IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0027.2016
(On Appeal From Court of Appeal No: AAU 0033.2009)

BETWEEN : **SAKIUSA ROKONABETE**

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 : **Miss. M .Tarai for the Petitioner**

Mr. M. D. Korovou for the Respondent

Date of Hearing: **6 April 2017**

Date of Judgment: **21 April 2017**

JUDGMENT

Marsoof, J

1. Having gone through the judgment of Aluwihare J in draft, I am in agreement with Aluwihare J's reasoning and conclusions.

Aluwihare, J

2. The petitioner who is presently serving a sentence of 15 years imprisonment for having been convicted on a charge of robbery with violence under section 293 (1) (b) of the

Penal Code,seeks special leave to appeal from this court on the following grounds, which are reproduced as they appear in the petition.

The Court of Appeal erred in not holding that:

i. the failure of the trial judge not adjourning the trial in order for an legal representation and thereby caused a miscarriage of justice in the circumstances of the case of the petitioner.

ii. by reason not being unrepresented, no miscarriage of justice occurred in the circumstances of the case.

iii. the sentence is manifestly harsh and excessive in all circumstances of the case and passed on anerror of the law.

Jurisdiction of the court

3. 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".

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".

4. Section 7 (2) of the Supreme Court Act (cap13) sets down the threshold, a party seeking special leave in a criminal matter has to meet. 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.

5. At the hearing of this petition the learned counsel for the petitioner Miss Tarai intimated to court that she had been specifically instructed by the petitioner to confine herself to the oral submissions in relation to the 3rd ground of appeal only which is in respect of the sentence imposed on the petitioner. She further submitted that the petitioner's wish is to rely solely on the written submissions tendered to court in respect of other grounds of appeal urged before this court.

6. Considering the nature of the grounds of appeal raised and since the facts of the case are not disputed, I do not wish, in this judgement, to dwell in to the facts of this case and will refer to them to the extent necessary to deal with the grounds of appeal.

7. Following the summing up by the learned trial judge, the assessors returned a majority verdict that the petitioner is guilty as charged and by the judgment dated 18 September 2009, the trial judge having accepted the majority verdict found the petitioner guilty and was convicted as charged.

Background facts

8. The petitioner and three others armed with pinch bars had invaded the home of the victim's Mr and Mrs Maqbool in the wee hours of the morning. They had threatened the husband and wife, who were of 59 and 54 years of age respectively and had demanded money. Intruders had ransacked the house of the victims, who had lost $1800 in cash and some of their belongings worth $1960. The main evidence against the petitioner emanated from the confessionary statement the petitioner made to the police which is reflected in the record of the caution interview dated 9 May 2004. This statement was admitted at the trial as a voluntary statement after a voir dire.

9. The grounds of appeal (I) and (II) referred to above are clearly interwoven and as such I wish to consider those grounds of appeal together.

10. The basis on which the petitioner is moving to have his conviction set aside is that, by the failure on the part of the trial judge to adjourn the trial in order to allow the petitioner to secure legal representation, serious prejudice was caused to him, which in turn the petitioner claims, resulted in a miscarriage of justice.

11. Upon scrutiny of the proceedings before the Magistrates Court as well as the High Court, the reason as to why there was no legal representation for the petitioner could be discerned without much difficulty.

12. The proceedings before the Magistrates Court and the High Court, on the instances referred to below, clearly reflects the steps that had been taken by the courts to facilitate securing of legal representation for the petitioner.

i. When the petitioner's case in relation to the impugned incident was taken up before the Suva Magistrate, on 18 April 2008, the court explained the petitioner's right to services of counsel.

ii. When the matter came up before the magistrate on 17 June 2008, the petitioner elected to be tried before the magistrate and the magistrate had again explained to the petitioner his right to counsel. On the said date the petitioner had waived his right and had informed court that he will be defending himself.

iii. On the 9th July 2008 the petitioner had withdrawn his election for a magistrate's court trial and elected to be tried by a High Court.

iv. The petitioner's first appearance before the High Court had been on the 23rdJuly 2008 and the learned High Court Judge had informed the petitioner to seek legal aid.

v. When this matter came up before the High Court on 15thAugust 2008,once again the accused was advised by the High Court Judge to obtain legal aid.

vi. Again on the 14th September 2009, the petitioner was informed of his entitlement to be represented by counsel and the petitioner had intimated to court that "I will represent myself".

13. It would be pertinent to refer to an observation made by the Court of Appeal when this matter was argued before that court. When being asked by their Lordships as to why the petitioner did not want assistance from the Legal Aid Commission the petitioner had said that due to the persuasion by a prison inmate, he was pursuaded to look after his own defence and not to rely on the available benevolent facility of legal aid.

14. The response by the petitioner referred to above clearly demonstrates that petitioner had no intention of seeking assistance from legal aid or to retain a counsel of his choice. This position is further fortified by the conduct of the petitioner by not requesting for legal aid.

15. Ironically, even in the present application before us, the petitioner had specifically instructed his counsel from the Legal Aid Commission not to make any oral submissions in relation to the main ground of appeal he had urged before us and had wished to rely solely on the written submissions prepared by him.

16. The petitioner, however, complains before this court (as per his written submissions) that the learned High Court judge erred in exercising his judicial discretion in refusing the petitioner's application for an adjournment in order to secure legal representation. The petitioner had placed reliance on the judgement of **Siwan vs State 2008 FJHC 189 HAA 050.** I see no relevance of the decision of that case, to the ground of appeal under consideration.

17. Section 14 (2) (d) of the Constitution of Fiji states :

Every person charged with an offence has the right -

"to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promoptly of this right or, if he or she does not have sufficient means to engage a

legal practitioner and in the interest of justice so require to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission and to be informed promptly of this right."

18. The petitioner has also relied on the judgement of **Galos Hired v King (1944) A.C 149** where the Privy Council had set aside the conviction as the accused was unrepresented due to the reason that his counsel was prevented from attending court due to 'wartime conditions'. The petitioner has also referred to a decision of the High Court of Australia; the case of **Dietrich v The Queen 1992 HAC 57.** In the said case chief Justice Mason had stated "when the trial judge is faced with an application for an adjournment or stay by an indigent accused charged with a serious offence, who through no fault of his part unable to obtain legal representation, thus the trial in such a case should be adjourned".

19. I am of the view that the petitioner is not entitled to benefit from any of the decisions cited by the petitioner referred to above.In the instant case, the non-representation of the petitioner by counsel was not due to any extraneous factors that were beyond the control of the petitioner, but as a result of obstinacy on his part in obtaining legal aid. Here is a situation where the petitioner was not keen to have a counsel to assist him as opposed to a situation where "due to no fault of his, accused is unable to obtain of legal representation" as referred to by Chief Justice Mason in the case of **Dietrich v.The Queen** referred to above.

20. The petitioner having informed court that he will represent himself on the 14th September 2009, on the next day in the midst of the *voir dire*, i.e. 15th September, a letter had been handed over to court by the petitioner, requesting an adjournment of the trial, in order to seek legal assistance. The learned trial judge having declined an adjournment in his considered ruling dated 15th September 2009, had observed that the "accused had been given ample opportunities to consult a lawyer. The learned trial judge had added that "he is not a stranger to the court. He is familiar with procedure. He should be able to defend himself. This is a delaying tactic."

21. The learned trial judge was justified in making the observation referred to above, in view of the somewhat checkerred history the case had earned. Originally the proceedings had been instituted before the magistrates' court in 2005 and the petitioner had been convicted. He had appealed against the conviction to the High Court and did not succeed. The petitioner, however, had been partially successful in his appeal to the Court of Appeal which ordered a retrial. Having gone through the process, the Petitioner would have been familiar with the court procedures .In the case of **Robinson v. The Queen (1985) A.C 956** it was held that

> *"The absence of Counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted. In this case, the appellant sought, but was refused legal aid by reason of an assessment of a lack of merit in his defence. The decision was properly reviewed and dismissed. Section 28 of the Constitution does not require the provision of legal aid in absolute terms. The obligation which is implicit in that respect is one which arises where "the interest of justice or require".*

22. Having considered all matters referred to above, I am of the view that the petitioner had failed to meet the criteria set down under Section 7(2) of the Supreme Court Act for granting of leave, with regard to the first two grounds of appeal on which special leave is sought.Accordingly special leave to appeal with regard to grounds of appeal (i) and (ii),is refused.

23. As regards the third ground of appeal, court heard the learned counsel for the petitioner who submitted that the learned trial judge had not complied with a mandatory provision of the Sentencing and Penalties Decree of 2009. The learned counsel pointed out that in terms of section 24, of the said Decree, "any period of time during which the offender was held in custody prior to the trial the matter or matters shall, unless the court otherwise orders, be regarded as a period of imprisonment already served by the offender.

24. Section 24 of the Sentencing and Penalties Decree, is couched in mandatory terms. As such the rule would be, upon conviction, to give credit to the accused the period of incarceration pending trial, by taking off that period from the sentence imposed. The exception would be for the court to direct otherwise. In the event the court decides not to apply the rule referred to above, the court may do so but would be required to give reasons for the non-application of the rule.

25. The learned counsel for the petitioner argued that the learned trial judge had failed to take into account a relevant consideration, namely Section 24 of the Sentencing and Penalties Decree of 2009 in imposing the sentence on the petitioner.

26. In the case of **Naisua v State [2013]FJSC14;CAV0010.2013**the Supreme Court held that "the test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of the **Kim Nam Bae** case. The Supreme Court affirming the principles set out in **House v The King** [1936] HCA 40: (1936) 55CLR 499 held that a appellate court will interfere with a sentence if its demonstrated that the trial judge made one of the following errors:

(i) Acted upon wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts
(iv) Failed to take into account some relevant consideration

27. It was pointed out on behalf of the petitioner that the learned trial judge had failed to give consideration to Section 24 of the Sentencing and Penalties Decree of 2009 which was mandatory and that this is a fit instance for this court to interfere, applying the principles laid down in the Naisua case.

28. The learned counsel for the petitioner submitted to court that, between 2005 and 2006 the petitioner had been in custody initially for one year and two months and subsequently for a further period of 11 weeks after the conviction, up to the time the conviction was

quashed by the Court of Appeal in July 2006. This was not disputed by the learned counsel for the respondent.

29. Perusal of the record reveals that when the sentence by the magistrate was imposed on 25 February 2005, the petitioner was already serving a prison term in respect of a conviction unrelated to the matter before us. As such I am of the view that the petitioner is not entitled to any credit for the time he spent in custody after the conviction, as he was serving a jail term. This is reflected in the sentencing ruling of the learned resident Magistrate of Suva dated 25 February 2005.

30. At the time the sentence in the present case was imposed, i.e. on the 18th September 2009, the petitioner was already serving a term of 13 years imprisonment imposed on him in 2008. Taking into account the fact that the petitioner was serving another term of imprisonment, the learned High Court judge had made eight years of the term of 10 year sentence (imposed in this case) concurrent to the term he was already serving and the balance two years to operate as a consecutive term, in terms of section 28 (4) of the Penal Code (Cap 17).

31. The petitioner had been sentenced on the 18th September 2009 and the learned High Court Judge had acted under the law that was in force at that time. The learned High Court Judge could not have acted in terms of the Sentencing and Penelties Decree of 2009 as the same had come into force only in November 2009, which was on a date after the sentence was imposed on the petitioner. As such it cannot be said that leanerd trial judge had failed to take in to account "relevant factors" into consideration.

32. Considering the above I am of the opinion that the petitioner had failed to make out a case for the grant of special leave and as such I see no basis to grant special leave on the ground of appeal (iii) as well.

33. 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

33. I agree with the reasoning and conclusions of Aluwihare J.

The Orders of the Court are:

1. *pecial 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.*

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

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

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

Solicitors:

Office of the Legal Aid Commission for the Petitioner
Office of the Director of Public Prosecutions for the Respondent.