IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 125 OF 2022

BETWEEN: **SAIMIMU DEAN**

Appellant

AND: **THE STATE**

Respondent

Coram: **Mataitoga, AP**

Counsel: **Sen, A for the Appellant**
Semisi K for the Respondent

Date of Hearing: **30 September 2024**

Date of Ruling: **2 December 2024**

RULING

1. The appellant [Saimimu Dean] with another were charged and tried in the High Court at Labasa with 1 count of Arson contrary to section 364(a) of the Crimes Act, 1 count of Attempted Murder contrary to section 44(1) and 237 of the Crimes Act 2009 and 4 counts of Murder contrary to section 237 of the Crimes Act 2001.

2. Following the trial the appellant was found guilty as charge and was convicted in a judgment delivered on 28 October 2022. He was sentenced on 11 November 2022 to

mandatory life imprisonment with a minimum term of 18 years imprisonment before he can seek pardon through the Mercy Commission.

3. The appellant through counsel [A.K. Singh Law] filed Notice of Appeal pursuant to section 21 of the Court of Appeal Act, on 22 November 2022. The Notice of Appeal set out 8 grounds of appeal against conviction. The appeal was timely. All the 8 grounds of appeal alleged error of law and fact on the part of the trial judge. Under section 21(1)(b) of the Court of Appeal leave is required to appeal.

Relevant law

4. In terms of section 21(1) (b) of the Court of Appeal Act the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** see: **Caucau v State [2018] FJCA 171**; **Navuki v State [2018] FJCA 172** and **State v Vakarau** [2018] FJCA 173; and **Sadrugu v The State** [2019] FJCA 87.

Review of the Appeal Ground

5. The first ground allege that the trial judge erred in law and fact in failing to properly consider the objections by the appellant counsel regarding the DNA testing process. The trial judge handled the appellant's objections this way: **State v Dean [2022] FJHC 686 (HAC 025 of 2020)**

> *"222. Mr Sen vigorously challenged the reliability of the testing process and the results it produced. The same challenge was made in respect of the DNA testing process. I concede that non-disclosure of the process and the procedure before trial by the DPP's office, despite repeated requests, has put the Defence at a disadvantage when it comes to effectively challenging the results. However, the fact that Mr. Sen's coming on board at the 11th hour to defend the 1st accused, even after the trial was fixed, would have made the things difficult to the DPP's office.*
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> *223. I have no doubt the Scientific Officer Miliana is qualified and experienced in her field. She comprehensively explained the techniques, the processes and the machines she used in her lab. It is true that she was not able to produce the calibration certificate updates and standards certificates. She frankly*

admitted that the machines are not capable of identifying the particular accelerant present. I am satisfied that she produced reliable and credible results.

224. If this challenge was made in a traffic case of speeding or drunk driving where the police officers solely rely on a machine to prove their case, I would have upheld the objection of the Defence. However, this is not such case. The test results would certainly be evaluated against other evidence led in the trial. I accept the test results of the FCL that all the exhibits stated above tested positive for accelerant and it is capable of causing fire and that benzene is not ruled out.

6. The issue really is whether there is prejudice suffered by the appellant in his defence, as a result of the finding of the trial judge. It is reasonable to assume that the gap allegedly created by non-disclosure by the DPP of the DNA testing process and procedure, which was covered in the evidence of Miliana the Scientific Officer prejudice the appellant's defence preparation.

7. The appellant alleges that his defence was prejudiced by the fact that he was no able to call his own independent expert witness to impeach the evidence of DNA because he was denied through non-disclosure by the DPP of the procedure and process their expert followed and the trial judge's ruling on the issue.

8. The broader issue of **fairness in the trial process** is also a consideration in ensuring that the interest of justice is maintained. It was not directly raised by counsel for the appellant but it is embedded in his ground of appeal and the manner it was treated by the court. Section 14 of the Constitution of the Republic of Fiji, confers rights on the appellant (accused) when facing trial. This was not considered by the trial court in dealing with the request of the appellant counsel for DPP to disclose the procedure and process of DNA evidence.

9. In section 14(2) [c] of the Constitution the appellant has 2 distinct rights protected: i} adequate time and facilities to prepare defence and ii) the right to access witness statements. The appellant's right may have been denied.

10. Section 14(2) [e] of the Constitution give the right to the appellant; to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence.

11. The late engagement of counsel for the appellant and the fact he was engaged after the trial date was fixed, is insufficient to mitigate, the need for the appellant's rights at the pre-trial stage is observed strictly..

12. I am satisfied that ground of appeal has reasonable prospect of success should be allowed so that the issues pertaining to pre-trial rights of the appellant will be considered by the full court, with the benefit of all the record of the trial below.

Grounds 2, 3, 4 and 5 – What was the accelerant used and its relevance

13. All the above grounds relate to the use of an accelerant to burn the house in question. The appellant's submission is imprecise in articulating what is the relevance of the accelerant use, its smell and whether they were present on the clothes worn by suspects at the material times.

14. The evidence from the trial concludes that there was an accelerant used to burn the house. The likely place where the accelerant was placed, is in one of rooms of the house. To determine who may have been responsible for placing the accelerant in the burnt-out house, the police investigators carried out several tests to determine who may have done that, it established nothing positive against the appellant.

15. The issue in contention was: who placed the accelerant in the house. In this regard the expert evidence was inconclusive in nature in determining whether the appellant bucket hat which was tested for his DNA. Without that positive DNA test, the evidence against the appellant as the arsonist is threadbare. Despite this lack of forensic evidence, the alteration of the Report of the fire investigator, and the trial judge reliance on Viliame Vamalumu's [PW3] evidence as bolstering the finding of the forensic investigators, need further elaboration from the full record of the trial.

16. These grounds as presently argued has unreasonable prospect of succeeding on appeal. However, if its renewed, on appeal with more clear connectivity between the claims and the elements of the offence it may succeed.

17. I refuse leave to appeal on these grounds.

Altered Report of the Fire Investigator

18. The appellant claim for this ground of appeal, is that the trial judge did not place sufficient weight on the contradictory report of the fire investigator. The fire investigator first report was that the fire started from inside the house.

19. The trial judge recorded the evidence as follows: see Judgment

> *"89. Under cross-examination by Mr. Sen, Petueli said that criminal activity was considered as a possible cause of the fire. He agreed that in the statement to police, he had stated ...we found that the fire started from inside the house. That statement was done on the day of the investigation and the report was prepared after that.*
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> *90. Under cross-examination by Mr Rabuku, Petueli agreed that most accidental fires originate from within the dwelling house. He could not determine whether any accelerant liquid was used to start the fire. In his final report, it does say that it cannot be determined whether the fire originated above the floor, from within or underneath the floor or from outside because the whole floor was burnt so there was no pattern to work on the floor of the fire. Usually if there's a pattern that remains and he will be able to work with that and identify where the fire had started. His statement to police was based on his internal observation of the fire in the early hours of the morning. After the full investigation, he changed his mind when he did his report.*

20. Having referred to this report. The appellant in his submission have not stated how the two inconsistent versions of the Fire Investigators report, support any of the grounds of appeal or arguments he advanced. If anything, the reports is further evidence of the lack of professionalism in all the forensic evidence that the prosecution adduced.

21. This ground of appeal has no merit and is dismissed.

Ground 7 – Unfair Trial Procedure

22. This ground of appeal is already discussed in paragraphs 8 to 11 above.

23. In addition, the trial was marred by the type of evidence lead by the prosecution. Some examples of this are:

- Evidence of Vilimone Vamalumu PW3 he was basically coached to say what he said in court to implicate the appellant without the trial Judge stopping such evidence.

- The evidence of the Chief Scientific Officer Miliana Werebauiloma in paragraphs 92 to 101 of the judgement outstanding in its lack of professional standards: this is an example from the judgment

  "99. Under cross-examination by Mr. Sen, Miliana admitted that her laboratory is not accredited by law. She has no idea of the method of collection of the items by the uplifting officers. The methodology of testing and spectrum that was used to identify the accelerant were not disclosed to the defence. If a request was made they would have provided it to the DPP's office. If a person driving a gasoline taxi and goes and fills the fuel, his clothes can be contaminated with gasoline.

  100.When the lid of the gallon (MFI 3) was opened and shown to the witness, she agreed that some liquid was already in there and that it does have a slight odour that is of an accelerant. They didn't analyse the liquid but the gas that was produced in the head space. She agreed that the gallon had been in a dirty place. Brush cutters are generally powered by premix. She agreed that the instrument she used to detect the accelerant was not calibrated under Trade and Measurements Act.

  101. Under cross-examination by Mr Rabuku, Miliana agreed that she was not involved in collection of the samples from the scene of the fire but only in the analysis that's done in the lab. The findings of fire investigators do at the scene

in terms of an accelerant is not conclusive in nature. Her analysis she used would determine whether there is accelerant and secondly what type of accelerant. She agreed that the correctness of her findings would depend on the correct decisions of fire investigators who uplifted the samples, the method of extraction of these samples and the method of storage of those samples before they had reached her. She is not aware if the pair of red shorts had been worn by 2nd accused's brother. If the pair of shorts was used for grass cutting, the presence of accelerant therein is a possibility. She did not agree that the findings of her lab were flawed or unreliable, but admitted it had limitations for the purposes of criminal prosecutions." {Emphasis mine}

24. The above are examples of the improper way in which evidence was adduced without the court intervening to ensure the process is fair to the defence as well.

25. Leave is granted for this ground to be reviewed by the full court.

ORDERS:

1. Leave is granted to the appellant to appeal on grounds 1 and 7
2. Leave is refused for grounds 2, 3, 4, 5, and 6.

The Hon Isikeli U Mataitoga
Acting President