IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. CAV 0001 of 2016
[On Appeal from the Court of Appeal No. AAU 0048 of 2011]

BETWEEN	:	**SACHINDRA NAND SHARMA**	***Petitioner***
AND	:	**THE STATE**	***Respondent***

Coram	:	**The Hon. Chief Justice Anthony Gates** **President of the Supreme Court** **The Hon. Mr. Justice Suresh Chandra** **Judge of the Supreme Court** **The Hon. Madam Justice Anjala Wati** **Judge of the Supreme Court**
Counsel	:	**Mr. M. Yunus for the Petitioner** **Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**11 August 2016**
Date of Judgment	:	**26 August 2016**

JUDGMENT

Gates P

[1] I have had the advantage of reading in draft the judgment of Chandra J. I agree with his Lordship's judgment, its reasons and conclusions.

Chandra J

[2] The Petitioner seeks to appeal the judgment of the Court of Appeal dated 3 December 2015 dismissing the appeal under section 23 of the Court of Appeal Act.

[3] The Petitioner filed a timely appeal on 12 January 2016 pursuant to Rule 6 of the Supreme Court Rules setting out 6 grounds of appeal against conviction and one ground of appeal against sentence as follows:

> **Ground 1**
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> That the learned appellant did not properly consider and/or valuate the effect of non-direction on the ingredients/elements of the offence a fundamentals area of law, thus discounting the appellants rights to fair trial and clearly obverse to the reasoning's of the Supreme Court of Fiji in **Mudaliar v State** [2008] FJSC 25, CAV 2007 Oct 17, 2008] where it was held *'at common law the position is clear an accused person is entitled to fair trial in which the relevant law is explained to the jury and the rules of procedure and evidence are strictly followed.'*
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> **Ground 1[A]**
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> That the learned appellate court misinterpreted section 135 of the Criminal Procedure Decree to an extent, where it held in paragraph 9 to 16, that save for completeness, it was otiose for trial judges to direct on ingredients of offence, in the face of agreed/admitted facts.

Ground 2

That the appellate court did not properly consider and/or evaluate the effects of the learned trial judges failure to fully direct assessors that the prosecutions bears the 'onus probandi' in law to disapprove alibi evidences in accordance with correct principles and such failure impinged on the appellants right to fair trial, from the distinction, whereby the nature of defence relied principally on alibi.

Ground 3

The learned appellate court did not properly and/or adequately consider in accordance to established principles of a trial, upon referral to certain conducts of the appellants trial counsel in the impugned ruling at paragraph 8, 32, 34 and 35 such references invariably imply that rights to a fair trial is subject to competency of trial counsel.

(a) The learned appellate court thereby erred as right to a fair trial is absolute fundamentally placing in the province of trial judges on overriding duty to oversee the incorporation of such right even where defendants [sic] are represented.

The rationale was identified in **R v. Ensor** (1989) 1 WLR 497 where it was held 'the court agreed, however with what O'Connor L.J. said giving the court of appeal judgment in **R v. Swain** (unrep. March 12, 1987) namely if the court had any lurking doubt that an appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate them it would quash the conviction.

Ground 4

That the learned trial judge did not correctly direct the assessors the proper method to consider the identification evidence of recognition when upon the fact that recognition may be more reliable does not absolve a judge from reminding the jury that mistake in recognition are sometimes made **R v. Bowden** [1993] Crim. LR 379.

Ground 5

That the learned trial judge erred in law and in fact in failing to direct assessors at all, that they must not draw any adverse inference from appellants choice to exercise his constitution rights to remain silent during the course of interview, consequently, such failure constitutes a fatal non direction.

Ground 6

That the learned judge erred in law in failing to direct the assessors on the failure of the prosecution to call a material witness and such failure may have virtually deprived the assessors to consider an independent evidence since there was evidence emanating from prosecution witnesses regarding the material witness and the courses open for the assessors."

Appeal against Sentence

Ground 1 – That the sentence is harsh and excessive and wrong in principle.

[4] On 21 July 2016 the Petitioner filed an amended petition setting out the following grounds of appeal against conviction:

1. The Court of Appeal erred in law and in fact to affirm the decision of the trial Judge, when it failed to make an independent assessment of the complainant's evidence and determine whether the complainant's evidence was plausible or affront to common sense and/or whether the evidence was coached.

2. The Court of Appeal erred in law and in fact to affirm the decision of the learned trial judge, by failing to make independent assessment of Ashi Kala's (PW2) evidence and determine whether the witness evidence was plausible or affront to common sense and/or whether it was coached.

3. The Court of Appeal erred in law and in fact to affirm the decision of the learned trial judge, when it failed to make independent assessment of Davendra Prasad's (PW#) evidence and determine whether the witness evidence was plausible or affront to common sense and/or whether it was coached.

4. The Court of Appeal erred in law and in fact to affirm the decision of the learned trial judge, when if failed to make independent assessment in

Krishneel Prasad's (PW4) evidence, in particular his medical report where at paragraph 12 the following was related to the doctor "the above relayed that a kerosene stove blew up beside him thus receiving injuries" and determine whether the witness evidence was plausible or affront to common sense and/or whether coached.

5. The Court of Appeal erred in law when it refused the application of the Petitioner to adduce fresh evidence on appeal.

[5] These grounds of appeal are fresh grounds which were not argued before the Court of Appeal.

[6] While submitting that stringent criteria have been laid down on the reception of fresh grounds in **Dip Chand v The State** Criminal Appeal CAV 0014.2010(9May 2012) Counsel for the Appellant submitted that in **Suresh Chandra v The State**, unreported, Criminal Appeal CAV 21 of 2015 (10 December 2015) and **Pauliasi Nacagilevu v The State**, unreported, Criminal Appeal CAV 23 of 2015 (22 June 2016) fresh grounds of appeal were considered in fairness to the petitioner to see whether there were any merits in the grounds of appeal.

[7] The amended grounds of appeal are fresh grounds of appeal which are conceded by the Petitioner as fresh grounds of appeal. They were not canvassed before the Court of Appeal. When this application was taken up for hearing, in view of this position, the application to proceed with the amended grounds of appeal was refused by Court and Counsel for the Appellant sought to make submissions only on ground 6 of the original grounds of appeal filed on 12 January 2016.

Jurisdiction of the Supreme Court

[8] Section 98(3)(b) of the Constitution of the Republic of Fiji states:

> "The Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the court of Appeal."

Section 98(4) of the Constitution provides:

> "An appeal may not be brought to the Supreme Court from a final Judgment of the Court of Appeal unless the Supreme Court grants leave to appeal."

Section 7(2) of the Supreme Act (Cap.13) provides:

> "in relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless:
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> 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."

[9] The threshold set by Section 7(2) is very high unlike in an appeal from the High Court to the Court of Appeal which is based on whether a ground of appeal is arguable. An appeal against the judgment of the Court of Appeal to the Supreme Court must satisfy the threshold for special leave to appeal in the first instance. The grounds of appeal should be in respect of the judgment of the Court of Appeal and should not be on fresh grounds as sought in the present application of the Petitioner.

[10] In **Livai Lila Matalulu and Anor v The Director of Public Prosecutions** Civil Appeal No.CBV0002 of 1999S (17 April 2003) the role of the Supreme Court was expressed as follows:

> "The Supreme Court of Fiji is not a Court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant would undermine the authority of the Court of Appeal and distract this Court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principle or, in the criminal jurisdiction, "substantial and grave injustice." (Emphasis added)

[11] In invoking the provisions of Section 7(2) of the Supreme Court Act, the Supreme Court would not re-hear the matter as is done in the Court of Appeal when hearing an appeal. The Supreme Court is not a second court of criminal appeal. The Supreme Court would consider whether a situation has occurred which requires "resolving points of law of great and general importance" or whether "a substantial and grave injustice" has occurred when hearing an appeal from the judgment of the Court of Appeal.

[12] Counsel for the Respondent cited the judgment of the Court of Final Appeal of the Hong Kong Special Administrative Region – **So Yiu Fung v Hong Special Administrative Region** [1999] 2HKCFAR 539; [2000] 1 HKLRD 179 which provides useful dicta in relation to the concept of "substantial and grave injustice" in relation s.32(2) of the Hong Kong Court of Final Appeal Ordinance (Cap.484) which provides that:

> "Leave to appeal shall not be granted unless it is certified by the Court of Appeal or the High Court, as the case may be, that a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done".

Which provision is similar to the provisions in s.7(2) of the Supreme Court Act in Fiji.

[13] In **So Yiu Fung** it was stated at p.541, 542 and 543:

> "This Court's primary role in the administration of criminal justice is to resolve real controversy on points of law of great and general importance. For this Court does not function as a court of criminal

> appeal in the ordinary way. However, the "substantial and grave injustice " limb of s.32(2) exists as a residual safeguard to cater for those rare and exceptional cases in which there is a real danger or something so seriously wrong that justice demands an enquiry by way of a final criminal appeal despite the absence of any real controversy on any point of law of great and general importance.
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> ... ... Reviewing convictions to see if they are safe and satisfactory is entrusted to the intermediate appellate court. If the matter proceeds further to this Court, our task does not involve repeating that exercise. We perform a different one. In order for an appeal brought under the 'substantial and grave injustice' limb of s.32(2) of the Hong Kong Court of Final Appeal Ordinance to succeed, it must be shown that there has been to the appellant's disadvantage a departure from accepted norms which departure is so serious as to constitute a substantial and grave injustice."

[14] The views expressed in **So Yiu Fung** were endorsed in **Kosar Mahmood v HKSR** FAMC No.31 of 2012 (unreported) by Court of Final Appeal of the Hong Kong Special Administrative Region and went on to state:

> "We wish to stress that in all future applications on the substantial and grave injustice ground, the application for leave to appeal must identify the specific way in which it is submitted that the court below has departed from established legal norms; and why such departure is so seriously wrong that justice demands a hearing before the Court of Final Appeal notwithstanding the absence of any real controversy on any point of law of great and general importance. It will simply not be sufficient merely to set out the same arguments that were canvassed in the court below."

[15] In Fiji too, since the same phraseology is used in the Supreme Act in s.7(2) regarding leave to appeal from the Court of Appeal, in order to regulate the appeals that are taken up against judgments of the Court of Appeal, it is timely that the views expressed in **So Yiu Fung** (supra) and **Kosar Mahmood** (supra) be adopted.

Factual background

[16] The Petitioner was charged for one count of Attempted Murder, contrary to section 214(a) of the Penal Code (Cap.17), one count of Act With Intent to Cause grievous Harm, contrary to section 224 (a) of the Penal Code (Cap.127) and on one count of Arson contrary to section 317(a) of the Penal Code (Cap.17).

[17] The particulars of the first count were that the Appellant on 9 November 2007 at Vatuwaqa unlawfully attempted to murder Poonam Premila Sharma. The particulars of the second count were that the Appellant on 9 November 2007 at Vatuwaqa with intent to do some grievous harm to Krishneel Prasad unlawfully wounded him. The particulars of the third count were that the Appellant on 9 November 2007 at Vatuwaqa willfully and unlawfully set fire to the dwelling house of Davendra Prasad which fire then spread to the dwelling house of Suresh Chandra resulting in the complete destruction of Suresh Chandra's dwelling house and its contents, with the estimated value of FJD$8000.00; and also spread to the dwelling house of Gopi Nath resulting in the complete destruction of Gopi Nath's dwelling house and its contents with the estimated value of FJD$8000.00.

[18] The Petitioner and Poonam Sharma had been in a de facto relationship for about two years prior to 9 November 2007. Some time before 9 November 2007 the relationship had come to an end. Poonam Sharma had decided to return to her parent's home in Vatuwaqa. The Petitioner had attempted to meet with Poonam Sharma on a number of occasions shortly before and on 9 November 2007. It appeared that she had resisted all his efforts to discuss their relationship and had refused to meet him again. The Petitioner had apparently engaged Poonam Sharma's brother to help arrange a meeting, but to no avail. The incident had taken place at about 3 a.m. at Poonam's house. The evidence revealed that the Petitioner had set fire to Poonam's house, had stabbed her several times and tried to throw her into the fire. Poonam's mother and father, had come to her rescue. As a result of the said fire Poonam's brother who had been sleeping in the same room as that of Poonam's had also suffered injuries by being burnt. The fire had spread to two

other houses which were also destroyed. The Petitioner had slipped off and had been arrested about three months later when he was in hiding.

[19] The Assessors returned a unanimous verdict of guilty and the Petitioner was convicted on 27 April 2011. He was sentenced to a term of imprisonment of 16 years for attempted murder, 6 years for acting with intent to cause grievous harm and 6 years for arson. The sentences were to run concurrently with a non-parole term of 14 years.

[20] The grounds of appeal canvassed before the Court of Appeal were adequately dealt with and disposed of in the judgment of the Court of Appeal. All the grounds that were taken up before the Court of Appeal were on alleged misdirections by the trial Judge to the Assessors which have been dealt with by the Court of Appeal by reference to the relevant passages in the summing up of the trial Judge and applying the relevant legal principles regarding them with authorities where applicable.

[21] Counsel for the Petitioner after his amended grounds of appeal were struck out, sought to pursue only ground 6 of the grounds of appeal filed on 12 January 2016 (see para [2] above) to the effect that the learned trial judge erred in law in failing to direct the assessors on the failure of the prosecution to call a material witness and thereby deprived the assessors from considering evidence from an independent witness.

[22] The witness referred to by the Petitioner is Joji Veiquwa whose name transpired in the course of the trial in the evidence given by Poonam, her mother Kala and her father Prasad. The Petitioner's position being that, all the material witnesses who gave evidence at the trial were the family members, being Poonam, her parents and her brother while Joji Veiquwa was an outsider and would have been an independent witness specially as the identity of the Petitioner and his defence of alibi were in issue.

[23] The Petitioner made an application to the Court of Appeal to lead fresh evidence prior to the hearing of the appeal. The full Court of the Court of Appeal heard his application on 6 February 2015 and was refused by judgment dated 27 February 2015.

[24] The Court of Appeal in their judgment regarding the application to lead fresh evidence stated:

> "[6] Mr. Joji was not listed as a prosecution witness and was not called by either party to give evidence. Although there was evidence of Mr. Joji's presence in connection with incidents that occurred immediately prior to the time of the commission of the offences, there is no evidence of his presence at the scene of the crime or in the vicinity around the time of the occurrence of this crime.
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> [7] The appellant denied the commission of this crime. At the trial he pleaded an alibi. The Appellant does not claim Mr. Joji as a witness to his plea of alibi. The appellant does not indicate what Mr. Joji would speak of if called to give evidence. In the written submissions filed the appellant states that he believed Mr. Joji had some knowledge of the events relating to the incident. He further submitted that Mr. Joji's evidence would either support the prosecution or the defence. The appellant stated that Mr. Joji is an independent witness and his evidence is important either to support or discredit the prosecution witnesses or support the alibi. Thus the appellant was not certain as to what Mr. Joji would speak of.
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> [11] It is settled law that "in order to justify the reception of fresh evidence ... ... 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" (emphasis added) (Denning LJ in **Ladd v Marshall** [1954] 3 All ER 745 at 748, **Coir Industries v Louvre Industries Limited** (1984) 30 FLR 45, **Skone v Skone** [1971] 2All ER 582 HL, **Roer Robert McGregor & Sons Ltd** [1968] 1 All ER 636(CA)

> [12] Considering the above principles, we cannot fathom as to how the evidence of the proposed witness would upset the judgment, as the appellant does not indicate as to what the witness would speak of in the event his application is allowed. Although the Court of Appeal has discretion to receive further evidence, such could be admitted only on special grounds. In view of the fact that the appellant himself is not certain as to what the witness would say in court, the appellant has failed to satisfy this court on any of the three conditions referred to above. Hence this application is without merit and is refused."

[25] It is clear that the Court of Appeal has considered the application of the Petitioner fully and refused it. When the appeal was argued before the full court of the Court of Appeal, this ground was not pursued and as the Court of Appeal had refused the application to lead fresh evidence, the full Court did not deliberate on it. It is the Petitioner's complaint before this Court that the trial Judge had failed to direct the assessors on the failure of the prosecution to call Joji and thereby there was a miscarriage of justice.

[26] The Petitioner did not call Joji as a witness at the trial although he summoned witnesses to support his defence of alibi. No reasons were adduced by him even in the application to call fresh evidence as to why he did not summon Joji as a witness at the trial.

[27] As stated by the Court of Appeal in the judgment refusing the application to lead fresh evidence, it was pointed out that there was no evidence to show the presence of Joji at the scene of the crime or in the vicinity around the time of the occurrence of the crime. In those circumstances it cannot be stated that there was a failure on the part of the trial Judge to direct the Assessors of the failure of the prosecution to call Joji as a witness. If that was material, Defence Counsel could have sought a re-direction from the trial Judge, which too was not done. Therefore there was no miscarriage of justice.

Conclusion

[28] The application of the Petitioner has been an attempt to re-argue the same matters that were before the Court of Appeal and does not meet the threshold for the grant of special leave to appeal to the Supreme Court. Therefore special leave to appeal is refused and the Petitioner's application is dismissed.

Wati J

[29] I agree with Chandra J's reasons and conclusions.

Hon. Chief Justice Anthony Gates
PRESIDENT OF THE SUPREME COURT

SUPREME COURT OF FIJI
FIJI

Hon. Mr. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT

Hon. Madam Justice Anjala Wati
JUDGE OF THE SUPREME COURT