DIP CHAND v STATE (CAV0014 of 2010S)

SUPREME COURT — CRIMINAL JURISDICTION

MARSOOF, HETTIGE and SUNDARAM JJ

2, 9 May 2012

Criminal law — appeals — from Court of Appeal to Supreme Court — upon grant of special leave — grant of leave in cases premised on grounds not advanced before Court of Appeal — powers of Supreme Court — further evidence on appeal — distinction between "fresh" and "new" evidence — approach of Supreme Court to grant of permission to adduce fresh evidence — Administration of Justice Decree s 8(1) — Constitution Art 29(1) — Court of Appeal Act s 28 — Criminal Justice Act s 32 — Criminal Procedure and Investigations Act ss 3(1)(a), 7(2)(a) — Penal Code ss 199, 200 — Supreme Court Act ss 7(2), 14.

Evidence — scientific — DNA evidence — approach to admissibility of DNA evidence

In the High Court at Lautoka, the petitioner was charged with, and convicted of, three counts of murder of three sisters. The prosecutor adduced evidence of the petitioner's confession, which the petitioner had given voluntarily, and otherwise relied entirely on circumstantial evidence, including DNA evidence. The Court of Appeal affirmed the conviction and sentence. The petitioner sought special leave to appeal from the judgment of the Court of Appeal to the Supreme Court, and moved the Supreme Court to adduce fresh evidence on the application. At issue was the power of the Supreme Court to permit a party to adduce fresh evidence on appeal, the role of the Supreme Court in hearing appeals in criminal matters from the Court of Appeal, the nature and extent of the prosecutor's duty to disclose material matters to a criminal defendant, and the status of DNA evidence in criminal matters.

Held –

(1) The Supreme Court has both express and inherent power to permit a party, in an appropriate case, to adduce fresh evidence, which power should be exercised judicially having regard to the interests of justice. In deciding whether or not fresh (as opposed to new) evidence should be permitted to be adduced on appeal, the petitioner must establish that he either did not know about, or could not have discovered by his reasonable diligence, the evidence.

(2) The Supreme Court, in hearing appeals in criminal matters from the Court of Appeal upon grant of special leave, did not permit appeals as of right, but especially did not permit appeals on grounds not advanced below in the absence of substantial and grave injustice.

(3) Although the prosecution owes a criminal defendant a duty to disclose material matters, the duty is not absolute and is subject to the discretion of prosecuting counsel in terms of what material to withhold and the timing of any disclosure, which includes assessments as to material that is clearly irrelevant and need not be disclosed.

(4) Although DNA evidence will be unassailable where expert evidence to that end is not challenged at trial, such evidence may not be admissible at trial where a party offers expert testimony challenging the reliability of the procedures or the results.

Application for special leave to appeal dismissed.

Cases referred to

Aminiasi Katonivualiku v State (Criminal Appeal No CAV0001/1999S); *Connelly v Director of Public Prosecutions* [1964] AC 1254; *Daubert v Merrell Dow Pharmaceuticals Inc* [1993] USSC 99; 509 US 579 (1993); *Gallagher v R* (1986) 160 CLR 392; *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318; *Josateki*

Solinakoroi v State Criminal Appeal No CAV 0005 of 2005; *Kwaku Mensah v R* [1946] AC 83; *Lawless v R* (1979) 142 CLR; *Mickelberg v R* (1989) 167 CLR 259; *R v Keane* [1994] 1 WLR 746; *R v Parks* [1961] 3 All ER 633; *Ratten v R* (1974) 131 CLR; *Raura v State* [2006] FJSC 4; CAV0010U.2005S (4th May 2006); *Sachinda Nand Mudaliyar v State* CAV0001/2007; *Spencer v Commonwealth* 384 SE 2d 775 (Va 1989); *State of Minnesota v Schwartz* NW 2d 422 (Minn SC 1989), cited.

Cannon v Tahche [2002] VSCA 84 (13 June 2002); *Craig v R* (1933) 49 CLR 429; *Frye v United States* 293 F 1013 (1923); *Ladd v Marshall* [1954] 3 All ER 745; *R v Bain* [2004] 1 NZLR 638; *R v Stinchcombe* [1991] 3 S.C.R. 326; *R v Ward* [1993] 1 WLR 619, considered.

S. Sharma instructed by *A Singh (Anil J Singh Lawyers)* for the Petitioners.

S. Puamau instructed by *Office of the Director of Public Prosecutions* for the Respondent.

[1] Marsoof, Hettige and Sundaram JJ. This is an application for special leave to appeal against the judgment of the Court of Appeal (Byrne, AP, Calanchini, J and Temo, JA) dated 19th October 2010, affirming the conviction and sentence imposed on the Petitioner by the High Court of Fiji at Lautoka.

[2] The Petitioner was charged on 3 counts of murder contrary to s 199 and 200 of the Penal Code, Cap 17, of three sisters, Ashika Sherin Lata, Renuka Rohini Lata and Radhika Roshini Lata, who were respectively, 19, 18 and 17 years of age when they were allegedly murdered by the Petitioner.

[3] It is common ground that the three young ladies were taken from their home in the western end of Viti Levu by the Petitioner, whom they called 'aaja' (grandfather), in his boat towards a nearby island known as Malake Island, on a fishing trip and picnic. The following day the boat was found drifting with visible signs of blood on the boat, and the explanation offered by the Petitioner was that they were set upon by unknown persons who approached his boat in a red boat, and abducted the 3 girls after beating him and rendering him unconscious.

[4] Extensive search carried out on the sea in the vicinity of Malake island for a number of days, proved futile, and the bodies of the 3 girls were never found. On 4th July 2005, in the course of his caution interview, the Petitioner confessed that he killed Ashika, Radhika and Renuka hitting each one of them repeatedly on the head with a stick he used to kill fish, in a frenzy over an argument he had with Ashika, which position he substantively repeated in responding to the 3 charges that were read out to him on 6th July 2005.

[5] After a *voir dire* (trial within the trial) which extended from 1st May to 8th May 2006, at which the Respondent called 8 witnesses while the Petitioner made an unsworn statement, the learned High Court Judge (K Govind J), delivered his ruling on 10th May 2006, holding that the confession was made voluntarily.

[6] Thereafter, the Petitioner was tried in the High Court of Lautoka before 3 assessors from 10th May to 18th May 2006, with 17 prosecution and 3 defence witnesses testifying. At the end of the trial, the assessors unanimously found the Petitioner guilty as charged, and the trial judge (K. Govind J.) convicted and sentenced him on 19th May 2006, to life imprisonment with a minimum term of 19 years imprisonment.

[7] On appeal to the Court of Appeal, the conviction and sentence were affirmed, by its judgment which was pronounced on 19th October 2010.

[8] The Petitioner, having invoked the jurisdiction of this Court by his petition dated 25th October 2010, which was improved upon by his amended petition dated 11th September 2011, was heard in support of his application for special leave to appeal on 13th October 2011.

[9] On 13th October 2011, Mr Sharma, who appeared for the Petitioner, moved to withdraw the petition dated 11th September 2011 to enable him to file a fresh application for special leave to appeal including a ground of alleged non-disclosure of the medical card dated 8th July 2005 maintained by the Medical Orderly of Natabua prison, and an application to adduce fresh evidence, if any, pertaining thereto. As learned State Counsel had no objection to this application, this Court granted Mr Sharma leave to withdraw the application already filed, and to file within six weeks a fresh application for special leave to appeal as aforesaid, subject to any objections that may be taken up thereto by the Respondent.

Application to Adduce Fresh Evidence

[10] The Petitioner has accordingly filed a fresh application for special leave to appeal dated 2nd November 2011, which contains 13 grounds of appeal, of which ground (i), which is quoted below, is directly relevant to the motion for permission to adduce fresh evidence:-

> (i) The trial miscarried since the police and/or the prosecution did not disclose to the defence the Petitioner's medical card kept by Natabua prison and details of his medical examination at the Lautoka Hospital on 14th July 2005 despite consenting to the tender of Petitioner's X-ray report dated 14th July 2005 during trial.

[11] Four affidavits in all have been filed by the Petitioner in support of the motion to produce the aforesaid medical card containing certain notes pertaining to the Petitioner's medical condition within the period 8th July 2005 to 13th August 2005 as fresh evidence. There are two affidavits sworn by the Petitioner on 3rd November 2011 and 21st November 2011 respectively, and two other affidavits affirmed to by Inoke Takiveikata, who was, at the relevant time, the Medical Orderly attached to the Natabua prison, where the Petitioner was detained, and Dr Akthar Ali, who is the Principal Medical Officer of the Lautoka Hospital, who had examined the Petitioner on 14th July 2005 and 29th July 2005, while he was in custody.

[12] The photocopy of the aforesaid medical card reveals that on 8th July 2005, the Petitioner had informed the Medical Orderly that he had been assaulted inside the Rakiraki Police Station Crime Office for six consecutive days. The Orderly has noted that the Petitioner complained of body pain, chest pain, back ache and a swollen left ear, and that he was referred to the Visiting Medical Officer for further medical examination and treatment. The Visiting Medical Officer had, after examining the Petitioner, observed that there were no visual signs of any injury on the chest.

[13] The next entry in the medical card is dated 14th July 2005, and was made by the Medical Orderly, who has noted that the Petitioner complained of shortness of breath and was referred to the Lautoka Hospital for further examination. An x-ray of the chest taken at the said Hospital, which was marked in evidence at the trial as defence exhibit DW1, showed that the Petitioner had three fractured ribs. Hence, he was examined by Dr Akthar Ali, who had him admitted to the Surgical Ward of that Hospital for observation for a few hours, and was discharged at 2pm on the same day as his condition was stable, after re-booking him to be seen at the Clinic on 29th July 2009.

[14] It appears from the very next entry in the medical card that Dr Ali saw the Petitioner once again on 29th July 2005, and another x-ray done on that day which revealed that the injuries and fractures were healing without any complication and that there was no need for another follow up.

[15] There are two other entries pertaining to the Petitioner's medical condition dated 11th August and 13th August 2005, which show that he was treated by the Lautoka Hospital for asthma and general body pain.

[16] Mr Sharma, who appears for the Petitioner, has submitted that the non-disclosure of the medical card pertaining to the Petitioner kept by Natabua prison, and the summary of injuries suffered by the Petitioner as noted in the said card after the Petitioner underwent medical examination at the Lautoka Hospital on 14th July 2005, deprived the Petitioner of material evidence demonstrative of the involuntary nature of the confession made by him while he was in Police custody. He submitted that unless the Petitioner is permitted to adduce the medical card, a serious miscarriage of justice will result.

[17] The Respondent has taken strong objection to the application of the Petitioner to produce fresh evidence. Responding to the submissions of learned Counsel for the Petitioner, learned State Counsel has submitted that the x-ray of chest taken at Lautoka Hospital on 14th July 2005 was marked in evidence at the trial by the defence as DW1, and that since the medical card in question had been maintained by the Medical Orderly who accompanied the Petitioner to the said Hospital, the Petitioner knew or ought to have known, of the existence of the card, and could have produced it if so advised. She has further submitted that the voluntary nature of the confession made by the Petitioner has in any event been established by the testimony of other independent witnesses, and hence he suffered no prejudice by reason of the medical card having not been put before the Court during the *voir dire*.

[18] Learned State Counsel also submitted that the said card was not one of the documents in the possession of the Respondent, although it was one, which the Petitioner with reasonable diligence could have obtained and produced at the trial, if it was material to his case. She further submitted that no application was made by the Petitioner at anytime, either in person or through Counsel, for the purpose of having it adduced in evidence.

[19] This Court no doubt has the power to permit a party, in an appropriate case, to adduce fresh evidence. Section 28 of the Court of Appeal Act, expressly provides that the Court of Appeal may, if it thinks it 'necessary or expedient in the interest of justice' receive fresh evidence, and in terms of s 14 of the Supreme Court Act No. 14 of 1988, this Court is possessed of all powers vested in the Court of Appeal, and as the apex court of Fiji Islands, it has the inherent power to make any order that is conducive to the achievement of the ends of justice. As was observed by the High Court of Australia in *Craig v R* [1933] HCA 41; (1933) 49 CLR 429 at 439-

> 'A court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence had cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable man to be affected. Such evidence should be calculated at least to remove the certainty of the prisoners' guilt which the former evidence produced. But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance.'

[20] Admission of fresh evidence at the stage of an appeal may either be conclusive of the appeal or may cause the court to order a retrial of the matter. The bases for allowing the reception of fresh evidence were set out in *Ladd v Marshall* [1954] 3 All ER 745. In that case Lord Denning, at page 748 A-B, outlined them in the following passage:

> 'In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.'

[21] Similar, though not identical criteria, to those laid down in *Ladd, R v Parks v Marshall* were stated in [1961] 3 All ER 633. An important consideration that influenced the approach of the courts in these cases was the interest of the state that litigation should come to an end. In *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, the English Court of Appeal emphasised that strong grounds were required to allow fresh evidence in the face of a final decision. These consideration were foremost in the minds of the learned judges in decisions of the High Court of Australia in *Ratten v R* (1974) 131 CLR 510 and *Lawless v R* (1979) 142 CLR 659.

[22] The Australian decisions referred to above have also establish that at common law, a distinction is drawn between 'fresh' evidence, that is to say evidence which was not known to the accused at the time of his trial, and which could not have been discovered by him with reasonable diligence, and evidence which is merely 'new' that is, evidence that were either known to the accused, or which he could have with reasonable diligence, discovered. See, *Gallagher; v R* (1986) 160 CLR 392 at 402 and 410; and *Mickelberg; v R* (1989) 167 CLR 259 at 301. Evidence which was either available, or could with reasonable diligence have been discovered before trial, is not 'fresh' evidence.

[23] In *Sachinda Nand Mudaliyar v The State* CAV0001/2007, the aforesaid distinction was adopted and applied by this Court, in the context of an application to lead fresh evidence in the course of an appellate hearing, which might have, if permitted, cast a reasonable doubt as regards the guilt of an accused who had been tried and convicted by the High Court. In this case, the proposed fresh evidence consisted of an affidavit from Dr John Wittaker, a highly qualified gynaecologist, who had testified for the prosecution at the trial, seeking to qualify his previous testimony in the light of fresh evidence placed before him, and another affidavit from Dr Andrew Mackintosh, who was also a highly qualified gynaecologist, who had not testified at the trial. In refusing to permit the proposed fresh evidence, this Court observed at paragraph 61 of its judgment that 'a decision deliberately taken by an accused not to adduce evidence of a particular kind at trial will weigh heavily against its reception on appeal.'

[24] However, as this Court proceeded to point out in *Sachinda Nand Mudaliyar,* in regard to the question whether fresh evidence ought to be allowed, 'no invariable rule concerning the failure to call such evidence can or should be laid down. The discretion conferred upon the Court must be exercised judicially, but having due regard to the interests of justice, above all else.'

[25] A crucial consideration in deciding whether fresh evidence should be permitted in this case, is that there is a strong likelihood that the Petitioner was aware or should reasonably have been aware of the existence of the medical card now sought to be produced, as the card was maintained in relation to him, and the defence has produced at the trial the x-ray that was taken at Lautoka Hospital on 14th July 2005.

[26] However, even if the defence was not possessed of the said medical card, it is clear that the defence could have procured the same with reasonable diligence. As Tipping J observed in the New Zealand decision of *R v Bain* [2004] 1 NZLR 638 –

> 'Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation.'

[27] Even if we consider that the Petitioner was, for some reason, not in fact been aware of the existence of the medical card at the time of the *vior dire* or at the time the trial was heard before the assessors, the Petitioner cannot deny that he was aware of the existence of the card a few months before he lodged his appeal to the Court of Appeal on 10th April 2007. In this case, leave to appeal was granted by the Court of Appeal on 18th of July 2008, the appeal was heard on 27th September 2010 and judgement pronounced on 19th October 2010.

[28] It is important to note that Petitioner has stated in paragraph 12 of his affidavit dated 3rd November 2011 that on his instructions his lawyer sent a letter on 4th July 2006 to the Officer in Charge of the Natabua Prison requesting a copy of his medical card and certain other information. He has stated further in paragraph 13 of the said affidavit that after receiving a copy of his medical card from the Natabua Prison, his lawyer wrote to the Lautoka Hospital on 17th July 2006 requesting a copy of his medical report maintained in that hospital, and that on 27th July 2006 he received from the late Dr V. Taoi, who was at that time the Acting Consultant Surgeon of the Lautoka Hospital, a copy of his medical report. Further explaining the position, Dr Akthar Ali in paragraph 16 of his affidavit of 16th November 2011 has stated that the letter sent by the late Dr V Taoi dated 27th July 2006 contains a summary of what is contained in the medical folder of the Petitioner.

[29] Having received a copy of the medical card and from the Natabua prison and other relevant information from the Acting Consultant Surgeon of Lautoka Hospital at least by the end of July 2006, the Petitioner has failed to make an application to the Court of Appeal to adduce fresh evidence. Section 28 of the Court of Appeal Act has empowered that Court, if it is considered necessary or expedient in the interest of justice, to order production of any document, exhibit or other thing connected with the proceedings, the production of which appear to them necessary for the determination of the case.

[30] The Petitioner has not offered any explanation for not seeking permission of the Court of Appeal to lead fresh evidence. At the time of Appeal the appellant was aware of the existence of the medical card, or at least the contents thereof, which were summarised in the letter of Dr Akthar Ali. The Court of Appeal is empowered by statute and common law to admit fresh evidence in an appropriate case, and the Petitioner who has failed to apply to the Court of Appeal for permission to adduce fresh evidence, cannot be permitted in the course of an

application for special leave to appeal to this Court make an application to produce fresh evidence, unless he can show that he became aware of the fresh evidence after the completion of the appellate proceedings in the Court of Appeal.

[31] Having given the application of the Petitioner to lead fresh evidence careful consideration, we are not persuaded that this is an appropriate case to permit the Petitioner to adduce the medical card and details of his medical examination at the Lautoka Hospital on 14th July 2005 as fresh evidence, and we accordingly reject the said application.

Special Leave to Appeal

[32] It is now necessary to deal with the application of the Petitioner for special leave to appeal against the judgment of the Court of Appeal affirming his conviction and sentence. Section 8(1) of the Administration of Justice Decree confers on the Supreme Court the exclusive jurisdiction, *subject to such requirements as prescribed by law*, to hear and determine appeals from all final judgments of the Court of Appeal. Section 7(2) of the Supreme Court Act No 14 of 1998, sets out stringent criteria for the grant of special leave to appeal in the following manner:-

> 'In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-
>
> (a) a question of general legal importance is involved;
>
> (b) a substantial question of principle affecting the administration of criminal justice is involved; or
>
> (c) substantial and grave injustice may otherwise occur.'

[33] The Petitioner has, in his amended petition for special leave to appeal dated 2nd November 2011 filed in this Court, set out the following grounds of appeal:-

(i) The trial miscarried since the police and/or the prosecution did not disclose to the defence the Petitioner's medical card kept by Natabua prison and details of his medical examination at the Lautoka Hospital on 14th July 2005 despite consenting to the tender of Petitioner's X-ray report dated 14th July 2005 during trial;

(ii) The learned Trial Judge erred in law and in fact when he misdirected himself during the trial within trial (*voir dire*) by wrongly assuming that the Petitioner was released by the police in the evening of the 28th or the 30th July and yet not complaining to anyone about police impropriety;

(iii) The learned Trial Judge erred in law and in fact when he disregarded the relevance of the Rakiraki Police Station diary exhibit one (1) which contained notings crucial to the question of admissibility of the confessions obtained by the police;

(iv) The learned Trial Judge erred in law when he did not direct his mind to the fact that the caution interview of the Petitioner exhibit 'c' was oppressive in that the questioning started on 4th July 2005 at 22.13 hours (10.13pm) ending at 02.40 hours (2.40am) the next day;

(v) The learned Trial Judge erred in law and in fact when he convicted the Petitioner in the absence of any cogent evidence to prove the theory contained in the confession.

(vi) The trial miscarried when PW4 Vijay Kumar Singh gave evidence about matters which were prejudicial to the Petitioner and as such he was denied a fair trial resulting in miscarriage of justice;

(vii) The learned Court of Appeal Judge erred in law when they failed to provide a reasoned decision other than stating that the summing up as a whole was fair and balanced which did not disclose any errors of law;

(viii) The learned Court of Appeal Judges erred in law when they confined and/or limited the role of the learned trial Judge to only putting counsels submissions to the assessors without realizing that it was important for the learned trial Judge to give his version as well;

(ix) The state failed to discharge the onus upon it to prove that the DNA sample obtained from the crime scene and the victims tooth brushes were not contaminated;

(x) The learned trial Judge failed and /or neglected to fairly put the defence of the Petitioner to the assessors which resulted in substantial miscarriage of justice;

(xi) The learned trial Judge erred in law and in fact by failing to assist the assessors from isolating favourable evidence from the least favourable ones, in effect the learned trial Judge repeated the State and Defence case without assisting the assessors;

(xii) The learned trial Judge and the learned Court of Appeal Judges failed to direct the assessors or themselves that the onus was on the state to disprove that the confession was not obtained as a result of police impropriety on the Petitioner and further the learned trial Judge misled the assessors by implying that there was onus on the Petitioner to complain to the Police; and

(xiii) The learned trial Judge failed to direct and remind the assessors that in a case involving circumstantial evidence if there is any doubt or hypothesis consistent with innocence it was their duty to acquit.

[33] It is necessary to note at the outset that most of these grounds are new grounds of appeal in the sense that except for grounds (xii) and (xiii), none of the others were taken up in the Court of Appeal. Grounds (i) to (v) were not even included in the original petition for special leave to appeal filed in this Court by the Petitioner on 25th October 2010, or the amended petition filed on his behalf dated 11th September 2011, but grounds (vi) to (xiii) were the same as grounds (b) to (j) in the said petition dated 25th October 2010.

[34] Given that the criteria set out in s 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course, the fact that the majority of the grounds relied upon by the Petitioner for special leave to appeal have not been raised in the Court of Appeal, makes the task of the Petitioner of crossing satisfying the threshold requirements for special leave even more difficult.

[35] It is necessary to stress that the said criteria in a sense curtail the power of the Supreme Court to grant special leave to appeal against a final judgment of the Court of Appeal, and as was observed by this Court said in *Aminiasi Katonivualiku v The State* (Criminal Appeal No: CAV0001/1999S) at 3-

> 'It is plain from this provision that the Supreme Court is not a Court of Criminal appeal or general review nor is there an appeal to the Court as a matter of right and... the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal....'
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> The above passage was cited with approval by this Court in *The State v Raura* [2006] FJSC 4; CAV0010U.2005S (4th May 2006).

[36] The Supreme Court has been even more stringent in considering applications for special leave to appeal on the basis of grounds of appeal not taken up or argued in the Court of Appeal. In *Josateki Solinakoroi v The State* Criminal Appeal No: CAV 0005 of 2005, the Supreme Court of Fiji in an

exceptional case took into consideration the principles developed by Privy Council in similar situations, and in particular relied on the following observation in *Kwaku Mensah v R* [1946] AC 83

> '*Where a substantial and grave injustice might otherwise occur the Privy Council would allow a new point to be taken which had not been raised below even when it was not raised in the appellant's printed case:'*

[37] Mr Sharma has in these circumstances submitted that the Petitioner's application for special leave to appeal is a rare and exceptional one which raises questions of general legal importance involving substantial questions of principle affecting the administration of criminal justice. He in particular emphasised that ground (i) relating to the failure on the part of the prosecution to disclose the medical card maintained at the Natabua prison raised important issues pertaining to the prosecution's duty to disclose material evidence to the defence, and ground (ix) concerned important issues of the integrity of DNA samples in criminal investigation and trial. He has also submitted that the denial of special leave at least with regard to these two grounds will result in a substantial and grave injustice.

[38] Responding to these submissions, Ms Puamau, who appears for the Respondent, has stressed that the grounds urged by the learned Counsel for the Petitioner are mostly factual, and those factual matters have been dealt with fairly and adequately in the Judgment of the learned High Court Judge after the *voir dire* hearing, the learned High Court Judge's directions to the assessors, as well in the judgment of the Court of Appeal. She also stressed that only the last two grounds urged by the Petitioner had been taken up by the Petitioner in the Court of Appeal, and that they have been addressed in the judgment of the Court of Appeal, and that no explanation has been offered by the Petitioner for his failure to take up the rest of the matters in his appeal to the Court of Appeal.

[39] In the light of these submissions, we consider it sufficient to focus on the two issues which have been stressed by Mr Sharma.

Prosecution's Duty to Disclose Material Evidence

[39] Ground (i) on which the Petitioner seeks special leave to appeal relates to the duty of the prosecution to disclose material evidence to the defence. What is in issue here is whether the omission on the part of the Respondent to disclose to the Petitioner the medical card pertaining to the Petitioner maintained at the Natabua prison, violated this duty of the prosecution resulting in a substantial and grave injustice.

[40] We have already dealt with the relevant factual position when considering the Petitioner's application to adduce fresh evidence. While it is unnecessary to repeat them here, it may be useful to refer to the submission of Mr Sharma that the failure on the part of the Respondent to disclose the medical card in a timely manner, violated Article 29(1) of the Constitution of 1997, which confers on every person charged with an offence the right to a fair trial before a court of law. He contended that the said right to a fair trial envisaged a corresponding positive and continuing duty on the part of the prosecutor to disclose during any part of the trial, material that may assist the defence.

[41] Under the common law, the duty to disclose encompassed the disclosure of all material matters which affected the case relied on by the prosecution, whether they would strengthen or weaken the prosecution case or assist the defence case. Traditionally, the prosecution duty was considered to be restricted

to a duty to make available to the defence, witnesses whom the prosecution did not intend to call, and earlier inconsistent statements of witnesses whom the prosecution were to call: see Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 41st ed (1982), paras 4-178-4-179. The prosecutor's duty to disclose, is just one aspect of what is sometimes called the 'prosecutor's obligation to act fairly'. The rules of practice, which are calculated to enhance the administration of criminal justice by ensuring that accused persons have a 'fair trial', are collected in the speech of Lord Devlin in *Connelly v Director* of Public Prosecutions [1964] AC 1254 at 1347. As his Lordship noted, it is the court itself which carries the responsibility of ensuring that an accused has a 'fair trial', and, to that end, will enforce practices such as those which extend to controlling the form of presentment or indictment to prevent abuses of the court's process which involve unfairness to the accused.

[42] In *R v Ward* [1993] 1 WLR 619, 674 this limited approach to disclosure was held to be inadequate, wherein it was said that –

> 'An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial'.
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> The rule was stated with reference to scientific evidence, because that is what the case concerned, but the authority was understood to be laying down a general test based on relevance: see *R v Keane* [1994] 1 WLR 746, 752.

[43] In England, the common law underwent change by reason of the enactment of the Criminal Procedure and Investigations Act 1996, which gave statutory force to the prosecution duty of disclosure, but changed the test. Although not applicable in Fiji, the provisions of this Act are of some comparative interest. Under s 3(1)(a) of the Act, primary disclosure must be made of any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused. Secondary disclosure under s 7(2)(a) is to be made, following delivery of a defence statement, of previously undisclosed material which might be reasonably expected to assist the accused's defence. Section 32 of the Criminal Justice Act 2003, has amended s 3(1)(a) of the 1996 Act so as to require primary disclosure of any previously undisclosed material 'which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused'.

[44] In Australia, although the principles of common law are generally applicable, there are differences in the law in the various jurisdictions within the country, as explained in the New South Wales Law Commission Report of 2000. However, the best statement of the ambit of the prosecutor's duty in the Australian context is to be found in the judgement of Chernov, J in *Cannon v Tahche* [2002] VSCA 84 (13 June 2002) at paragraph 57, which is quoted below-

> 'The prosecutor's 'duty of disclosure' has been the subject of much debate in appellate courts over the years. But, as it seems to us, authority suggests that, whatever the nature and extent of the 'duty', it is a duty owed to the court and not a duty, enforceable at law at the instance of the accused. This, we think, is made apparent when the so-called 'duty' is described (correctly in our view) as a discretionary responsibility exercisable according to the circumstances as the prosecutor perceives them to be. The

responsibility is, thus, dependent for its content upon what the prosecutor perceives, in the light of the facts known to him or her, that fairness in the trial process requires.'

[46] A similar view has been expressed in the leading Canadian case of *R. v Stinchcombe* [1991] 3 SCR 326. As Sopinka J observed in the course of his judgment in that case-

'....this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers, the Crown has a duty to protect their identity. In some cases, serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. Discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant.....'

[47] In the light of the above case law, it is impossible to discern in the circumstances of this case, a violation of the prosecution's duty to disclose material evidence. In the first place, there is nothing to suggest that the prosecution was aware of the existence of the medical card that the Petitioner alleges should have been disclosed to him. Even if the Respondent was possessed a copy of the medical card, or was aware of its existence, in the absence of any request from the Petitioner for its disclosure or production, the Respondent could not have anticipated that the Petitioner was in need of this document and cannot be blamed entirely for its non non-disclosure.

[48] We have set out in paragraphs 25 to 29 of this judgment the facts relevant to the alleged non-disclosure, and it becomes obvious from these facts that it was the Petitioner who was in a better position to know about the existence of the medical card, and who could have with reasonable exertion, obtained a copy of it. If the defence was able to lay its hands on a copy of the medical card in July 2006, it cannot be understood why it could not have obtained it in May 2006 in time for the *voir dire* and the trial.

[49] The Petitioner has not succeeded in persuading us that the non-disclosure of the medial card has prejudiced the defence or resulted in a substantive or grave miscarriage of justice. Hence, we see no reason to grant special leave to appeal on ground (a) that has been urged by the Petitioner.

Integrity of DNA Samples

[50] The other matter that was stressed by Mr Sharma related to ground (ix) on the basis of which special leave to appeal has been sought, namely, that the state failed to discharge the onus upon it to prove that the DNA sample obtained from the crime scene and the victims tooth brushes were not contaminated.

[51] It is common ground that at the time the Petitioner was found in the boat a drift in the vicinity of Malake Island, there were blood strains in various parts of the boat as well as on the clothing worn by the Petitioner. Samples of these blood strains were uplifted from the boat and the Petitoner's jeans, and along with toothbrush samples uplifted from the tooth brushes used by the three ladies who were victims of this horrendous and senseless crime, they were taken to a highly accredited laboratory in Adelaide, South Australia, for testing.

[52] Mrs Elizabeth Selina Llewellyn, a Forensic Expert, testified at the trial and gave an account of how the blood samples were uplifted, preserved and how the individual samples were taken to the laboratory in Australia. Her report was

marked in evidence without objection, and her evidence was unchallenged. The prosecution also tendered in evidence the report of the DNA Expert, Mr Andrew Donnelly, without any objection from the defence. In essence, the evidence showed that the blood strains matched the DNA of two of the three victims.

[53] Mr Sharma has submitted that the prosecution had failed to discharge the onus upon it to prove that the DNA sample obtained from the crime scene and the victims tooth brushes were not contaminated. He has also submitted that the trial judge ought to have cautioned the assessors against relying on facts which were speculative nature, or regarding the doubt that arises from the fact that the blood strains of one of the victims were not found in the boat at all.

[54] In my view, the DNA evidence is unassailable given that the testimony of Mrs Llewellyn and the DNA report of Mr Andrew Donnelly were not challenged at the trial. Since the introduction of the DNA fingerprinting technique, the use DNA of evidence has been widely accepted across the world. For decades, the authority for admissibility of scientific evidence was the case of *Frye v United States* 293 F, 1013 (1923) in which the Court observed that 'while Courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.'

[55] Although DNA evidence has generally been acted upon in judicial decisions since then, it must be stressed that DNA evidence would not always be admissible, especially when a party offers expert testimony challenging the reliability of the procedures or the results. On one side of the line are decisions such as *Spencer, v Commonwealth* 384 SE 2d 775 (Va. 1989) where the Court held that DNA testing is a reliable scientific technique, the laboratories involved had performed the tests properly, and that there was no challenge as to reliability by the defense, the DNA evidence would be admissible. On the other side of the line are cases such as *State of Minnesota v Schwartz* NW 2d 422 (Minn. S.C., 1989), where the Court emphasized that reliability of the results was crucial, and citing the high error rate of a particular laboratory, the Court asserted that DNA tests were only a reliable as testing procedures used by the laboratory conducting them. It is equally important to establish the chain of custody of the blood samples that produced the DNA evidence. In *Daubert v Merrell Dow Pharmaceuticals, Inc.* [1993] USSC 99; 509 US 579 (1993), the Court held that the Judge would assume the role of 'gatekeeper' and ensure that any scientific evidence that was admitted was not only relevant to the issue at hand but was also reliable.

[56] In the instant case, we have the unchallenged report of a well know expert of tests done at a very reliable laboratory, and strong evidence of the chain of custody supplied by Mrs Llewellyn, and we find that in the absence of even a suggestion in cross-examination of the possibility of contamination, it is too late in the day for the Petitioner to put in issue the DNA matching or its reliance by the trial court. In the circumstances, we do not consider that ground (ix) deserves further consideration in this Court, and special leave to appeal on that ground necessarily has to be denied.

The Other Grounds

[57] I find that the other grounds included in the amended petition for special leave to appeal filed by Petitioner dated 2nd November 2011 involve only factual issues which have been considered already by the Court of Appeal, and there is nothing in them to merit the grant of special leave to appeal.

Conclusions

[58] Except for the confession of the Petitioner, the prosecution has relied entirely on circumstantial evidence to prove the guilt of the Petitioner in this case. The circumstances relied upon were that the three victims were the only persons who took the boat with the Petitioner on the fishing trip and picnic; that the next morning the boat was found adrift with only the Petitioner in it; that extensive search over a large area of the sea in the vicinity of the Malake Island, where the boat was found adrift, failed to find the victims or their bodies; and that the bloodstains found in the boat and the jeans of the Petitioner were shown by DNA evidence to match the DNA samples of at least two of the victims.

[59] We have no doubt that the confession of the Petitioner according to the testimony of more than one independent witness and the finding of the High Court Judge at the *voir dire,* has been made voluntarily. The confession, does not stand alone, and has been corroborated by other cogent circumstantial evidence.

[60] For these reasons we refuse the application for special leave to appeal and dismiss the said application. In all the circumstances of this case, we make no order for costs.

Application dismissed.

Justin Carter
Barrister