 'Kaykay' a warning letter about their unfair competitive tactics. They asked Arvind of the Curry Shop to intervene and persuade "Kaykay' to drop the touts but none of this deflected Kaushik from his ways. Anupchand told Ramnik Premchand Shah at the United Sports Club in the second part of June 1981 that all the tourists now by-passed his shop for "Kaykay' and a solution must be found to arrest Tanga Trading Company's declining fortunes but he was advised to sell better quality goods and not to be rude to his customers. It was, in all, an intolerable situation for Anupchand and Vijay.

Anupchand hired a Colt Lancer 1200 cc white saloon KJW 777 from Regique & Co Ltd in Moi Avenue, Mombasa for some people arriving from Nairobi at 4 pm on April 30. He asked for a fast car, a 2000 cc one, but Rafique did not have one.

They had not hired a car from this company before. They had four of their own: a Peugeot 504 automatic KTS 168, Toyota de Luxe KJL 745, a mini Austin KJN 800 and a Datsun SSS KJK 391. The last was not in working order and the others were. The Mini could not be termed a fast car but the other two, the Peugeot and the Toyota, should have been able to pace along briskly enough on the local roads. All four vehicles would be known, however, to be vehicles which Anupchand and Vijay and their families owned, or could be traced to them.

On May 3 the same year, either at 3 pm or 5.15 pm, Ashwin Hiralal Nathwani, who owns the shop on the other side of 'Kaykay' had a telephone call from someone speaking English asking for Kaushik so he sent a messenger for him. Kaykay's telephone was out of order. Kaushik went and took it and told his brother, Hansmuckchandra, it was from someone speaking German who asked him to collect a gift from someone in Europe who was in an hotel in the Shanzu area who had no time to bring it to him at "Kaykay'. They shut up shop at 6 pm and went home. The same night at about 9 pm Kaushik and Ranjan left the Govindji home in a white Cortina KQN 884 and were seen by Bharatt Premchand Shah coming out of the Wimpy in Moi Avenue a few minutes later. Kaushik was carrying a white plastic bag. They were seen by Mayur Shantilal Malder slightly later driving past the Florida along Mama Nginga Drive. So they were taking the long way round to the Shanzu hotel and later CIP Ngundu did the same journey in a Ford Cortina from the Wimpy to the scene of the alleged murders and he did it in 38 minutes. Down a side road, a murram one, which led to a restaurant and some hotels at Shanzu, off the main Mombasa Shimo-la-Tewa road, there lived, among others, Mackenzie and Muire. Mackenzie heard what sounded like a gun shot soon after 9.30 pm. His gardener, Mbigo Iha, thought it was the sound of a burst tyre but when he counted up to 3 of them he was not so sure. It was raining very heavily then.

At the Serena Hotel nearby at 10.15 pm Mchumbi Juma was asleep in his Peugeot 504 Saloon KJQ 992 and he was awakened by a light from a torch flashed through the car's windows. There were two Indians outside and one had the torch. They hired him to drive them to their home in Kaunda Avenue near the Oceanic Hotel for Kshs 180. He let them into his vehicle and when the front passenger door was opened the interior light shone around. One sat in front next to him and the other on the back seat. The one in front had the torch and it was a black one. On another day Mchumbi Juma pointed out that Indian, who had sat in front holding the torch, when he saw him at the offices of the CID Urban Mombasa. He was the only Indian among a number of Africans and he was Anupchand. Corporal Gitonga was handed a black torch by Anupchand from his house during a police search of it and Mchumbi Juma said it was just like the one Anupchand had when he drove him and the other Indian to their home that night.

Anupchand and Vijay then went to the Central Police Station at 11.30 pm in their Mini and told IP Masama that two Africans had made Anupchand hand over the keys of the Colt Lancer at 11 pm and Kshs 500 in cash at gun point near a *kiosk* outside the Voice of Kenya studios opposite the Commercial Bank of Africa behind the New Castle Hotel where he parked his car before he went to have a drink in the hotel. IP Masama went back with them to the *kiosk* and the surrounding area and saw nothing significant there save for some security lights on all those buildings blazing away at 11.45 pm. Corporal Tanui had been on duty in that very spot from 7.30 pm to 11.30 pm with other policemen in an exercise designed to curtail the sale of drugs to American sailors ashore and he saw and heard nothing of this hijacking of the Colt Lancer. Back to the police station went Anupchand, Vijay and IP Masama where Anupchand wrote out his statement for the police.

The next morning, May 4, Mbigo Iha found Kaushik and Ranjan dead in the Cortina 500 to 700 metres down the side road from the main road and near it the empty Colt Lancer. This was at 7.30 am and when Mackenzie and Muir saw this, the former telephoned Bamburi Police Station and the latter reported it to Bamburi Police Station on his way to work. Hansmukchandra told the Provincial CID Kaushik and Ranjan had not returned home from their evening car ride to the Shanzu Hotel from the night before.

Anupchand went in his mini to Rafique and Company Ltd to collect the proprietor and log book of the Colt Lancer for the police. This was at about 9 am and at about 10 am he and Vijay were detained by CID Corporal Ngugi in their shop and taken off to the officer in charge of the division and then to the Provincial CID who handed them over to the Urban CID for interrogation. They were formally arrested on May 5 and told why this was so.

Meanwhile the CID had begun their investigation. Photographs were taken of the side road, the corpses and the vehicles at the scene. The corpses were taken to Al Haj Dr Mohamed Hatimy for postmortem and the extraction of blood samples. The cars were examined for fingerprints and bullet holes. The scene was searched for further clues and various items were collected. The clothes of the victims and of Anupchand and Vijay were sent away for examination by the Government analyst.

The photographs reveal, among other things, the Colt Lancer in a large puddle on the road ahead of the Cortina. Both are facing away from the main road but towards the restaurant and the hotels. There are some misfired bullets on the ground near the offside doors of the cortina and in front of it there is an empty cartridge near where a round has blasted out its offside front parking light. Inside the Cortina the dead Kaushik is slumped across the dead Ranjan. The ignition key is still in the switch and Kaushik's foot half on and half off the accelerator. There is also a bullet hole high up on the inside of the nearside front door. The photographs of the interiors of each vehicle highlight what was found in each and where. The corpses are photographed inside and outside the Cortina from every angle to indicate the number, size and nature of their injuries. Others reveal where the other significant objects were found by the police or pointed out to them. These include a pistol, a knife and the four vehicles belonging to Anupchand and Vijay and their families.

Kaushik and Ranjan died of shock and excessive bleeding caused by their wounds. Both had been shot at close range in their right cheeks with a 22 pistol. Kaushik had also been shot just above his right eyebrow on his right temple. Ranjan had been stabbed 10 times with a sharp pointed knife like the one found at the scene; 7 times in the back of which 3 penetrated the lung and 1 on the right side of her neck, 1 on her right wrist and 1 on her left wrist. These were all consistent with their being attacked by two assassins, one with a pistol and one with this knife. They had been dead at least 18 hours when the postmortems were done. Finger prints were lifted from the Cortina's front near-side window glass and the Cortina's rear view mirror and inside top right hand corner of the rear nearside window but the ridges were not raised enough to reveal any characteristics. Blood on the clothes of Kaushik and Ranjan was of the same group as their own. There were no stains on those of Anupchand and Vijay. The knife had human blood on it of the same group of Ranjan which is AB.

Inside the Cortina the police found an artificial Afro style wig on the floor near the front seats, a cigarette lighter, a packet of Embassy cigarettes, a red cloth, and a visiting card of Otto Lehnst on which had been written on the reverse by someone the name 'Kausik' and Kaykay's telephone numbers and that of Nathwani the neighbour. There were two spent bullets, one in the nearside front door and one on the floor.

Another wig of the same sort was found in the same position in the Colt Lancer and two cushions in the rear on the seat and a red brown hand bag and a bottle of water on the floor at the back. The handbag had a sticker and medicines in it with Anupchand's name on them.

Neither of the wigs had any human hair on it. They must have been to give the impression that the two Africans who robbed Anupchand of the Colt Lancer were driving it but they were never used and that may have been because it was raining and no one would see who was in it that night.

Outside the vehicles, the bullets and empty cartridges apart on the road, the investigating team found in the bushes a pair of ladies shoes 29’ from the Cortina and 44’ away a large curved knife (the one with human blood on it) and 32’ off a pair of black nylon gloves in a maize garden. Level with the Colt was some petrol in a tin 15’ away. CIP Mbithi recovered a pistol on the off-side of this road facing the main road.

This is an automatic .22 High Standard model Dura Cal one with a capacity of 10 rounds, and it was not registered in this country. It was complete, in good condition and not prone to accidental discharge. The spent rounds had been fired from it and the pistol had not been cleaned since it was last fired. One round had misfired and two were defective. Two bullets that had been fired were recovered and they had been damaged because they had hit something hard in flight.

Back in Mombasa Anupchand and Vijay were being detained separately in very sparsely furnished cells at various separate suburban police stations because CID have none at their Urban or Provincial buildings. They were interviewed separately and various CID officers interrogated them for a stretch at a time. Each was denied access to his family and to his advocate until they were brought before the court which was 3 days later. Relatives brought food for them and were made to eat some before Anupchand and Vijay did. Police officers escorted them to the Bella Vista Restaurant on May 6 for supper. Their advocates put it to each policeman who took part in the arrest, interrogation or the escort of Anupchand and Vijay that he squeezed their testicles with pliers, violently pulled about their penises, slapped them, shouted abuses at them, threatened to arrest every member of their families and rape their womenfolk or saw or heard the others do so, and all the policemen denied doing so.

There was no caution before this interrogation and no inquiry statement was taken from either of them. At about 6 pm Anupchand said something and as a consequence of what he said he took CIP Mbithi, CIP Ngando, and other CID men the next morning to the side road and pointed out the pistol’s magazine with 5 bullets and 1 that had misfired in it in a plastic white bag 0.6 kilometres from where the Cortina had halted. When he did this he was in custody, he had not been cautioned before doing so and no notes were taken of the event. Anupchand denied he pointed out these things, and he claimed he could not do since he knew nothing about them.

At about 3 pm on May 6 SP Ng’ang’a of Provincial CID Headquarters, Mombasa, who had had nothing to do with these investigations, charged Anupchand with the murder of Kaushik and Ranjan and then cautioned him in the usual form. SP Ng’ang’a says Anupchand decided to write his reply and Anupchand maintains he was forced to do so but they agreed the head and tail paragraphs were written by Anupchand at SP Ng’ang’a’s dictation. They are that Anupchand understands the charge, wishes to write his reply and has done so voluntarily. The statement is a confession.

IP Luvisia, of the same headquarters, who also had no part in the investigations, showed Anupchand’s statement to Vijay on May 7 and charged him with these two alleged offences and cautioned him and Vijay wrote out his reply, which is also a confession, and topped and tailed it with the same paragraphs at the request of the officer.

The next day, May 7, Dr Jhaveri examined Anupchand and Vijay at noon and 12.15, respectively, in the presence of CIP Mbithi, and found them to be sane, in good health and with no visible signs of recent injury. Anupchand maintains he complained of ill-treatment by the police and Vijay said he had been slapped and some acid poured into his urethra. A week later the doctor went to Shimo-la-Tewa gaol where he saw them about their asthma, the food and Vijay’s glands near his private parts were inflamed. He admitted them to hospital where one was treated for asthma and both were prescribed a special diet. Neither complained of ill-treatment by anyone this time. A psychiatrist, Dr Mahero, saw them in the prison after this but no report by him was tendered in evidence. Their confessions were admitted after a separate trial within a trial for each.

Anupchand and Vijay elected to make no statement at all and to call no witness when each was put on his defence at the trial. At the end of the summing up each assessor said that in his opinion Anupchand and Vijay were guilty of murder (presumably of each one). Earlier they had presented a written opinion which

was added to the record. It was to the same effect and also unanimous.

We return to the confessions. First, that of Anupchand. He begins by introducing himself, his family and the history of their business. Then there follows two or three pages bewailing the cut-throat competition of 'Kaykay' organized by Kaushik and its insidious effect on the 'Tanga Trading Company'. Anupchand writes at one point –

"My temperature began to rise and I began to have bad feelings against him. I thought of fighting him but all questions came one by one. How, where, what to do to him."

He explains how in the evenings after work he drives out to an hotel or bar for a drink and to listen to music. He bought this pistol and 10 bullets for Kshs 5,000 from an *M'Kikuyu* on April 13 or April 14 and kept them at home. He went out and bought 2 wigs about the same time. He was bent on shooting Kaushik in the first week of May 1982. He hired the car and he asked a lady called Christine at the Bush Bar in Utange village to call Kaushik to the Dolphin Hotel on Monday May 3 to collect something there at 10 pm. She told him when she had done so. Anupchand then wrote:-

"So my brother and I were prepared to go for the final. To shoot him down."

They followed him along the road, overtook him, halted and made him stop too. He shot Kaushik, and Vijay stabbed Ranjan. They found the Colt Lancer would not start. Vijay hurled the can of petrol for an emergency into the bush and Anupchand also disposed of the pistol and other items by chucking them into the bush. They went home by cab for Kshs 200 and then went to tell the officer at the Central Police station their hired vehicle had been stolen earlier that night.

Vijay wrote in his reply that Anupchand's account was true. He recounts briefly their troubles with "Kaykay' and Kaushik, Anupchand's plans and preparations for this operation to eliminate him. He adds –

" the wife" (Ranjan) "was forcing to come in the middle which we did not want therefore I stabbed her several times with the knife while my brother also shot her along with her husband."

He follows on with what Anupchand did with the pistol and Vijay with the knife, how they travelled home and they reported to the police about the Colt Lancer adding –

" this was just to cover ourselves."

Before leaving these replies to the charges and cautions we make five points about them. They are admitted to be in the handwriting of Anupchand and Vijay respectively. They are not in police 'officialese' but in the sort of English a Mombasa Shah with only a Form III education might use. Most of what is set out in them is born out by the evidence of the witnesses for the Republic. Matters in the confession which were not born out by the testimony of any witness was the sale by the *M'Kikuyu* of the pistol and rounds to Anupchand and the helpful telephone call by Christine, who were not called, and the details of the killings because there were no eye witnesses to them. It is from Vijay's statement that it is clear Anupchand carried the pistol and shot Kaushik and Ranjan, and Vijay repeatedly stabbed her because she tried to come between Anupchand and Kaushik. The learned judge summed up all the evidence in detail and explained the relevant law to the assessors.

He tackled the evidence again in his judgment just as thoroughly. He noted the absence of evidence from anyone who saw these killings so what the Republic had put forward amounted to a confession apiece, since retracted, and circumstantial evidence. He searched the latter for corroboration which he rightly warned himself he should find before basing a conviction in this case on either retracted confession. He lists 10 such pieces of circumstantial evidence which he declared to be ample. He agreed with the assessors that Anupchand and Vijay were proved beyond any reasonable doubt guilty of each murder and he convicted them of each one.

Mr Prinja made submissions on 15 grounds of appeal on behalf of Anupchand and 13 for Vijay and Mr Metho replied to them for the Republic, and we are grateful to them for all the work and erudition they have brought to bear on these matters. The first clutch of their arguments were related to whether or not the confessions were rightly admitted by the trial judge. It may well happen, of course, that an accused who has originally denied all knowledge of a crime later admits he committed it. This may be because from questions put to him in interrogation he forms the view that proof of his guilt exists and decides of his own free will to confess. The person best able to get the feeling and effect of the circumstances in which a confession was made is the trial judge, and his findings of fact and reasoning are entitled to respect. *Regina v Rennie*. The Times November 7 1981.

A substantially truthful confession may contain mistakes but in an appropriate case a trial judge may rely on it despite its mistake. If a material element in it is demonstrably untrue and it must have been known to its author its value its destroyed and it cannot be relied on. *Aneriko v Uganda* [1972] EA 193.

The pre-1964, Judge's Rules of England apply in Kenya and are rules of practice. *Anyangu v Republic* [1968] EA 239.

Anupchand and Vijay were taken into custody without a warrant by the CID on May 4 at 10 am for two alleged offences of murder and not taken before an appropriate subordinate court until May 7 at 3 pm. So they were in police custody for three days and five hours. There is no statutory maximum period for which the police can detain someone taken into custody without a warrant for murder. Compare section 36 Criminal Procedure Code (cap 75). The period can only be for a reasonable one and because what is or is not reasonable will depend on all the circumstances of each case. It was not unreasonable here because Anupchand and Vijay were mature sane reasonably healthy local businessmen and not young illiterates from very remote areas, and the CID had two grisly complex murders to solve, no eye witnesses, or none who came forward to help them do so, and two suspects who denied all knowledge of them (which they were entitled to do) for 2 and 3 days respectively.

It was not oppressive or unjust, in the circumstances, to keep Anupchand or Vijay apart or for different officers to interrogate them or send them to separate police stations for the night during that period or to make no provision for their comfort different from that endured by others in custody. It so happened, for example, that it was convenient to lodge Anupchand at Bamburi Police Station for one night, because it was on the way back from the scene to which he would be returned the next morning. It is not right, however, to detain people in isolation too long or whirl them around different police stations often, for that would disorientate them and make it difficult to know what weight to give their answers or actions. See *R v Reid*, [1982] Crim LR 514.

Each was denied access to an advocate. This can be done for good reason as, for example, in rare cases involving immediate risk to life, limb or property, which we presume was not the case here. If it were done because the CID believed the advocate would advise Anupchand and Vijay not to answer questions or transmit unhelpful messages deliberately or innocently or generally make the task of the police unhelpful, then we agree with the *obita dicta* of Lawton LJ in *Lemsatef v R*, [1977] 2 All ER 835 this was done for no good reason, for it should be supposed that the advocate will act with integrity until the opposite is known or suspected. He can always be told that messages are not to be passed on because inquiries are afoot. There remains, however, even, if this practice is breached, as with other rules of practice, the discretion vested in the trial judge whether or not to admit the confession. *R v Reid*, (*ibid*).

In mid-December 1981 this court deprecated the presence of police officers at medical examination, *Paul Nakwale Ekai v Republic* Criminal Appeal 115 of 1981. Yet here, the investigation officer, CIP Mbithi, was present when Dr Jhaveri examined Anupchand and Vijay at noon and 12.15 pm respectively. This did not, according to them, inhibit either from telling the doctor that he had been maltreated by the CID while in their custody. Dr Jhaveri recorded Vijay's complaints, and denied Anupchand made any. The doctor is an Indian and Hindu just as Anupchand and Vijay are, and the trial judge believed the doctor, (having all the evidence about this before him) and not Anupchand and Vijay.

We do not know what instructions, if any, their advocate, Mr Parkar, had about their time with the CID

before he appeared for them in the subordinate court, and it was for him to decide what to say or not to say to the magistrate about it. *Boyd Mackintosh* [1982], 76 Cr App R 177, 183. He wrote a letter, in general terms, on May 11 to the Medical Officer at Shimo-la-Tewa prison asking for a medical examination for each but no action was taken on it (Dr Jhaveri never read it) and Mr Parkar does not seem to have followed it up. Neither appellant, however, made any such complaint to the magistrate which is significant when it is remembered who and what they are though, according to their testimony, they were courageous enough to do so to the doctor in the presence of CIP Mbithi of the CID.

There was acute conflict as to whether their relatives were encouraged to bring vegetarian food to them as a supplement or a substitute for what others in the cells were given, and if either was escorted to a local Indian restaurant, the Bella Vista, for supper one evening. The learned judge in his rulings accepted the evidence of the witnesses for the Republic and not that of Anupchand or Vijay on this issue. One or both had asthma and an ulcer so they were not men with ordinary diets for whom the police usually hire caterers to feed in the cells.

When a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against him for it, he should, without delay, cause that person to be charged or told that he may be prosecuted for it. It is unlawful to do otherwise, of course, and unwise, too, because failure to comply with the Judges' Rules provides criminals with defences. *Boyd Mackintosh* (*ibid*).

It was after Anupchand and Vijay made their oral statements admitting these offences to CIP Mbithi that he had enough evidence to charge them and we are satisfied that this was after the May 6 morning visit to the scene with Anupchand where he pointed out the pistol with its magazine and rounds and when Vijay heard of it and Anupchand's confession which was on May 7 and Anupchand was formally charged at 3.05 pm on May 6 and Vijay at 10.10 am on May 7. They had to be medically examined thereafter and that took place at noon and 12.15 pm and they were in the subordinate court with their advocate, Mr Parker, by 3.30 pm all on May 7 which was as soon as practicable.

The first question is whether the statements were made voluntarily within the meaning of that term in law? Had the Republic proved beyond any reasonable doubt that they had not been obtained from Anupchand or Vijay by fear of prejudice or hope of an advantage excited or held out by a person in authority or oppression? *Ibrahim v Rex*, [1914] AC 559, 609. The second is whether there were breaches of the Judge's Rules which constituted such oppression as to undermine their voluntary character? The third is was there such failure to bring either Anupchand or Vijay before the magistrate pursuant to section 36 Criminal Procedure Code that was oppressive? We would say, after our own study of all the evidence and the relevant law that the statements had been made voluntarily, there were breaches of the Judges' Rules which did not amount to oppression and the provisions of section 36 had been followed. See generally *Boyd Mackintosh* (1983), 76 Cr App 177 (CA Crim Div).

The learned judge was obviously satisfied that the confessions were the truth of what occurred that night but he did not act on them alone. He accepted them with caution, realizing they were both retracted and repudiated, and he was careful to look for corroboration of each one. This was, no doubt, in accordance with the principles set out in *Tuwamoi v Uganda*, [1967] EA 84, 92 (CA-U).

He set out 10 matters of independent admissible evidence which he accepted as true and called them corroboration. The correct definition of corroboration is that it is some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence. *Clynes* [1960], 44 Cr App R 158, 161 (C Cr A). There were, with respect, 3 items in the list which could be termed independent evidence of material facts which implicated Anupchand and Vijay and they were the presence of the Colt Lancer (Anupchand had hired) at the scene, the false report to IP Masama that it had been wrested from Anupchand that night with which Vijay associated himself and Moumbi Juma's evidence of their hiring him and his taxi at the Serena Hotel, Shanzu, a kilometre away from the scene at 10.15 pm the same night to take them home.

The trial judge had a duty, it is true, to assist the assessors by indicating the evidence which they were entitled to treat as corroboration. He did not do so, and therefore did not mention any that they were not

entitled to treat as corroboration (which could be fatal to a conviction in a trial by jury if they were matters that were inadmissible (*Martin, Ansell and Ross* (1934), 24 Cr App 177, 185). Despite this, even if the judge fails to do so and the case against an accused is so overwhelming, having regard to all the evidence, that there had been no miscarriage of justice it would be right in the circumstances to dismiss the appeal. Cf *Regina v Cullinane (Stephen)* The Times March 1 1984.

This court held in December 1981 that it is not fatal to a conviction if no notes at all are made of a summing up and there is no suggestion that the judge summed up improperly. The trial judge in that case had held that an alibi had been shown beyond any reasonable doubt to be false, and did not deal with it in detail, analyse it or give reasons for doing this. Yet, if this court's evaluation of all the evidence led to the finding that the conviction was proper the result would be that it would be upheld. *Walukau and Musete v R* [1981] Cr App 25 of 1981.

When, in a case tried with assessors, the case for both sides is closed and the judge has summed up the evidence for both he has to ask each of the assessors to state his opinion orally and the judge must record it. Section 322(1) Criminal Procedure Code (cap 75). This is what happened in this trial. One of them wrote out and each signed an opinion, which is not required, and we doubt that this is to be encouraged in ordinary trials because the assessors are not trained to give written opinion on such matters.

Though it was not raised in Vijay's memorandum of appeal or in argument, we feel bound to refer to the request for the assessors to remain in court during the trial within a trial held to determine the admissibility of his confession [Exhibit 57]. This request was made by Mr Georgiadis, who was then representing the appellants, and was said to be in the authority of the recent Privy Council decision in *Ajodha v The State* [1981] 2 All ER 193, and, in particular, Lord Bridge's statement of the appropriate procedure on such occasions (at pages 202 and 203). The purpose of a trial within a trial has been stated again and again in England and in the various countries which apply the common law. It is to determine the voluntariness of the statement tendered for the prosecution, because it is axiomatic, in all those systems of law, that a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. If it is not voluntary it is unlikely to have been true.

Unless the evidence relating to the challenged statement is heard before the judge alone, there is a serious risk of prejudice to an accused person on two grounds. First, because should the judge rule against admissibility the jury, or, as in this country, the assessors, they will perforce have heard a great deal of inadmissible evidence, or, if not inadmissible, evidence going to the issue of something which has become inadmissible, whether they are there as "spectators" or not. Secondly, an accused person is normally expected to go into the witness box (even though he has the right not to do so) to substantiate the allegations of ill-treatment or oppression which have been made against the police. Indeed in the instant case Mr Georgiadis was not intending to call the first appellant, Anupchand, merely relying on his cross-examination of Dr Jhaveri and CIP Mbithi, but after an indeterminate exchange between counsel and the judge, Anupchand in fact, gave very comprehensive evidence.

If the accused person does give evidence he can quite properly be crossexamined on his allegations of ill-treatment and the like. But he does not lay himself open to be cross-examined on the general issue, which is reserved until later, and none of this is normally heard by the assessors or by the jury. If all this takes place in the presence of the assessors, it is manifest that much of the protection otherwise afforded to an accused person is removed, whether it is at the instance of his legal advisers or not. The opinion of the Privy Council in *Ajodha v The Queen* (*ibid*) envisages that defending counsel may for tactical reasons, prefer that the evidence bearing on voluntariness be heard before the jury, with a single cross-examination of the witnesses on both sides, followed, presumably, by a ruling, or at least an indication from the judge, as to whether he considers the statement admissible. Thus the jury, or, here, the assessors, will hear the impugned statement, whether admissible or not. That judgment, however, was given in relation to a vastly different territory, with different people and where different conditions and circumstances prevail. We do not know the full extent of those differences. Moreover, *Ajodha*'s case is not a binding authority, and appears to have been doubted in a recent Court of Appeal decision in England, *R v Airey*, The Times 19th June, 1984.

In the circumstances of the instant case, we do not say that Bhandari J was necessarily wrong in acceding to the defence request that this evidence should be given in the presence of the assessors. But it has long been held in England itself that the admissibility of a confession, which in Kenya is governed by section 26 of the Evidence Act (cap 80), is a matter for the judge alone as is shown by the following passage from the judgment of Cave J in *The Queen v Thompson*, [1893]2 QB 12, (referred to by Mr Prinja in another connection) at p 16:

"The material question, consequently, is whether the confession has been obtained by the influence of hope or fear; and the evidence on this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession."

Even clearer is the following further message from the Kenya case of *Mwangi s/o Njoroge v R* [1954] 21 EACA 377 at p 380, which was also referred to by Mr Prinja, and which related to a repudiated statement:

"In the course of the discussion Mr Twelftree contended that in a case where the defence repudiates the making of a statement it is not necessary for the trial court to conduct what is conveniently termed "a trial within a trial" and to give an interlocutory ruling on the question. This argument is fallacious, but as there still seems to be some doubt on the matter we take this opportunity of resolving it. The question whether a statement tendered in evidence was or was not made by an accused person is a question of fact affecting the admissibility of the statement. The decision of such fact is a matter for the judge. "Where the question of admissibility depends on the proof of some preliminary but disputed fact, it must in general be decided by the judge alone … and this is so even where the given fact happens to be also in issue in the action and ultimately determinable by the jury" *Phipson on Evidence*, 9th ed, p 11. As to the procedure to be followed, the following passage from the same work at p 10 is in point: "Questions as to the admissibility of evidence are questions of law and determinable by the judge. As it is almost impossible to discuss such questions without revealing the nature of the evidence objected to, it is usual for the jury to retire during the argument."

Apart from these authorities we consider that if it were allowed to become a practice to hear the disputed evidence in the assessors' presence it could lead to dangerous results, as is the case with most short cuts of this kind. Once the assessors are allowed to remain in court it is no longer a trial within a trial, but part of the trial proper. The law in this country as to the practice and procedure on determining the admissibility of an extra judicial statement was set out comprehensively and with crystal clarity as long ago as 1956 in *Kinyori s/o Karudito v Reg* (1956), 23 EACA 480, at p482 as follows:

"For the avoidance of doubt we now summarise the proper procedure at a trial with assessors when the defence desires to dispute the admissibility of any extrajudicial statement, or part thereof, made by the accused either in writing or orally. This same procedure applies equally, of course, to a trial with a jury. If the defence is aware before the commencement of the trial that such an issue will arise the prosecution should then be informed of the fact. The latter will therefore refrain from referring in the presence of the assessors to the statement concerned, or even to the allegation that any such statement was made, unless and until it has been ruled admissible. When the stage is reached at which the issue must be tried the defence should mention to the Court that a point of law arises and submit that the assessors be asked to retire. It is important that that should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement. For example, an interpreter who acted as such at the alleged making of the statement should not enter the witnessbox until after the assessors have retired. The assessors having left the court the Crown, upon whom the burden rests of proving the statement to be admissible, will call its witnesses, followed by any evidence or statement from the dock which the defence elects to tender or make. The judge having then delivered his ruling, the assessors will return."

We therefore consider, as a general rule, almost as an invariable rule, only to be departed from exceptionally, the authority of *Kinyori*'s case should be followed and the assessors should be absent during the whole of the determination as to the admissibility of an extra-judicial statement. In the present

case, however, we are satisfied that no prejudice can have been occasioned, and no injustice can possibly have resulted, to the second appellant, or to either appellant, by the course taken.

The judge sentenced Anupchand and Vijay to death which is the mandatory sentence for murder. He did not specify for which count this sentence was passed. It is clear, however, that

"In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or the other law under which the accused is convicted, and the punishment to which he is sentenced."

see section 169(2) Criminal Procedure Code (cap 75).

Therefore Anupchand and Vijay should have been sentenced to death on each count. *Gatheru Njagwera v Reginam* (1954), 21 EACA 384(CA-K) and *Turon v Republi*c, [1967] EA 789, 794, 796 (CA-K). See also *Okwaro Waijata v Republic*; *Alaka v Republic*, [1978] KLR 114, 116. Hancox and Sachdeva JJ.

The Court of Appeal on July 27, 1982 in *Jackson Ndambuki Mutuse v R* Mombasa Cr App 66 of 1982 held, however, that the trial judge who sentenced the accused who was before him to death without stating which of three counts carrying that mandatory penalty this was for should have sentenced him on the first one leaving the other two in abeyance and then the court went on to set aside the sentence and substitute an order to that effect.

None of the relevant authorities was cited to the court in *Jackson Ndambuki Mutuse*, and fourteen months later this court held that its judgment on this point was given *per incuriam*. *Gerald Kamau Kihara v Republic*, Nairobi Criminal Appeal 10 of 1983 September 30 1983.

It is undesirable, because inhumane, that double or multiple sentences of death be passed and they can and should be avoided where the charges allege murder. It is not improper to file an information containing two or more counts of murder, and it is within the discretion of the court to allow or disallow this. Generally, however, the court should ask the Republic to choose the one on which it prefers to proceed and to leave the other or others on the court file until further order. *Gachanga Thiongo v Rex* (1949), 16 EACA 169 (CA-K) and *Mongella s/o Ngui v Rex* (1934), 1 EACA 152.

Here, in this case, after carefully considering all the arguments and submissions on both sides, and our own evaluation of the evidence adduced at the trial, we are left with no reasonable doubt Anupchand and Vijay were properly convicted, and we order that the appeal of each be dismissed.

Dated and Delivered at Mombasa this 26th day of August 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

.....

JUDGE OF APPEAL

J.O.NYARANGI

.....

AG. JUDGE OF APPEAL

I Certify tha this is a true copy

of the original

DEPUTY REGISTRAR