IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Criminal Petition No. CAV 0035 of 2016
[on appeal from Court of Appeal No. AAU0043/2011]

BETWEEN: JOSATEKI LULU

Petitioner

AND: THE STATE

Respondent

Coram: The Hon. Chief Justice Anthony Gates
President of the Supreme Court
The Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court
The Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

Counsel: Mr. S. Waqainabete for the Petitioner
Mr. S. Vodokisolomone for the Respondent

Hearing: Thursday 6th July 2017
Date of Judgment: Friday 21st July 2017

JUDGMENT OF THE COURT

Gates P:

[1] On 29th November 2016 the petitioner's appeal to the Court of Appeal against conviction and sentence was dismissed. He filed a timely petition to the Supreme Court on 22nd December 2016.

[2] On 18th March 2011 the petitioner had been found guilty after trial before the High Court in Suva of a single count of rape contrary to section 207(1) and (2)(a) of the Crimes Decree. On 13th April 2011 he was sentenced to a term of imprisonment of 9 years and 10 months with a non-parole period of 8 years. The petitioner and the complainant were not known to each other.

[3] The petitioner raises 3 grounds in his petition. They are based on what his counsel argues are inadequacies of directions in the summing up:

(i) circumstantial evidence with regard to timings.

(ii) the voluntariness of the caution interview as an issue in the main trial.

(iii) and the method of questioning him in itaukei language whilst recording the interview in English.

Circumstantial Evidence and the Timings

[4] On the 12th March 2010 the complainant went for a drink with her boyfriend after work. They had an argument and the boyfriend left. The complainant rang up a friend of hers to join her. She drank some bourbon and coke. Sometime after midnight her friend dropped the complainant at her house gate.

[5] However the complainant rang her boyfriend and decided to catch a taxi and to meet up with him again. She left her home and was walking up to the Ratu Dovi Road junction whilst talking on the phone. Somebody came and held her. He dragged her to a grassy area. He then pushed her down to the ground, removed her clothing, and penetrated her with his penis for about 5-10 minutes. Shortly afterwards the police arrived and took her to Valelevu Police Station.

[6] This ground was argued on the basis of timings. It was said that the inference that the petitioner, who lived nearby across the open ground, was the only possible culprit was not the only inference to be drawn.

[7] The boyfriend said he was talking on the phone to the complainant between 12 midnight and 1am when the phone suddenly diverted. The complainant's mother had testified that it was at about 1am that the police had come home to inform her that her daughter was at the Police Station. A taxi-driver driving on his way to Nausori had seen a girl on her phone grabbed by a Fijian man and taken into the bushes. He was

driving past between 1-1.30 am (or 1-2 am). He had gone to the police station at Nasinu 8 miles and reported the incident.

[8] Lastly a police witness from the Command Centre received a report for assistance "after 1am." He then directed a mobile patrol to the area and they arrived at the scene at 1.40am. While there his attention was drawn to a man running across the ground. The police officer chased him into a house. That person was the petitioner who was accordingly arrested. The officer said he was sure the man arrested in the house was the one he chased there from the ground. He rejected the suggestion that there was anybody else in the vicinity at that hour.

[9] The petitioner says the timings indicate that the rape was committed between 12.40am to 1am or 1.15am. The police arrived at the scene by 1.40am when one of them chased the petitioner to a house nearby. It was the petitioner's case that it is not believable that the rapist would wait around at the crime scene for up to 25 minutes and only flee after the police had arrived.

[10] This had been a violent rape. The complainant suffered injuries. She had scratch marks over her arm, torso, and thighs. Around the vagina, which the doctor had observed were abrasions over introitus with scratch marks. The skin was broken and the area was tender, and she felt pain upon being touched. The doctor noted she was slightly intoxicated. He had also noted seeing a collection of white fluid looking like semen inside the vagina. At the time of the investigation of this case the police forensic facilities may not have been capable of identifying by DNA from which person that came. There was no such evidence led in this trial.

[11] The Court of Appeal canvassed the witnesses' evidence on timings most closely in its 36 page judgment. Prematilaka J concluded at para 13 that:

> "Therefore, it is clear that from the above evidence one cannot unequivocally determine that the act of rape had taken place the latest at 1.15 a.m. and the police had arrived at 1.40 a.m. as argued by the Appellant. It is equally clear that the times described by witnesses are only approximate and not exact according to the clock. It would have

> been very unrealistic if it had been otherwise given the circumstances."

[12] The court referred to an appropriate passage from **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, SCR (3) 280, also a case dealing with an appeal from a conviction for rape. The judgment referred to apparent discrepancies in a witness' recollection but which do not shake the basic version. Their evidence is not a video recording of events. Notoriously witnesses estimates of time lack precision.

[13] It is undisputed that the petitioner had been running across the open ground, that he was pursued by a police officer into a house, and was there arrested. Sergeant Suliano said he never lost sight of the man at any stage and had kept his torch trained on him all the way to the house. The person apprehended inside the house was the petitioner. He smelt heavily of liquor, was shivering without his shirt, and with his pants unzipped. Some of this was disputed. The T-shirt was said to have been still worn though torn or otherwise that it had come off when he was arrested by the police officer. That area of dispute was to be resolved by the High Court, and it would not be perverse, having heard the relevant witnesses for it to conclude that the petitioner had been without a shirt at the time.

[14] The challenge in the Court of Appeal had been on the timings, meaning that someone else could have been the person who committed the crime. But the prosecution had relied on other evidence as part of its circumstantial case to eliminate another hypothesis.

[15] The direction given on circumstantial evidence by the trial judge in his summing up was as follows:

> "In circumstantial evidence, you are asked to piece the story together from witnesses who did not actually see the crime committed, but give evidence of other circumstances and events, that may bring you to a sufficiently certain conclusion regarding the commission of the alleged crime.
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> In drawing that inference, you must make sure that it is the only inference that could be drawn, and no other inferences ... could have

> been possibly drawn from the said circumstances. That should also be the inescapable inference that could be drawn ... in the circumstances.
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> It is not sufficient that the proved circumstances are merely consistent with the accused person having committed the crime. To find him guilty you must be satisfied so as to feel sure, that the inference of guilt is the only rational conclusion that could be drawn from the combined effect of all the facts proved. It must be an inference that satisfies you beyond reasonable doubt, that the accused person committed the crime."

[16] This was wholly correct, nor was his direction challenged before us. The proper direction is to be based on the following passages in **Chamberlain v R (No 2)** (1983) 153 CLR 521 per Gibbs CJ and Mason J at 535f:

> "Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider "the weight which is to be given to the united force of all the circumstances put together": per Lord Cairns, in *Belhaven and Stenton Peerage* (1875) 1 App. Cas. 278, at p. 279, cited in *Reg. v Van Beelen* (1973) 4 S.A.S.R. 353, at p. 373; and see *Thomas v The Queen* [1972] N.Z.L.R. 34, at pp. 37, 38, 40 and cases there cited.
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> It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence (see *Luxton v Vines* (1952) 85 C.L.R. 352, at p. 358; and *Barca v The Queen* (1975) 133 C.L.R. 82, at p. 104.
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> Per Brennan J at 599:
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> The prosecution case rested on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met.

> First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the jury finds. The drawing of the inference is not a matter of evidence: it is solely a function of the jury's critical judgment of men and affairs, their experience and their reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts."

[17] However the English decision in **McCreevy v Director of Public Prosecutions** [1973] 1 WLR 276 does not go so far. This was dealt with by Prematilaka J in his judgment at paras [46-50]. His lordship concluded:

> "[50] I am of the view that on the facts and circumstances of this case the High Court Judge has adequately directed the assessors on how they should approach the circumstantial evidence. What is required is a clear direction that assessors must be satisfied of the guilt of the accused beyond reasonable doubt and the aforesaid direction of the High Court Judge satisfies this requirement fully. Thus, there being no ideal stereotyped direction in evaluating circumstantial evidence, I hold that in the circumstances of the case, the said direction is quite adequate. In any event, I am of the view that the said omission has not caused any substantial prejudice to the Appellant."

[18] We accept that the position in **McCreevy** is the correct approach to directions on circumstantial evidence in Fiji.

[19] The partial confession if accepted could be treated as a piece of evidence identifying the petitioner with the crime and with the evidence of him being found at the scene. The fact that it is a partial confession only would tend to confirm it was not fabricated by the police. It identifies him as the person involved in a sexual encounter or assault on the complainant that night. It does not confirm that the petitioner had penetrated the victim or had ejaculated.

[20] Answer 42 almost suggests that what he did to the complainant was acceptable to the complainant. He denied inserting his penis, he denied having sex with her, and denied

force. His limited admissions do not assist the defence case of police fabrication. But they could amount to part of the jigsaw linking him with a sexual encounter with the complainant.

[21] Then there is the evidence of the complainant's mobile phone which she lost at the scene and which showed up at the petitioner's house. At the police station the police handed the complainant's bag to the complainant's mother. Later the complainant realised the mobile was not in the bag. The mother rang the police who promised to get the phone back.

[22] The police returned the complainant's mobile phone back to her. It still had all its saved contacts intact.

[23] On 13th March 2010, the night of the arrest, PC Navneet Chandra of Valelevu CID carried out the search of the suspect at the Station. On the petitioner he found cash, a mobile phone and a wrist watch. These were listed in the cell book.

[24] On 15th March 2010 the petitioner's wife came and took the remaining cash. PC Navneet was telephoned by the victim's mother who said that the victim's phone had been stolen the same night. It was grey coloured and was a Nokia 1200. Navneet remembered there was a similar phone taken from the suspect in the search. That phone had been taken by the petitioner's wife Akosita. Accordingly Navneet went around to the wife's place. She confirmed that she had taken the phone from the petitioner's listed property at the Station.

[25] She also confirmed to the officer that the mobile was at the petitioner's place at Vunivaivai settlement from where the petitioner had been arrested. In his judgment Prematilaka J traversed the evidence for the prosecution and for the defence on this issue.

[26] If accepted the evidence of the possession by the petitioner of the complainant's mobile is very strong evidence bolstering the circumstantial case and pointing to the

petitioner as perpetrator of the crime. The petitioner gave no innocent alternative explanation such as finding the phone on the ground on his way home.

[27] The defence argument before us was that there was a flaw in the conclusion. The petitioner's case was that the timings meant he could not have been the perpetrator. The evidence given by the petitioner at trial of being punched by an unknown person as he crossed the ground and falling down was fanciful. Nor was his explanation as to why at first he was running away from an unknown pursuer, and then after checking on 2 friends who were sleeping, of finally walking back to Sailasa's house. All of this was unrealistic and as an alternative to the circumstantial hypothesis unworthy of belief. Lies of course do not make a case for the prosecution. The trial judge put the circumstantial evidence before the assessors and informed them correctly how they were to approach it. This ground fails.

Whether prejudiced without written record in itaukei?

[28] Ground 2 argues that the court had failed to consider the gross prejudice caused to the petitioner when he had been interviewed in Fijian and his answers not recorded in Fijian. The interviewing officer had immediately translated into English and recorded the English version only of what was said. The petitioner said he signed the English translation though he "only knew a bit of English."

[29] He said he had attended Gau Secondary School in Lomaiviti up to Form 4. He has been residing in Suva for some time, the length of which was unclear.

[30] The allegation against voluntariness of the caution interview statement was that after being assaulted he merely agreed to everything the police officer had put to him. Any complaint about being interviewed in Fijian and that his answers were unfairly and wrongfully recorded in English would be of no relevance to his case, for he says the answers were not his. So the language in which they were written is of no litigation significance. The issue was for the court to decide whether he actually gave those answers, only some of which were incriminating, and whether he did so voluntarily.

[31] The interviewing officer admitted in cross-examination he had put the questions in Fijian and translated them and the petitioner's answers into English, and that was the language in which he recorded them.

[32] This was not a correct way of carrying out a caution interview procedure. The interviewing officer should have recorded the words of the questions together with the suspect's answers in the language of choice that is the language in which it was conducted. It would be for the court through its interpreters to check what had been recorded first in Fijian, before the court. If the subsequently prepared translation was challenged, the court could decide whether to admit the translated version. It is normal procedure for the interviewing officer to provide an English translation as an accompanying exhibit to the original in Hindi or itaukei.

[33] It seemed from the trial itself the petitioner had no difficulty in finding his way to the parts of the caution interview document which was in English, and in answering questions on whether he had said this or that. The court may have not been prepared to accept that the petitioner had the difficulty he said he had in understanding English. But there was no prejudice caused to his case bearing in mind the way it was run. This ground must fail.

Failure of court to consider properly the voluntariness of the caution statement

[34] The 3rd and final ground was that "the court (had) failed to consider that my interview was given involuntarily as a result of the assaults done against me."

[35] During the trial a voir dire had been held to determine whether the taking of the caution interview had been voluntary. The trial judge ruled it voluntary and admissible. At the end of the main trial his lordship delivered a 39 page summing up on the case. Allegations had been made of assaults from the moment of apprehension to the police vehicle, prior to the caution interview, and even after the charge statement had been taken. After the voir dire in which the caution interview statement had been ruled admissible, the petitioner, as was his right, put in the main trial the same questioning to the police witnesses to suggest he had been subject to assaults,

threats and violence: **Noa Maya v The State** CAV009/2015 23rd October 2015. These allegations were examined most thoroughly in the Court of Appeal judgment.

[36] The judge had considered the lack of complaint to a police officer well known to the petitioner at the police station, PC Alwin Kishor Kumar, and the failure to complain to the Magistrate or to the Corrections Centre at Korovou. He had not asked for any medical attention, nor had his relatives for him.

[37] In his judgment after receiving the unanimous opinions of the assessors of guilt, the trial judge came to the same conclusion. The judge had not changed his mind during the trial on the voluntariness of the petitioner in giving the caution interview. The direction as suggested in **Noa Maya** (supra) Keith J at para 23 following **Mushtaq** [2005] UKHC 25 is therefore not so relevant.

[38] In a case such as this where the allegations of assault are not independently supported or evidenced the direction has less significance. **Noa Maya** will be more applicable in a case where the allegations are supported by cogent evidence or where doubts are raised. This was not such a case. This ground fails also.

Conclusion

[39] The grounds fail and the criteria for leave have not been met. The orders of the court are therefore:

1. Petition for Leave to appeal is refused.
2. The judgment of the Court of Appeal is upheld.

Marsoof J:

I concur with the judgment of Gates P and agree with the orders proposed.

Ekanayake J:

I have read the draft judgment of his lordship Gates P. I agree with its reasoning, conclusions and the orders proposed.

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Hon. Justice Anthony Gates
President Supreme Court

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Hon. Justice Marsoof
Judge of the Supreme Court

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Hon. Justice Ekanayake
Judge of the Supreme Court

Solicitors for the Petitioner: Director, Legal Aid Commission
Solicitors for the Respondent: Director of Public Prosecutions

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