

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

CRIMINAL APPEAL NO. AAU 136 OF 2016
(High Court No. HAC 136 of 2016)

BETWEEN : LLOYD RICHARD SENIKAUCAVA

Appellant

AND : THE STATE

Respondent

Coram : Prematilaka, RJA
Gamalath, JA
Bandara, JA

Counsel : Appellant appeared in person
Ms S. Shameem for the Respondent

Date of Hearing : 13 September, 2022

Date of Judgment : 29 September, 2022

JUDGMENT

Prematilaka, JA

[1] I have read in draft the judgment of Gamalath, JA and agree that the appeal be dismissed.

Gamalath, JA

- [2] In the High Court at Lautoka, the appellant was convicted for murder, contrary to Section 237 (a) (b) of Crimes Act (Decree) No. 44 of 2009 and according to the particulars of offence he on the 7th day of November 2014 at Sigatoka, in the Western Division murdered Tracy Ann O'Brien Mar. Following the conviction the appellant was sentenced to life imprisonment with a minimum term of 16 years imprisonment. That was on 16 August 2016.
- [3] The appellant filed a leave to appeal application in which he was seeking to canvass both the conviction and the sentence. However, in the hearing before the Single Judge on 27 May 2019, he had abandoned his appeal against sentence, while maintaining the ground against the conviction.
- [4] The main contention of the appellant in furtherance of his appeal against the conviction had been 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.” Secondly, “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 balanced and objective manner.”
- [5] Having considered the grounds, the learned Single Judge refused to grant leave to proceed for want of an arguable point.
- [6] The refusal was on 6 June 2019. Presently, appearing in person before the Court, the appellant is renewing his ground of appeal against the conviction. His submissions before this Court was not clear as to the exact nature of the ground upon which he is placing reliance and since he is appearing in person, I found the need to be considerate in dealing on his appeal so that his grievances could be looked at closely and with the judicial scrutiny that it deserves.
- [7] In the submissions of the appellant before the Court it became clear he was acting under the belief that the only evidence upon which the trial against him proceeded was the caution interview statement, his confession, and acting under that belief he placed a great reliance on Question 126 of the Caution Interview where according to him he had not been warned of his right to remain silent, a Constitutional right. Advancing the argument based on that he submits that the failure on the part of the High Court Judge to evaluate the negative impact of what comes out of Question 126 is a denial of a fair trial for him. It is clear from his submissions he had not been able to fully appreciate that the trial against him was not based exclusively on the Caution Interview statement alone. There had been other circumstantial evidence upon which the Prosecution had relied in establishing his guilt and the summing up and the judgment clearly demonstrate that the learned High Court Judge had evaluated such evidence correctly in arriving at his finality on the case against the appellant.

- [8] However I am mindful the appellant is convicted for murder and is appearing in person. His concerns need to be addressed for him to be alerted to the basic structure of the evidence upon which his trial was build up in the High Court.
- [9] In the circumstances before venturing into examining the ground of appeal in detail, I wish to briefly state the facts of the case against the appellant as unfolded at the trial.
- [10] On the 10 November, 2011, at around 7.00 a.m. the prosecution witness Ratuva found the deceased lying in the bushes of his farm and he had immediately brought it to the notice of the police. Police investigating team reached the scene located at Vunavutu in Sigatoka.
- The evidence of the prosecution witness Kitione Sekinabou was called to establish the fact relating to seeing the deceased alive last. According to the witness he worked at one Kartika Constructions and stated that the last time he saw the deceased alive was at Sigatoka Club, in the company of the appellant Lloyd. The appellant and the deceased were seen smoking outside the club. While the witness was continuing in drinking grog, he saw both the appellant and the deceased left the club. That was around 11.00 p.m. on 6/11/2014.
- [11] The prosecution witness Radilaite Marama, was an employee of Deep Sea Night Club, at Sigatoka. The deceased was there at the club and was seen drunk with alcohol. The deceased was in such a state of intoxication, the witness wanted her to stay back at the pub so that she could sleep until she becomes sober. In the meanwhile the appellant had intervened and wanted to take the deceased away. After some discussion over the matter, the appellant went away with the deceased.
- [12] Prosecution witness Iliesa Itanimo stated in evidence that in the night of 6 November 2014, the deceased met him and complained about her boyfriend who had beaten her up causing bruises. The deceased's boyfriend was one Hara. The witness, the deceased, and the appellant had been drinking throughout the night at the River View Nightclub. After the drinking spree was over, the appellant and the deceased had left his company looking for transport to get back to their village. The last time he saw the deceased alive was when she and the appellant boarded the vehicle to go to their village. That was in the late hours of the night of 6/11/2014.
- [13] The evidence of Rakesh Prasad, the taxi driver in whose vehicle the deceased and the appellant travelled in the early hours of 7 November 2014 plays an important part in this case. According to his evidence he was driving his taxi in the early hours of the morning. Two persons, one was a woman of European descent and another Fijian boy, hired his taxi to travel to Vunavutu. On the way from Sigatoka to Vunavutu, the 'boy' wanted to get down at Nasauma Village, and was saying that he wanted to go to his house. He in his evidence later recognized the Fijian boy as the appellant. In the car, both the appellant and the woman were engaged in an altercation continuously. Along the way

the witness was taking a turn on the road towards Vanuavutu, when the passengers wanted him to stop the car. As the vehicle was stopped, the appellant wanted to get down with the woman. The woman was not interested as she was saying her residence was ahead in another area. The handbag of the woman, a black coloured one, was with the appellant, hanging around his shoulders. Since the appellant was holding on to the bag, the woman had got down from the car, despite the reluctance showed earlier. The witness identified the bag that was with the appellant in court. This handbag, the one that was recovered at the scene where the deceased's body was found, was later recognized by several witnesses as one deceased's handbag, an exhibit at the trial.

- [14] The prosecution witness Sireli Kunasina, a driver, gave important evidence that has an inferential value in evidence in understanding the case. On 7 November 2014 at around 12 midnight while coming back from Suva, driving his vehicle and having reached the Total Service Taxi Service at Sigatoka, he had seen the appellant Lloyd and Tracey the deceased together. The appellant was trying to hug the deceased but the deceased was pushing him away, maybe her dislike to what he was doing then. Both looked drunk to the witness. Thereafter the witness has driven away and continued on his own journey to Kulukulu. However later, when he was returning to Kulukulu, he had seen the appellant and deceased getting down from a taxi, at the place the earlier driver described in his evidence.
- [15] That was when the witness was driving towards Kulukulu, passing the cross-cutting that the earlier witness described as the place where he dropped off Lloyd and the white woman. Later, the witness had gone to Vilisite to pick up his drunkard cousin with the idea of dropping him off at Malevu Village. On his return from Malevu Village, he had been driving through to the cross-cut to the village around 5.00 am. At the village two of his friends have boarded the car and at the same time Lloyd the appellant also had got into the car. After that they have started to drink again. When the appellant got inside the car, the witness had inquired about the woman he was with in the night. The appellant had kept silent to the question. He continued to drink without speaking. At that juncture, the witness had observed an injury on the hand of the witness.
- [16] Josaia Cokaibusa was the partner with whom the deceased had been having a relationship for 5 years before her death. In his evidence at the trial he testified to the fact that the deceased went missing from 6 November – 2014 and when he made enquiries from the appellant about her, the appellant had informed him that the deceased went to her brother's house in Nadi. The appellant had further told the witness, that the deceased's brother wanted her to go to his house in Nadi. Until 11 November – 2014, there was no trace of the deceased and on 11 November – 2014, he was informed about her death and he identified her body at a place called Drakoro, Vunavutu.
- [17] The Medical Evidence based on the examination conducted on the appellant was submitted in evidence by the prosecution and the report is tendered marked as exhibit 6. The results of the medical examination showed the following injuries on the appellant;

- [1] there was a scar on the right metacarpal joint which is the knuckle of the ring finger which was 1cm by ½ cm.
- [2] in touching the knuckles of the right finger there was tenderness complain of pain when I touched it.
- [3] there was swelling on middle finger and right finger knuckle

[18] The doctor opined that the injury may have happened about 2 weeks prior to the examination.

[19] The prosecution witness Dr James Kaloanivalu attached to the Forensic Science Services of Fiji Police, conducted the post mortem examination on the deceased on 11 November 2014. It was conducted in Kulukulu outskirts in a rural area. According to the medical findings, by the time when her body was found it was already in an advanced state of putrefaction. As such the exact cause of death could not be ascertained. The medical evidence, however had shown that there was a fracture, attributed to an ante-mortem injury, the doctor opined as follows;

“Looking on to the last page the further comments, I’ve mentioned about the examination of the right upper front or facial bone which is I mentioned here the right interior auxiliary bones, which is basically here, there was a fracture noted and there was perimortem missing that is teeth of the front upper goes missing accordingly and I mentioned there perimortem, meaning it was near or around the time of death and also because of as noted by the Forensic Pathologist the degree of how the teeth was moving that is also with that and the missing teeth and the fracture I mention that this were consistent with the possibility of considerable blood force trauma and therefore looking at the cause of death, the direct cause of death we couldn’t ascertain because of the extreme stages of putrefaction noted however, I highlighted the presence of that fracture of the right interior of the auxiliary bone, that is all sir.”

[20] Following the medical evidence, the prosecution adduced evidence relating to the recording of the caution interview evidence and produced in its evidence the caution interview statement of the appellant.

[21] The Charge Statement of the appellant was recorded by one Sitiveni Kanaika, Justice of the Peace and a Paralegal Officer. Speaking about the behavior of the appellant, the witness had stated in evidence that the appellant broke down in crying and made the statement in which he explained what transpired in the fatal night. The statements goes as follows:

“But Lloyd said if you really mean what you are saying then you should prove to me that you really mean what you are telling me now. So he told Tracey if you really mean that to prove what you saying that you should

give yourself to me that we should have sexual intercourse. It was at that stage that Tracey said no. When Tracey refused he really got wild they had heated argument and he was saying I am going to leave you he started to move away Tracey went back and pulled his shirt told him to stop at that time he turned around and punch Tracey on the mouth. She fell down and he wanted to pick her up when he tried to pick her up then he realized that she was unconscious so he stated to go away from the place. So at that moment after a few steps he realized that if she woke up would tell the stories what had happened he thinks that he will be in trouble that would be a big problem for him. So he went back and decided to kill her. So he went down with both hands and chopped the neck. After a few minutes he thought that she was dead when he moved his hand from her neck he could hear her still breathing so he used his right leg and pressed his leg to make sure he is dead. And after that he realized they were on the track and he decided to lift her and take her away to the bush. And then came back and thought it was still near so he moved her further into the bush and left her there. Then he left the place and came back to the village and on the way to the village he met some boys drinking he went and join them and they drank around the whole Friday till the afternoon before he went home and slept at his place.”

- [22] Doctor Neelam Pillay, the witness for the prosecution had conducted a medical examination on the appellant who had alleged that two days prior to his medical examination he was assaulted by the investigating police officers. However, the medical examination findings shows that there had been no injuries compatible with the evidence given by the appellant and as such the alleged assault on him cannot be supported having regard to the medical findings on the appellant.

Procedure and the discovery of evidence during the course of the investigation

- [23] As discussed earlier, the appellant was interviewed under arrest and the investigating police officers conducted the investigation according to the procedure laid down in law. It is important to note that the evidence of the doctor Neelam Pillay was to the effect that, after having examined the appellant, prior to the investigation, he had not observed any injuries on the appellant. The appellant’s allegation of being subjected to degrading and cruel treatment at the hands of the investigators was negated by the fact that in the medical evidence the doctor under cross examination had stated the history of being assaulted on Friday cannot be maintained by the fact that when the appellant was examined on Monday there were no signs found to establish any assault on him. The doctor’s evidence was that if the appellant was assaulted as alleged on the chest and abdominal parts, the tell-tale signs should have remained for at least 4 days after the alleged assault.

- [24] Reverting to the point on the conduct of the investigation, the appellant had led the police team to the place where he had allegedly assaulted the deceased. At the scene the appellant had pointed to the place where the blouse worn by the deceased was found in

the bushes. The deceased's black bag was thrown into the bushes and later found by the investigators on being pointed out by the appellant. The place into which the appellant threw the dead body of the deceased was also pointed out by the appellant.

In effect, the totality of the evidence would demonstrate the conduct of the appellant following the alleged crime and the inferences that can be drawn from such evidence does form a significant part in the prosecution's case, bolstering the overall structure of the prosecution's case against the appellant.

The evidence of the appellant at the trial

[25] At the conclusion of the prosecution case the appellant elected to testify on his behalf. He denied in evidence any involvement in the death of the deceased. In the evening of 6 November, 2014 he had started a drinking spree with his relatives at Sigatoka Deep Sea nightclub. There he met his friend, the deceased who made complaints to him about the ill treatment she was receiving from her boyfriend, who happened to be the appellant's uncle. The appellant had tried to pacify her when the deceased was complaining about the assault, on her by her boyfriend, the marks of which were visible on her body. They kept on drinking until the night club was closed down at 1am. The deceased was in a state of total intoxication and was staggering along the way. They have been drinking till late in the night and around 2am, the appellant had accompanied the deceased to his uncle's house and left her at his gate and walked away as he was afraid of the dogs at uncle's place. On the way he met Sireli Kunasila the prosecution witness coming in his taxi and he also got into the taxi.

[26] Later he was arrested and he alleged that the Police assaulted him during the course of the investigation. He denied that he pointed to the police the place to where the deceased's bag was thrown and the place where the deceased's pink blouse was found.

Totality of evidence

[27] The sum total of the evidence of the witnesses and the caution interview statement of the appellant, all combined together, forms the totality of the prosecution case against the appellant. In the summing up the learned trial Judge had dealt with the evidence comprehensively.

[28] At the very outset, I have referred to the grounds upon which the appellant is seeking to rely in assailing the conviction against murder.

[29] Making his oral submissions before Court, the appellant reiterated the fact that the learned trial Judge erred in failing to direct the assessors that during the recording of his caution interview, the police had failed to inform him that he has a right to remain silent, and as such there has been a miscarriage. He was emphatic that the right granted by the Constitution had been denied. However, the record of the Interview contained in the 2nd Volume of the transcript, at page 420, the available material provides a different picture; I find that the recording officer Women Detective Constable No.4217 Mereseini Naqiri had clearly stated that "you are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." This like a chorus keeps

appearing intermittently throughout the caution interview; pg 423 – Q43; pg 424 – Q47; p425 - Q63; p426 Q71; p428 – Q86; p431 – Q125; p43 - Q130; p434 – Q159; and continued throughout the interview.

[30] It evinces clearly that, despite the repeated reminders that the appellant under caution interview can remain silent as of right, the appellant had volunteered to relate the incident that culminated in the death of the deceased.

[31] In a dispassionate and objective handling of this issue the learned Trial Judge directing the assessors had stated as follows;

15. I now come to the issue of the police interview and charge statement given by the accused at the Sigatoka Police Station. He was given the right to remain silent, and he did not choose that option. In his statements, 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's statements are false and unreliable.

16. You have before you the caution interview and the charge statement of the accused in which he made those admissions. You heard accused giving evidence in Court. You also heard other evidence including that of two doctors who had examined him immediately after the arrest and after the interview and charging.

17. Mr. Kunaika, the JP had also recorded a statement in which the accused has made some admissions. That statement had been recorded at a Police Station on a request by police officers. The JP Mr. Kunaika said that accused gave his statement on his own free will. Accused on the other hand says that he made those admissions under duress.

18. 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.

[32] In the light of these facts, the contention of the appellant is untenable.

[33] Placing a serious importance on Q126 of page 431 of the proceedings the appellant sought to build up his contention that the answer to Q126 had not been probed into by the recording officer of the caution interview and as such there was a grave prejudice cause to him, on which the learned trial Judge had also failed to place any importance in the Summing Up.

[34] The question and answer referred to above is as follows;

“Q126.

Q. Do you wish to make any complaint before we resume with our interview?

A. Yes”.

What follows that answer was a direct reference to his degree of wellbeing in the sense the appellant had stated that his physical and mental stability is fit for him to continue with the ongoing interview. It is reflected in the answer to Question 127. If he had admitted that both physically and mentally he was fit to continue with the interview, the nature of his grievance on this matter seems to be rather incomprehensible. Further down in the caution interview, the appellant was specifically inquired if he wished to make any complaint before the resumption of the caution interview; the answer seems unequivocal; “No everything is fine” (see Q.131)

“Q.132

Q. Are you physically and mentally fit to continue with the interview?

A. Yes.”

[35] In the light of such material, the complaint based on the violation of his constitutional right is untenable and cannot be maintained to succeed as a ground of appeal.

[36] On the issue of the voluntariness of the confession the learned trial Judge had carefully probed into the moot issues and decided on the voluntariness on 29 July 2016; pp 100 to 111 record of the High Court.

[37] Dealing with the matter extensively the learned Trial judge had stated as follows in paragraphs 19 to 21 of the Judgments.

19. In light of accused’s 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.

20. I am satisfied that the confession given to police and the admissions made to Mr. Kunaika JP are truthful statements of the accused.

21. *I accept the version of the Prosecution, and reject that of the Defence. Prosecution proved the case beyond reasonable doubt.*

[38] As I have laid down in this discussion, it is not only the confession of the appellant that had been the foundation upon which the prosecution had built up its case; the available circumstantial evidence coupled with the conduct evidence of the appellant, prior to the commission of the crime and afterwards, the medical evidence and the other strings of evidence and their concomitance would evolve a strong case against the appellant which is unassailable having regard to the grounds he raised.

[39] In the circumstances, this appeal should be dismissed.

Bandara, JA

[40] I have read in draft the judgment of Gamalath JA and concur with the reasons and proposed orders therein.

Order of the Court:

Appeal is dismissed.

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice W. Bandara
JUSTICE OF APPEAL