IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 136 OF 2016
(High Court Action No. HAC 156 of 2014 at Lautoka)

BETWEEN : **LLOYD RICHARD SENIKAUCAVA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Basnayake JA**

Counsel : **Ms S. Nasedra for the Appellant**
Mr. L. Burney for the Respondent

Date of Hearing : **27 May 2019**

Date of Ruling : **6 June 2019**

RULING

[1] This is a leave to appeal application made by the appellant against his conviction and sentence. On 19 February 2019, an amended notice of appeal was filed for the appellant by counsel against the conviction, thus abandoning the appeal on the sentence. The grounds urged in the notice are:

a. That the learned trial Judge erred in law and in fact when he failed to direct and guide the Assessors on how to approach the evidence contained in the caution interview and on the weight to be attached to the disputed confession.
b. That the learned trial Judge erred in law and in fact when he did not put the case of the appellant to the assessors in a fair and balanced and objective manner.

[2] The appellant was charged with murder contrary to section 237 of the Crimes Decree No. 44 of 2009. Briefly the facts are that the appellant and the deceased were drinking alcohol on 6 November 2014 in a night club till late. Shortly after midnight they had both left in a taxi and got off near the shortcut to Vunavutu village. The deceased body was found on 10 November 2014 from a place near where the couple had got off in the early hours of 7 November 2014. The appellant was apprehended on 14 November 2014 from a faraway hiding place. The appellant has made a cautioned statement wherein he has admitted to the killing. At the trial in a voir dire the learned Judge has admitted the statement made by the appellant at the caution interview. After the trial the Assessors unanimously found the appellant guilty of murder. The appellant was convicted by the learned High Court Judge on 10 August 2016. On 16 August 2016 the appellant was sentenced to life imprisonment with a minimum of 16 years imprisonment before being eligible for parole.

[3] The learned counsel for the appellant submitted that the learned High Court Judge has failed to properly direct the Assessors with regard to the voluntariness of the confession. The learned counsel submitted that the learned Judge has failed in his sum up to the Assessors that, if they are not satisfied that the confession was given voluntarily, in the sense that it was obtained without oppression, ill-treatment or inducements, or conclude that it may not have been given voluntarily, they should disregard it altogether; that this amounts to a misdirection which prejudices the appellant. The learned counsel submitted that it could be considered as an arguable ground.

[4] The learned counsel submitted that although the admissions made in his caution interview statement and the charge statement have been ruled admissible after the voir dire, he continued to deny the charges against him and disputed the admissions. However the

learned trial judge has failed to properly highlight to the Assessors in the Summing-up the stance the appellant took up at the trial. The learned counsel submitted that the appellant disputed the credibility of the prosecution's evidence with regard to the appellant's statements to the police. However the learned High Court Judge has failed to attach any importance to the appellant's case.

[5] The learned counsel reproduced paragraph 18 of the summing-up to substantiate the grounds of appeal. Paragraph 18 states thus:-

> *"It is for you to assess what weight should be given to his caution interview, charge statement and the statement given to the JP. You may compare the evidence led in this trial and the caution interview of the accused to see if the accused had made a truthful statement to police. What weight you choose to give the interview made by the accused is a matter entirely for you. If you consider it to be unreliable either because the police assaulted and ill-treated the accused, or because the accused himself told lies to police, then you may think that you cannot put much weight on them at all. If however you consider them to be reliable records of what the accused said to police, then you may think that they contain important statements of what allegedly occurred that night."*

[6] The learned counsel relied on the judgment of **Maya v State** [2015] FJSC 30; (23 October 2015) (Gates P, Keith & Dep JJ) where Gates P stated that, "the assessors should be directed by the Judge in his summing-up that if they are not satisfied that the confession was given voluntarily, in the sense that it was obtained without oppression, ill-treatment or inducements or conclude that it may not have been given voluntarily, they should disregard it altogether. In Fiji the judge may admit a confession into evidence after the voir dire, and yet subsequently at the conclusion of the trial proper he or she may arrive at a different opinion. The defence may pursue in cross-examination in the trial proper the same issues of voluntariness in order to persuade the judge as well as the assessors of the rightfulness of such an allegation. The prosecution however bears the burden in the trial proper, as in the voir dire of proving that the confession was voluntary, and must do so to the standard beyond reasonable doubt, as with the other elements of

proof required to prove the charge. The position in **Mushtaq** [2005] UKHL 25 is to be preferred to that of **Chan Wei Keung v The Queen** [1967] 2 AC 160".

[7] The learned Judge rules on the voir dire that the confession was obtained voluntarily. The learned Judge in the summing-up referring to the confession states in paragraph 15 that:-

> *"In his statement he has admitted killing the deceased Tracey. Prosecution says that the statement was recorded under lawful and fair manner and the accused gave his confession voluntarily. Defence on the other hand says that the police ill-treated the accused and that his confession was obtained unlawfully under oppressive conditions, using police brutality and therefore accused' statements are false and unreliable". In paragraph 18 the learned Judge states thus, "What weight you choose to give the interview made by the accused is a matter entirely to you. If you consider it to be unreliable either because the police assaulted and Ill-treated the accused, or because the accused himself told lies to police, then you may think that you cannot put much weight on them at all..". In paragraph 19 he states that, "The prosecution relies on circumstantial evidence to prove that the accused person was responsible for Tracey's death and that there is no other reasonable explanation for her death other than that the accused killed her".*

[8] The learned Judge having summarized the evidence of the prosecution and that of the appellant (accused) states in paragraph 88 that,

> *"Prosecution relies on the confession made by the accused to the police, admission made to Mr. Kunaika, JP and circumstantial evidence". In paragraph 98 the learned Judge states that, "It is up to you to decide whether you could accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case".*

[9] From paragraphs 77 to 86, the learned judge summarizes the evidence of the accused appellant. The learned Judge states that there is not much of a disparity of the evidence of the accused up to the point the taxi stopped at Vunavutu short cut. The accused deviates from that point on from the evidence of the prosecution. The learned Judge summarizes the rest of the evidence of the accused where the accused does not implicate himself for the crime.

[10] As complained by the learned counsel for the appellant, I could not find the learned Judge stating, except in paragraph 15 (supra pa. 7) that if the confession was found to have been made under oppression, with ill-treatment or with inducements or that it may not have been given voluntarily, that they should disregard it altogether. However although the learned Judge does not use the same terminology, by stating that, "If you consider it to be unreliable either because the police assaulted and Ill-treated the accused, or because the accused himself told lies to police, then you may think that you cannot put much weight on them at all", the learned Judge drives the same point with the Assessors that if the confession was obtained in an improper manner that they should not give weight to it or that they should disregard it. Therefore I do not think that the learned judge has not followed the principles laid down in **Maya v State** (supra).

[11] Does the learned Judge satisfy himself with regard to the voluntariness of the confession of the accused? The learned Judge states in paragraph 4 of his judgment, that,

> *"Accused denies the allegation and says that his admission was obtained illegally and therefore unreliable". In paragraph 5, the learned Judge states, that, "Prosecution called 19 witnesses and relies on the confession made by the accused to police, admissions made to Mr. Kunaika, JP, and on circumstantial evidence". With regard to the confession, the learned Judge states in paragraph 19 to 21 as follows: "In the light of accused' evidence of police brutality, I reviewed my own finding on voir dire. If accused was brutally assaulted by police after his arrest, Doctor Zibran could have found some injuries on his body. Doctor Pillay who examined the accused after the caution interview and charging had not observed any injury on his body". "I am satisfied that the confession given to police and the admissions made to Mr. Kunaika JP are truthful statements of the accused. I accept the version of the prosecution, and reject that of the Defence. Prosecution proved the case beyond reasonable doubt".*

[12] Again I see the learned Judge stating with regard to the voluntariness of the confession in the judgment in that the learned judge was satisfied beyond reasonable doubt that the confession was made without any duress or oppression or ill-treatment and that if there was a doubt that he would have disregarded the confession. By stating that the learned Judge has revisited the voir dire and satisfied himself with regard to the voluntariness, a question arises whether the learned Judge has considered the evidence adduced at the

trial. The voluntariness of the confession runs through the trial and a duty lies with the prosecution to prove the voluntariness of the confession beyond reasonable doubt until the end of the case. I find that the learned Judge has considered the evidence of the prosecution as well as the defence. He has considered the voluntariness of the confession and admitted that into evidence. Even after conclusion of the trial the learned Judge has not changed his opinion about the voluntariness of the confession. The learned Judge has considered and disbelieved the evidence of the accused with regard to the assaults by the police. For those reasons the first ground is not established and refused.

[13] The second ground of appeal is that the learned Judge has failed to present to the Assessors the defence case in a fair, balanced and an objective manner. The learned counsel for the Appellant does not substantiate this argument. On perusal of the summing up and the judgment I find the learned Judge has discharged his task in this respect.

[14] The amended grounds are concerning the caution interview the appellant has made to the police. Even if the evidence with regard to the caution interview or the confession made to police is disregarded, the learned Judge had unchallenged circumstantial evidence to prove the charge. Therefore I am of the view that the grounds of appeal will have no force and are not arguable. Hence I refuse to grant leave to appeal.

Order of Court:

(1) Leave refused.

Hon. Justice E. Basnayake
JUSTICE OF APPEAL