

IN THE SUPREME COURT OF THE FIJI ISLANDS
AT SUVA

CRIMINAL APPEAL CAV0018/07
(Fiji Court of Appeal No AAU0052 of 2005S)

BETWEEN:

PENI BAINIVALU

Petitioner

AND:

THE STATE

Respondent

Coram:

**The Hon Justice Keith Mason, Judge of the Supreme Court
The Hon Justice Robert French, Judge of the Supreme Court
The Hon Justice Mark Weinberg, Judge of the Supreme Court**

Hearing:

Monday, 25 February 2008

Counsel:

**Petitioner in Person
A Prasad for the Respondent**

Date of Judgment:

Wednesday, 27 February 2008, Suva

JUDGMENT OF THE COURT

1

Peni Bainivalu was charged in the High Court of Fiji at Suva on 23 January 2007, on an amended Information from the Director of Public Prosecutions, with the following offence:

“ROBBERY WITH VIOLENCE: Contrary to section 293(1)(b) of the Penal Code, Cap 17.

Particulars of Offence

SAKIUSA BOSE VASUITOGA aka 'BOSS', SOLOMONE QURAI aka 'STONE' and PENI BAINIVALU aka "BEN ACHE", on the 11th day of February, 2006 at Nasinu in the Central Division, robbed MOHAMMED AZIM KHAN s/o Mohammed Hafiz Khan of \$12.00 cash and at the time of such robbery did use personal violence on the said Mohammed Azim Khan."

2 Persons involved in the commission of the offence with Mr Bainivalu were also charged with murder, demanding money with menaces, acting with intent to cause grievous bodily harm and larceny from the person.

3 On 26 January 2007 Mr Bainivalu pleaded guilty to the charge of robbery with violence. On 29 January 2007 he was sentenced to a term of five years imprisonment. His two co-offenders stood trial for, and were convicted of, murder.

4 A summary of facts was read to the Court by counsel for the prosecution and, subject to one handwritten alteration, was agreed to by counsel for the accused. The summary was in the following terms:

"On Saturday 11th February 2006 at about 1040pm at Kewals Yard, Kalabu, Stage 3A, 6½ miles, Peni Bainivalu alias 'Ben Ache' aged 26 of Raiwai and two others were involved in a confrontation with three others.

On this day Mohammed Azim Khan (the deceased), Ashwin Kumar and Mohammed Maushin went searching for two of their friends who were late in returning from a nearby shop.

On their way towards the shop outside of Kewals Yard in the street, these three men were confronted by Peni Bainivalu and two others who were intent on robbing them. During this confrontation Peni Bainivalu and his companions attacked the deceased Mohammed Azim Khan and Ashwin Kumar. One of Peni Bainivalu's companions's [sic] also used a knife during this robbery which the 3rd accused came to know about later on after the robbery. Peni Bainivalu used personal violence against the deceased Mohammed Azim Khan. Peni Bainivalu firstly pushed the deceased and then punched the deceased on his head and face. (Questions & Answers 165-172)

The Police carried out investigations and Peni Bainivalu was questioned under caution. Peni Bainivalu admitted being part of the robbery and using violence in his Record of Interview where he described how the events unfolded. (Questions & Answers 145-182)

Peni Bainivalu was charged with Robbery with Violence under section 293(1)(b) of the Penal Code, Cap 17.

5 The underlined portion of the summary of facts was inserted by hand at the request of
counsel for Mr Bainivalu. The record of interview signed by Mr Bainivalu was also before
the Court. It appears that the original record was taken in Fijian and translated to the English
language.

6 According to his record of interview, Mr Bainivalu admitted confronting three Indian
boys just beside an old wrecked car near a footpath. Boss went after one of them and Mr
Bainivalu confronted another one, whom he punched and who fell down as a result. Another
of his companions, Solo, then searched that man's pockets. He said he punched the Indian on
the jaw using his right hand.

7 There was a break in the record of interview while Mr Bainivalu was provided with
lunch brought from his home. When the interview resumed, according to the record, he said
that after punching the first Indian boy he helped Boss who was struggling with another. He
was pushing the other boy away when his finger went into his mouth and the other boy bit his
finger. He then punched that boy in the head. He fell down and Mr Bainivalu freed his hand.
He then exchanged punches with a third Indian boy. Then Solo broke a beer bottle on the
back of that boy's head. He fell down. He and Solo then ran away. After the incident he
went to his cousin's house to change his clothes so he would not be recognised as having
taken part in the "scuffle in Kewals Yard".

8 In the course of the interview, Mr Bainivalu was taken to the site of the offence. He
identified various locations including the site of the confrontation with the three Indian boys.

9 In submissions to the sentencing judge Mr Bainivalu's counsel said, according to the
sentencing judge's record:

*"Accused admits that his actions are inexcusable. He is remorseful.
On the day of the incident he went to Kalabu to work but instead joined a
drinking spree.
He succumbed to peer pressure. He has pleaded guilty and has saved the
court time.
1st offender. He asks for another chance. Asks for lenient sentence. Asks*

for sentence at lower end of tariff”

At that time he had spent one month in custody.

10 Mr Bainivalu was 27 years old at the time he was sentenced. He had no prior convictions. He had been educated to Form 4 level and trained as an electrical maintenance engineer. He had been in steady employment until the time of the offence. He had continued in employment while on bail and had a letter from his employer praising the work he had done. The sentencing judge accepted that he committed the offence because of peer pressure and had, through counsel, expressed remorse. She also accepted that he did not know until after the robbery that one of his companions had a knife.

11 The sentencing judge identified the tariff for robbery with violence offences as four to seven years, noting that the Court of Appeal in *Singh v The State* Crim App AAU0008 of 2000S said that in New Zealand there had been a “significant trend to higher sentences for the more serious cases of aggravated robberies”.

12 The sentencing judge picked seven years imprisonment as her starting point. Mr Bainivalu’s youth, character and guilty plea were said to deserve a significant reduction as well as his sincere attempts to live an honest and hardworking life. She regarded his involvement in the incident as an “aberration from your normal life”. Aggravating factors were the group violence and the injuries inflicted on the victim. Taking all those matters into account, a sentence of five years imprisonment was imposed.

13 Mr Bainivalu wrote a letter dated 13 February 2007 to the Court of Appeal. The letter was headed:

***“LEAVE TO APPEAL AGAINST MY SENTENCE ON CRIMINAL CASE
NO HAC 008/06.”***

The letter began:

***“With respect I Peni Bainivalu am searching your high chair for granting
my application for the Right to Appeal my sentence of five (5) of which I am
currently serving.”*** [sic]

14 The grounds of appeal he identified as ***“GROUNDS OF APPEAL AGAINST***

SENTENCE...” were:

- “1. *That I was order [sic] by my counsel to plead guilty to something I didn't do and my counsel told me (I don't wanna waste my time on the case).*
2. *That I didn't took [sic] any cash from the victim.*
3. *The Learned Judge erred in Law by not considering that I am a first offender.*
4. *Robbery with Violence is not inside of me, from the past year till today.*
5. *The Learned Judge erred in Law by not considering that I am the only breadwinner in the family.*”

15 The Court of Appeal file shows that the matter came before the President of the Court of Appeal on 11 April 2007 in Chambers in the presence of Mr Bainivalu and counsel for the State. His record bore the note:

“Leave to appeal sentence [no leave on ground 1].”

There followed a direction for transcription of the judge's notes for 25 and 26 January. The record was also to contain the statement of the facts read to the Court on 26 January, the amended Information and the sentencing judgment. Mr Bainivalu was given 14 days to formulate further grounds of appeal against sentence. The case was set down to be heard in the June sittings.

16 On 1 May 2007 Mr Bainivalu filed written submissions which began with the statement:

“This is my appeal against conviction.”

He then asserted that a miscarriage of justice had occurred in the High Court and that his conviction was not safe. He contended that his guilty plea should not be a bar to appealing against conviction. He said that his plea was made under duress. He asked that his case be remitted to the High Court for retrial. He had obviously had some access to legal assistance for he put legal submissions quoting *Meissner v R* (1995) 184 CLR 132; *Maxwell v R* (1996) 184 CLR 501 and *R v Balchin* (1974) 9 SASR (CCA). According to his submissions the three accused were initially charged out of the same facts. A common purpose was required on the part of each of the accused in order to be able to sustain a plea of guilty. He then put the following contentions in his submission:

“4.0 CIRCUMSTANCES OF THE CASE

- 4.1 *I have an education level of form 4. I am a tradesperson and am unfamiliar with the workings of the court. I qualified for legal aid and was initially represented by Mr Malcom Maitava of the Legal Aid Commission. He then left the Commission and my file was assigned to Ms Resina Seinikurucirici. After my file was transferred to her, despite my repeated attempts to discuss my file with her, she was always busy. When she finally did see me, she only saw me for a brief moment, to tell me to plead guilty as I had no choice as I was at the scene [sic] of the crime. I did not even know what she wanted me to plead guilty to. I also advised her that I did not agree with the facts of the case. She did not have the facts amended to those that I agreed with. She simply admitted the facts on my behalf without authority from me. This is very dangerous as I did not agree to the facts. Furthermore the Judge did not ask me if I admitted the facts, she asked the lawyer, who refused to listen to me. There is no evidence that I admitted the facts of this case. [sic]*
- 4.2 *When the Judge saw that I was hesitant with my plea and that my lawyer kept whispering guilty to me in court, she should not have accepted the guilty plea, but should have entered a plea of not guilty.*
- 4.3 *My lawyer was not ready for the trial on the assigned date; so she kept forcing me to plead guilty.*
- 4.4 *When I told my lawyer that I had mentioned my case to my sister who worked for Mr Dilip Jamnadas, a lawyer, she abused me for doing so, saying the Jamnadas & Associates were not criminal lawyers and did not know anything about criminal law like her. She threatened me for trying to see another lawyer. I was therefore in a difficult position that if I spoke to another lawyer, she would stop acting for me, which I was scared of. I needed a lawyer so I remained under her control and she acted outside my authority. As a result of my experience with her I have also decided not to use any lawyer in my appeal and I have lost hope in the legal system. I relied on my previous lawyer and am now in jail because she could not be bothered to take the time to act for me. She had no time.*
- 4.3[sic] *I have a defence to this case, I did not intend to carry out any of the alleged offences and further that I was not part of the group, with the other two accused, Bose [sic] and Stone.”*

5.0 CONCLUSION

- 5.1 *I therefore ask that this court allow me my constitutional right to a fair trial and that this case be sent back to the High Court where I can defend myself.”*

17 The matter came on before the President of the Court of Appeal in Chambers on 2 May 2007 in the presence of Mr Bainivalu in person and counsel for the State. It was adjourned to the following day at 9.30am. The respondent was to ensure that documents requested on 25 April 2007 were supplied to the Registry on that day.

18 On 3 May 2007 the matter came on again before the President in the presence of Mr Bainivalu and counsel for the State. The President's notes were in the following terms:

“Further grounds put in. To be supplied to resp. Include reference to equivocal plea. Leave refused. Statement of Facts to be put in today. Sent appeal to continue.”

He then made directions for the filing of submissions by the respondent and by Mr Bainivalu. The President made a footnote against the reference to the “Statement of Facts” yet to be put in. The footnote read as follows:

“When received I shall check if they could support equivocal plea and, if so, note it for furth cons.”

A further note on the record read as follows:

“They do not. 4/5”

We infer from this that the President considered whether the statement of facts as accepted by Mr Bainivalu were consistent with an equivocal plea and that he concluded they were not. It seems therefore that the refusal of leave to appeal against conviction was based upon Mr Bainivalu's plea of guilty and his acceptance, through counsel, of a statement of facts consistent with that plea.

19 The Court of Appeal heard Mr Bainivalu's appeal against sentence and dismissed it on 25 June 2007. The Court cited its earlier decision in *Singh & Others v The State* CA AAU0008 of 2005 where it said that a robbery with violence, either actual or threatened, would always give rise to serious consequences at least psychological, if not physical. The Court said:

“The vulnerability of the victims and the effect on them and their lives must rank high in the scale of aggravating circumstances.”

As the Court observed in the present case, a man was killed. Mr Bainivalu was not charged with his murder but the fact of the death fully bore out the seriousness of this type of robbery.

20 The Court accepted that the sentencing judge had not explicitly referred to all of the mitigating factors upon which Mr Bainivalu relied. None the less it concluded that these were subsumed by the credit given for the guilty plea and the fact that he was only charged with robbery with violence. He was given credit for being a first offender and a good worker. The Court was of the view that the selection of a seven year starting point and the reduction of two years properly assessed the criminality of the act and gave credit to the petitioner.

21 Mr Bainivalu filed a letter in this Court on 26 July 2007 by way of a petition for special leave to appeal against the decision of the Court of Appeal. In summary, those grounds were:

1. That the President of the Court of Appeal did not allocate enough time for the proper determination of the petitioner's case because he dealt with nearly 15 other appeals in one "judgment day".
2. That the President had dismissed the appeal on unfair and unjust grounds and did not accept a challenge that Mr Bainivalu raised against his conviction.
3. A miscarriage of justice had occurred in the High Court. The plea of guilty was made under duress.
4. The petitioner's lawyer had told him that if he didn't plead guilty she would not represent him. He said he did not agree with the facts of the case as admitted by his lawyer.
5. This "ground" referred to *Meissner v R* (1996) 184 CLR 132 for the proposition that a plea of guilty will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred.
6. This "ground" cited *Maxwell v R* (1996) 184 CLR 501 for the proposition that a defective plea of guilty may be withdrawn and convictions set aside on various grounds.

22 As to the first ground, it appears that the appeal was heard before three judges on 20 June 2007. Judgment was given on 25 June 2007. It seems to have been the case that judgment was given by the President of the Court on behalf of the Court along with a number of other judgments. In any event, no basis for the grant of special leave is disclosed in the

first ground.

23

In support of his contention that his plea of guilty was submitted under duress, Mr Bainivalu said in written submissions to this Court filed in December 2007, that he had just wanted to stop the fight. It was never his intention to assault or rob anyone. He said he did not punch the deceased but rather the other boy, Ashwin Kumar, and that was in his own defence because his finger was bitten. He said that the boy he had punched on the face and head was on the television news the following night saying that he had bitten one of the attackers. In his written submission Mr Bainivalu said that he then went to the police station to explain the incident. As to the balance of the matters dealing with the petitioner's contention that his plea of guilty was submitted under duress, Mr Bainivalu said that he was not in the right state of mind when he made his plea. It is notable that he said nothing in his submissions about the record of interview conducted with him on 16 February 2006 which he signed and which included an acknowledgement that he was properly advised of his rights.

24

The Court record does not disclose any evidentiary basis in support of the proposition that the plea of guilty was improperly procured. That is not to say Mr Bainivalu may not have been advised by counsel to plead guilty with a view to obtaining the discount attaching to such a plea. He may also have been advised that there was little prospect of successfully defending the case having regard to his admissions on the record of interview. None of that advice would have been inappropriate. There is a degree of improbability in Mr Bainivalu's accusations against his counsel and the police. His counsel in particular was astute to ensure that the summary of facts reflected the fact, favourable to Mr Bainivalu, that he did not know about the existence of the knife until after the robbery had occurred. In addition, as the judge's record shows, counsel in mitigation put to the Court that Mr Bainivalu admitted that his actions were inexcusable, that he had been on a drinking spree, succumbed to peer pressure and was remorseful. It is difficult to see how these matters could have been put to the Court if counsel was receiving instructions that Mr Bainivalu was in fact innocent of involvement in the robbery, but had merely attempted to break up a fight. In our opinion, Mr Bainivalu's assertions to this Court which amount to a petition for special leave to appeal against conviction do not have either the inherent probability or the evidentiary support which could lead to a conclusion that there has been in this case a substantial miscarriage of justice.

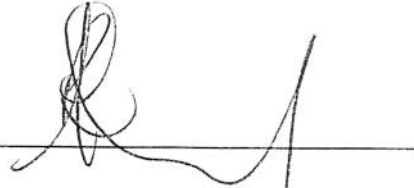
25 There is a question whether, when a single judge of the Court of Appeal refuses leave to appeal under s 35(2) of the *Court of Appeal Act*, an unrepresented accused should be informed of his right to seek review before three judges of the Court of Appeal under s 35(3) of the Act. Had Mr Bainivalu been informed of that right he would no doubt have raised his application for leave to appeal against conviction at the same time as the appeal against sentence for which leave had been granted. Having considered the matters on the record which would have to have been considered by the Court of Appeal, we do not think it would have come to any different view.

26 We would also note that the contention, made in this case about alleged falsification of the record of interview by police, is an allegation frequently made and difficult to either prove or disprove. The recording of interviews, even if only by sound tape, would go a long way to reducing the incidence of such allegations and the time involved in their consideration in *voir dire* hearings at trial.

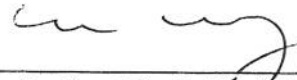
27 In our opinion no ground for the grant of special leave is shown in this case and the petition for special leave should be dismissed.



Hon Justice Keith Mason
Judge of the Supreme Court



Hon Justice Robert French
Judge of the Supreme Court



Hon Justice Mark Weinberg
Judge of the Supreme Court

Solicitors:

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