IN THE SUPREME COURT, FIJI ISLANDS
AT SUVA

CRIMINAL APPEAL NO: CAV0001/1999S
(Fiji Court of Appeal Criminal Appeal No. AAU0015 of 1997S)

BETWEEN:

AMINIASI KATONIVUALIKU

Petitioner

AND:

THE STATE

Respondent

Coram:	Hon Justice Daniel V Fatiaki, President of Supreme Court Hon Justice Jai Ram Reddy, President of Court of Appeal Hon Justice John von Doussa, Judge of Supreme Court
Hearing:	Monday, 14th April 2003, Suva
Counsel:	Mr. R. P. Singh & Mr K Vuataki for the Petitioner Mr. G.H. Allan for the Respondent
Date of Judgment:	Monday, 14th April, 2003, Suva
Date of Reasons:	Thursday, 17th April, 2003, Suva

REASONS FOR JUDGMENT ON PETITION FOR SPECIAL LEAVE TO APPEAL

At the end of the hearing of the petition, the Court announced that the application for special leave was refused for reasons which we now provide.

This is a petition for special leave to appeal from a decision of the Court of Appeal given on 8th January 1999 in which it allowed the petitioner's appeal and ordered a new trial.

By an information filed by the Director of Public Prosecution on 15th July 1996 the petitioner was jointly charged in the same information with another person not before the Court. The petitioner was charged with ten counts of **Abuse of Office** that are alleged to have occurred during his tenure as the Administrator General and Public Trustee. After a lengthy trial the petitioner was convicted on all ten counts and was sentenced to an effective cumulative term of three years imprisonment.

The petitioner appealed against the conviction and sentence to the Court of Appeal and the Court allowed the appeal, quashed the convictions and ordered a new trial on all ten counts. The petitioner had by then already served 13 months of his sentence.

In the petition for special leave to appeal against the retrial order the petitioner advanced the following grounds:

> *'1. THAT the learned Appellate judges erred in law in holding that there was evidence from which Assessors and Judge could properly infer that your Petitioner was in abuse of authority of his office by the possible inference that he was dishonest by approving the loan and authorising each of the payments to which the counts relate (p.22 of Judgment) and in particular:*
>
> *(a) in holding that your Petitioner had approved the loan when in fact all he approved by the words "I am agreeable to above" (p.18 of Judgment) was in essence agreeing to the terms (1) and (7) upon which "the application could be considered on" (p. 17 – 18 Judgment),*
>
> *(b) in failing conclusively to hold that under Section 4(3) of the Public Trustee Act the Assistant Public Trustee had powers to approve the loan and did so approve the loan (p.22 of Judgment),*
>
> *(c) in failing to accept that the Assistant Public Trustee had approved the loan and that it was reasonable inference that your Petitioner was not dishonest in continuing to authorise payments to complete the subdivisions and have advances repaid (p.21 – 22 of Judgment),*
>
> *2. THAT the learned Appellate Judges erred in law in holding that it was not essential to prove beyond reasonable doubt that the act of your Petitioner was prejudicial to the rights or interest of the beneficiaries named in the charge which was an essential element of the offence charged against your Petitioner (page 26 of the Judgment). That it was sufficient only that the act "might have "prejudiced the beneficiaries. In so holding that view, the Court of Appeal departed from the well known principle of Criminal Law that the prosecution must adduce evidence to prove each essential element of the offence beyond a reasonable doubt : Woolmington –*

v- DPP 1935 AC 462 and instead speculated on the matter OR ALTERNATIVELY that the learned Appellate Judges erred in law in failing to accept that there was no evidence that the interests of the beneficiaries had been prejudiced (p.26 of Judgment)."

The petitioner was ably represented at the hearing of the application by Mr Singh and Mr Vuataki who had earlier appeared for him in the Court of Appeal. Mr Vuataki argued in support of the above two grounds and Mr Singh argued against the Court of Appeal's Order for a new trial. Mr Allan for the Director of Public Prosecutions Office opposed the petition.

The particular circumstances under which special leave may be granted in a criminal matter are specifically set out in **section 7(2)** of the **Supreme Court Act 1998** which reads:

'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 could otherwise occur.'

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, whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal which in this instance, was an order for a new trial.

We do not consider it appropriate or necessary to canvas counsel arguments in detail. Suffice it to say that the several matters advanced by Mr. Vuataki in support of **grounds (1)** and **(2)** above, raises essentially factual issues that are properly within the province of a trial court (and assessors) to determine such as, the question whether or not the petitioner had actually approved the various advances that are the subject matter of each count in abuse of his office and what the particular state of mind of the petitioner was in approving the various advances. In this regard we note that the Assistant Public Trustee at the relevant time **Mr D P Singh** was not called as a witness at the trial.

In so far as the charges may or may not be said to have been defective in the averment of the person alleged to have been prejudiced by the petitioner's activities, the Court of Appeal was satisfied that no material prejudice was caused to the petitioner and no miscarriage of justice could have occurred. It was for this reason

that the Court found it unnecessary to decide whether the averment was actually defective. Properly understood the reasons of the Court do not depart from the principle in **Woolmington v DPP** [1935] AC 462.

The Court of Appeal also dismissed all other grounds of appeal raised by the petitioner before it but in doing so concluded, ***'that there was evidence upon which the assessors and the judge could properly have concluded that when the petitioner gave the directions set out in each of the counts, he could not honestly have believed that he was entitled to give them.'***

We are not persuaded that the matters raised in grounds 1 and 2 and elaborated upon by Mr Vuataki in his oral submissions satisfies any of three criteria for the grant of special leave.

The petitioner's appeal was allowed because the Court of Appeal formed the view that the summing-up ***'...lacks those essential qualities of objectivity, even handedness, and balance required to ensure a fair trial.'*** In particular, that the trial judge had failed in his summing up to fairly and objectively put the petitioner's case to the assessors.

We turn therefore to consider the submissions of Mr Singh which was to the effect that the Court of Appeal's order for a new trial was unreasonable having regard to the substantial ***'delay in holding the trial from the date of commission of the alleged offences.'***

In support of his oral submissions Mr Singh helpfully traced a brief chronology of relevant dates which reveals that the offences with which the petitioner was charged were committed over a three year period between the 5th of September 1989 and 25th February 1992 and although the trial took place some five years after the date of the last offence charged this occurred within 18 months of the information being filed in the High Court.

There is no evidence before the Court which might assist in its understanding of the nature and cause(s) of the delay, but even so, the question of delay is patently a matter for the consideration of the Director of Public Prosecutions and the re-trial Court.

Furthermore we note from the evidence of Mr Archibald who replaced the petitioner as Administrator General and Public Trustee that, on assuming office, he had caused internal inquiries to be conducted and had requested an independent inspection and investigation to be carried out, the results of which were not received by his office until 18th July 1994. Presumably thereafter matters would have been referred to the police for criminal investigations and that would have to be completed before criminal charges could be laid in the Magistrates Court where a Preliminary

Inquiry would then have to be held before the case was eventually committed to the High Court for trial.

We note, in passing, counsel's frank admission that the question of delay was not raised either before the trial court or in the Court of Appeal although the above chronology of events would have been obvious to the Court of Appeal at the time it made the order for a new trial.

The power of the Court of Appeal to order a new trial is contained in *Section 23(2)* of the *Court of Appeal Act (cap 12)* and may be exercised *'....if the interests of justice so require...'*

Speaking of an identically-worded power Lord Diplock said in delivering the opinion of the Privy Council in **Au Pui-Kuen v AG of Hong Kong**[1980] AC 351 at **356**:

> *'The power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no (court) exercising the discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it.'*

and later at p. **357**:

> *'The interests of justice are not confined to the interests of the prosecutor and the accused in the particular case. They include the interest of the public.....that those persons who are guilty of serious crime should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial or his summing up to the jury.'*

Earlier in delivering the opinion of the Privy Council in **Dennis Reid v The Queen** [1980] AC 343, Lord Diplock observed at pp **349/350**:

> *'It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant. At the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to apply the proviso ..... and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.*
>
> *In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against*

and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations.....The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion.....On the one hand there may well be cases where despite a near certainty that upon a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction.'

The issue on appeal before this Court, if special leave were granted, would be whether the Court of Appeal erred in ordering a re-trial on the information that was before the Court at the time of judgment, viz 8 January 1999.

Significant time has gone by since then, and we understand that **Mr D P Singh** the Assistant Public Trustee at the relevant time whose evidence at a re-trial could be important has died, and the petitioner's co-accused is no longer within the jurisdiction. Other events bearing on the prospects of a fair re-trial may also have happened in this time. However these are not matters that would fall for consideration by this Court in deciding whether the Court of Appeal was right or wrong in deciding as it did in January 1999.

Events that have happened since then are matters which the petitioner must take up with the Director of Public Prosecutions, or the trial court if he is again presented for trial.

In light of the foregoing we remain unpersuaded that the exercise by the Court of Appeal of its undoubted power to order a new trial was either inappropriate or unfounded or that *'grave and substantial injustice'* would thereby be occasioned.

The petitioner having failed to satisfy the criteria for the grant of special leave, the application fails and special leave is refused.

The petition is accordingly dismissed.

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Hon Justice Daniel V Fatiaki
President of Supreme Court

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Hon Justice Jai Ram Reddy
President of Court of Appeal

SUPREME COURT OF FIJI

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Hon Justice John von Doussa
Judge of Supreme Court

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