

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0026.2016
(On Appeal from Court of Appeal No: AAU 0042.2012)

BETWEEN : **RONALD JEREMAIA COLATI**

Petitioner

AND : **THE STATE**

Respondent

Coram : Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court

Counsel : Petitioner in Person
Mr. S. Vodokisolomone for the Respondent

Date of Hearing: 5 April 2017

Date of Judgment: 20 April 2017

JUDGMENT

Marsoof, J

1. I have read the draft Judgment of Aluwihare, J and agree with his reasoning and conclusions.

Aluwihare, J

2. When this matter was taken up a support, the learned counsel for the petitioner intimated to court that she had been instructed by the petitioner that the petitioner wished to support the application for leave to appeal himself, and he did not seek the assistance of the Legal Aid Commission to represent him in the present application. Accordingly, Miss Tarai sought and obtained permission to withdraw from representing the petitioner. The petitioner in person was heard in support of this application.
3. Following the trial in the High Court of Suva, before a judge sitting with three assessors, the petitioner was charged along with two others for Theft and Aggravated Robbery.
4. At the conclusion of the trial, the learned trial judge having accepted the majority decision of the assessors found the petitioner and the other two accused charged along with him guilty as charged, by his judgement dated 8th May 2012 and they were sentenced accordingly.
5. Aggrieved by the conviction and the sentences imposed on them, the petitioner and the other two accused filed applications for leave to appeal, and consequently leave was granted by the Court of Appeal to appeal against their convictions.
6. The appeal was heard before the Court of Appeal and by its judgement of 27th May 2016, the Court of Appeal dismissed the leave to appeal application filed by the petitioner against the conviction and sentence imposed on him, while the convictions of the other two accused were set aside and the sentences imposed on them were quashed.
7. Aggrieved by the judgement of the Court of Appeal referred to above, the petitioner has sought special leave to appeal from this court, by his petition dated 13th June 2016 which is timely. Subsequent to the filing of the said petition, seeking special leave to appeal, the petitioner had filed a second petition on the 16th August 2016 seeking the same relief. At

the hearing, the petitioner moved court that the petition he filed on 26 August 2016, be treated as an amended petition and submitted that he is confining himself to the grounds of appeal averred in the amended petition.

8. The grounds of appeal raised in the petition are reproduced below, verbatim;
 - (i) That the Lordships of the Fiji Court of Appeal erred in law in delivering and pronouncing inconsistent verdicts between core defendants on the basis of joint offenders in the judgement dated 27 May 2016. This was a miscarriage of justice in the circumstances of this case.
 - (ii) That the Court of Appeal erred in law in suggesting to the appellant during the hearing that there is no need for him to make any oral submissions on the issue regarding confession as it's already in his favour and in doing so it has prejudiced the appellant causing a miscarriage of justice.
 - (iii) That the learned trial judge erred in law when he did not direct the assessors to confirm the truth of the confessions before acting on them to convict me. This is a miscarriage of justice in the circumstances of the case.
 - (iv) That the learned trial judge erred in law when he failed to direct himself and the assessors that the prosecution witness Saimoni Qumiwaimaro will have implicated me to save himself.
 - (v) That the learned trial judge erred in law in failing to outline to the assessors that the prosecution witness Saimoni Qumiwaimaro was an accomplice and the legal consequence of an accomplice.

Jurisdiction of the court

9. Section 98 (3) (b) of the Constitution of the Republic of Fiji lays down that “the Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by a written law, to hear and determine appeals from all final judgements of the Court of Appeal”.
10. Further, section 98 (4) of the Constitution stipulates that “an appeal may not be brought before the Supreme Court from a final judgement of the Court of Appeal unless the Supreme Court grants leave to appeal”.
11. Section 7 (2) of the Supreme Court Act (cap13) sets down the threshold, a party seeking special leave in a criminal matter. Section 7 (2) of the Supreme Court Act reads thus;

“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.
- c) Substantial and grave injustice may otherwise occur.

Factual Background

12. The incident germane to the charges commenced at Tiwari Shopping Centre Narere, where witness Narayan usually parks his van for hire. In the witnesses’ own words, on the day in question, around 1:30 pm, his van was hired by an “i - Taukei boy” who wanted him to be taken to Suva. On the way, at Nasese, three others had got into the van. Having covered some distance, the person who was occupying the front passenger seat had pointed a knife at him and had wanted the van stopped. After being forced into the rear of the van, the witness had been tied, gagged and made to stay under the seat. He had further stated that he remained in that position for about 3 to 4 hours.

13. According to witness Hussein, a Director of Colour Market Ltd, he had driven to a Westpac bank branch of Nabua, carrying with him \$ 21,130 in cash and \$8675. 75 in cheques. This amount, the witness says was his day's collection. Having parked the car, he had collected the envelope containing the money and the cheques, and when he was about to get off the vehicle, a man had accosted him and had grabbed the envelope from his hand. The witness had made an attempt to retrieve the envelope from the man, but he had been punched by the man and bottles had been hurled at him. The witness had further stated that he saw them getting into a white van and speeding away.

14. The prosecution also called witness Saimoni. He had testified to the effect that the petitioner is a friend of his and on the day in question he spoke to him over the phone around 3.00 in the afternoon and wanted the witness to pick him up near the Chinese shop in Kinoya. The witness having picked the petitioner had driven him to a location opposite Western Wreckers Ltd at Samabula and had waited there for some time. From Samabula, the witness had driven the petitioner to Nabua and the witness had been told to pick three of his e friends from "Rifle Range". Having dropped the petitioner at Nabua, the witness had driven to the Rifle Range and had picked four others. One of them happened to be the person who stood as the first accused at the trial. The witness then had dropped them at Caubati Stage 3, and had returned to his usual taxi stand. Again around 4.00 p.m. he had picked up the petitioner from the same location where he dropped the four friends of the petitioner and had taken the petitioner to Nadi. The witness had been paid \$1500 as his taxi fare.

Grounds of Appeal

15. With regard to the first ground of appeal, the petitioner argued that the Court of Appeal erred in delivering, an "inconsistent verdict". The petitioner contends that he along with the two other accused were jointly charged before the High Court and in view of the

acquittal of the other two accused by the Court of Appeal, the petitioner argues, that his conviction cannot be sustained

16. It was the contention of the petitioner that when more than one person is charged jointly for committing an offence, it would be a miscarriage of justice, if the court is to pronounce different verdicts in respect of individual accuseds.
17. It was submitted on behalf of the state that the above ground of appeal was not raised or argued before the Court of Appeal and for this ground of appeal to be considered by the Supreme Court, the ground of urged must meet the test laid down in the case of **Balekevuya Vs. State 2016 FJSC (37), CAV 14/2016.**
18. As I have referred to earlier, at the end of the trial before the High Court, all three accused including the petitioner were convicted and sentenced as charged. The acquittal of the two accused resulted from the judgement of the Court of Appeal. Thus the first ground of appeal raised before this court, arose from the Court of Appeal judgement and as such the first ground of appeal cannot be considered as a fresh ground for the reasons set out above.
19. Section 60 of the criminal procedure decree of 2009 reads as follows:-
The following persons may be joined in one charge or information and may be tried together -
 - a) persons accused of the same offence committed in the course of the same transaction;
 - b) persons accused of an offence and persons accused of –
 - (i) aiding or abetting the commission of the offence; or
 - (ii) attempting to commit the offence;
 - (c) persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character; and

(d) persons accused of different offences committed in the course of the same transaction”.

20. The prosecution is entitled to present the charges or information as the case may be against more than one accused jointly, if the act or acts committed that constitute the offence, falls within any of the limbs enumerated in section 60 of the Criminal Procedure Decree.
21. The object of this provision is to make the system of administration of justice expeditious by not having to hold separate trials against persons who have been charged with complicity in the commission of a single crime.
22. It is trite law that even in cases where two or more persons are jointly charged for the commission of the same offence, evidence incriminating each accused must be evaluated separately in determining the culpability of the charges preferred, in respect of each accused.
23. In the instant case the prosecution presented information against the petitioner and two other accused on the basis that all three had formed a common intention to prosecute an unlawful purpose and in the prosecution of that purpose, two offences were committed, namely theft and robbery.
24. I find that the petitioner had raised this ground of appeal under the misconception that, because he was charged jointly with two others, either all of them must be found guilty or all of them must be found not guilty. I do not find any merit in the first ground of appeal and accordingly special leave to appeal on the 1st ground is refused.
25. As regards the 2nd ground of appeal, the petitioner argued, when the matter was taken up for hearing, the court of appeal had suggested that there was no need to make submissions regarding the voluntariness of the confession alleged to have been made at

the caution interview, on the basis that the learned trial judge had decided in favour of the petitioner regarding the admissibility of the confession and as a result, serious prejudice had been caused to him.

26. The petitioner in these proceedings, however, submitted that he would be satisfied if the Supreme Court considers the issue afresh. The petitioner's position was that, had the Court of Appeal analysed the evidence led at the *voir dire* in its totality their Lordships would have concluded that the confession made at the caution interview was not one that was obtained voluntarily.
27. In fairness to their Lordships of the Court of Appeal, it must be pointed out that the Court of Appeal had gone into the issue of voluntariness of the confessionary statement made by the petitioner at the caution interview and had concluded that the finding of the learned trial judge, that the statement had been made voluntarily, is not erroneous.
28. In view of the complaint made by the petitioner, that he was discouraged by the Court of Appeal from canvassing the issue of voluntariness and the fact that at the hearing of the petition, in response to a question by the court, the petitioner intimated that he would be satisfied if the issue of voluntariness is reconsidered by the Supreme Court. In order to avoid any prejudice that may have occurred, I am of the view that it is the duty of this court to revisit the issue.
29. The officer who arrested the petitioner DC 4322 Namata, Sgt 1844 Vamosi, the officer who witnessed the recording of the caution interview, and Sgt 2509 Ravunibola who recorded the caution interview gave evidence at the *voir dire*. Sgt Ravunibola had stated that he commenced the interview with the petitioner at 3:15 PM on that day. DC 3650 Daunitutu had said in his evidence that the petitioner was released for interviewing at 1:35 pm.

30. The petitioner argued that the prosecution was unable to explain where the petitioner had been between 1:35 PM and 3:15 PM and this factor was not placed before the assessors nor had that been considered by the learned trial judge in deciding the issue of voluntariness. In considering the evidence, I find that rather than harping on the purported inability of the officers to explain where the petitioner had been kept during the period in question, the petitioner ought to have closely question the officers on this issue. On examining the evidence, however, I find that the petitioner has failed to question the officers on the matter of vital importance to him.
31. All the police officers referred to above, testifying under oath had categorically stated that they did not assault, threaten or intimidate the petitioner nor had they made any promises before or during the course of recording the confession and the petitioner made the statement voluntarily.
32. It is evident from the proceedings that the suggestion of assault or intimidation had been made only regarding two witnesses, namely Sgt Vamosi who recorded the confession, and DC Namata, the officer who arrested the petitioner. Both these witnesses had denied having assaulted him or having subjected the petitioner to any form of intimidation.
33. As far as the challenge to the voluntary character of the petitioner's caution interview is concerned, other than the suggestions made to the police officers, there is absolutely no other material to substantiate the position taken up by the petitioner to say that the statement was obtained by oppression, ill treatment or inducement.
34. The only evidence available to the learned and High Court judge to determine the issues of voluntariness was the evidence led by the prosecution as the petitioner neither gave evidence at the voir dire nor was any material produced to support the petitioner's claim.
35. Their Lordships of the Court of Appeal held that, unless there is evidence to substantiate it, there is no evidentiary value in a mere suggestion. In the circumstances, I find no

reason to disagree with the conclusions of the learned trial judge that the record of the caution interview of the petitioner was made voluntarily, and hold the conclusion of the learned trial judge cannot be faulted with. I am of the opinion that the petitioner had failed to meet the threshold requirement for the granting of special leave regarding the second ground of appeal.

36. The petitioner's 3rd ground of appeal is the purported failure of the learned trial judge to direct the assessors to consider the truthfulness of the confession before acting on the same. No doubt, truthfulness needs to be considered before acting on a confession that had been declared as having been made voluntarily after a voir dire. In the present application, the petitioner argues that the learned trial judge had not directed the assessors on this aspect.
37. Their Lordships of the Court of Appeal had considered this ground of appeal and had come to the conclusion that the approach adopted by the learned trial judge is much in accordance with the law and had proceeded to disallow this ground.
38. In the summing up, having reminded the assessors of the evidence given by witnesses Alvin Narayan and Harun Hussain, the learned High Court judge had placed before the assessors, excerpts of the caution interview of the petitioner and had directed the assessors to the effect "*there appears to be no evidence to challenge its reliability and credibility. However, it is a matter for you*". Thus, it is clear that the learned trial judge, having expressed his view about the reliability and credibility of the confession, in the same breath had directed the assessors, that deciding the issue of reliability and credibility is a matter for them.
39. In my view the assessors must decide as to the probative value of the confession that must be given to a confession, considering its credibility and weight, and whether it is untrue. A court in the United States in the case of **Burton v The State**; 101 Alab. 108, on the issue of probative value held :-

“ Whether voluntarily made or not, we hold, is a question of law to be determined by the court from the facts, as a condition precedent to their admission. Having been declared competent and admissible, they are before the jury for consideration. The Jury have no authority to reject them as incompetent. But the jury are the sole judges of the truth and weight to be given to confessions, as they are of any other fact. In weighing the confession, the jury must take into consideration all the circumstances surrounding them and under which they were made, including those under which the court declared as a matter of law, they were voluntary. In weighing the confessions, the jury necessarily considers those facts upon which their admissibility, as having been voluntarily made, depends. While there is no power in the jury to reject the confession as being incompetent, there is no power in the court to control the jury in the weight to be given to facts. The jury may, therefore in the exercise of their authority and within their province, determine that the confessions are untrue, or not entitled to any weight, upon the grounds that they were not voluntarily made.... The jury considers the same facts (as the court) and in connection with other facts, if there are other facts, in determining whether the confessions are true and entitled to any, and how much weight.”

40. The direction given by the learned trial judge to the assessors that they must consider the reliability and credibility of the confession, in my view, is adequate to put the assessors on notice that they can act on the confession of the petitioner only if they find the confession both credible and reliable. I do not see any misdirection or a non-direction on the part of the learned trial judge. As such I am of the view that there is no merit in the 3rd ground of appeal raised by the petitioner and accordingly special leave to appeal on the said ground is refused.
41. I wish to consider the grounds of appeal 4 and 5 together as I find them interwoven. Further, these are fresh grounds of appeal that were not argued before the Court of Appeal.

42. The petitioner argues that the learned trial judge failed to direct the assessors that witness Simoni Qumiwaimaro was an accomplice and that there are possibilities of the witness falsely implicating the petitioner in order to exculpate himself and the learned trial judge failed to direct the assessors as to how the evidence given by an accomplice should be evaluated.
43. Pivotal no doubt, to decide the issue raised with regard to the evidence of witness Simoni is whether the said witness could be considered as an accomplice. In the case of **Davies v Director of Public Prosecutions 1954A.C 378** the House of Lords distinguished between accomplices in the actual crime, that is, a person who is *particeps criminis* in respect of the actual crime charged either as a principle or as an accessory before or after the fact, and accomplices in the general criminal transaction, that is, a person who is not *particeps criminis* in respect of the actual crime charged but who was criminally implicated in the transaction which gave rise to the actual crime charged. According to the House of Lords, it is only in the former class of accomplices is there an imperative duty to warn the jury of the danger of convicting without corroboration.
44. There is no material before this court to say that witness Simoni was, in any way involved in the alleged crime or that he had any knowledge of it either. The witness had said, in answer to a question by the petitioner himself, that the petitioner did not discuss the robbery with the witness. Further this witness had not been treated as a suspect at any stage of the enquiry. The witness had testified to the effect that the petitioner was known to him and that he responded to his request made over the phone around 3 pm on the day in question. As requested by the petitioner, the witness had driven the petitioner and some of the other accused to a number of locations. Under cross examination the witness had said that he was not forced by the police to make statements. The witness, however, had admitted that at Nabua police station he was assaulted by the police. According to the witness, the petitioner is a friend of his and they live in the same village. There is no evidence of any animosity between them either.

45. I am of the view that witness Simoni cannot be treated as an accomplice to the alleged crime and as such there was no necessity for the trial judge to direct the assessors with regard to evidentiary principles of evaluating evidence of an accomplice. I do not see any merit in the grounds of appeal nos. 4 and 5, and furthermore petitioner had failed to satisfy this court that these grounds meet the test laid down in the case of **Belekivuya v State** [2016] FJSC 37: CAV 0014. 2016, being fresh grounds that were not argued before the Court of Appeal. As such, special leave to appeal on grounds 4 and 5 are refused.
46. All circumstances considered, I am of the opinion that the petitioner had not met the threshold set out in section 7(2) of the Supreme Court Act.

Jayawardena, J

47. I have read in draft the judgment of Aluwihare J, and I agree with his reasoning and conclusions.

The Orders of the court are:

1. *Special Leave to appeal is refused.*
2. *The judgement of the court of Appeal is affirmed*
3. *The conviction and the sentence imposed by the High Court will stand.*



Saleem Marsoof
.....
Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

Aluwihare Buwaneka
.....
Hon. Mr. Justice Aluwihare Buwaneka
Judge of the Supreme Court

Priyantha Jayawardena
.....
Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Solicitors:

Petitioner in Person
Office of the Director of Public Prosecutions for the Respondent.