IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0006 of 2012
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[On Appeal from the Court of Appeal No. AAU 0095 of 2008]

BETWEEN	:	**SAKIUSA ROKONABETE**
		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. Mr. Justice William Calanchini** **Judge of the Supreme Court**
Counsel	:	**Petitioner in person** **Mr. M Korovou for the Respondent**
Date of Hearing	:	**21 June 2018**
Date of Judgment	:	**17 August 2018**

JUDGMENT

Gates P

[1] I have read in draft the judgment of Chandra J. I agree with the reasons given and the orders proposed, that the petition must be dismissed.

Chandra J

[2] This is an application for special leave to appeal filed on the 7th of May 2012 by the Petitioner against the Ruling by a Single Judge of the Court of Appeal dated 4th May 2012.

[3] The Single Judge of the Court of Appeal dismissed the appeal of the Petitioner against conviction and sentence under section 35(2) of the Court of Appeal Act, 1949.

[4] The Petitioner seeks leave to appeal on the following grounds:

> *"Against Conviction*
>
> 1. *That the Learned Trial Judge erred in law and fact when his Lordship did not deliver a written ruling entered against the admissibility of the disputed photocopied caution and charge interview statements of the Voir dire.*
>
> 2. *That the Learned Trial Judge erred in law and fact when his Lordship wrongly admitted evidence of photocopied caution and charged interview statement.*
>
> 3. *That the Learned Trial Judge erred in law and fact when his Lordship denied an adjournment for adequate time to read and familiarize myself with the bundle of disclosures returned to me on the day of trial by the Legal Aid Commission.*
>
> 4. *That the Learned Trial Judge was bias, swayed and unfair before, during and after the guilty verdict of the Assessors.*
>
> *Against Sentence*
>
> 5. *That the starting point of the sentencing base was in error and excessive in all circumstances of the case.*

6. *That impermissible aggravating factors not recognized was taken into and/or in consideration in enhancing the sentence.*

7. *That the sentence is manifestly harsh and excessive and wrong in principle in all circumstances of the case."*

Jurisdiction of the Supreme Court

[5] An appeal lies from a dismissal of an application for leave to appeal by a single Judge of the Court of Appeal in terms of section 35(2) of the Court of Appeal Act. It is well settled that an appeal lies to this Court against decision of dismissal under section 35(2) of the Act as a final decision of the Court of Appeal. **Araibulu v State** [2015] FJSC 31; CAV3.2015 (23 October 2015). The threshold for granting special leave to appeal to the Supreme Court is very high and the Petitioner has to reach that threshold to get leave to appeal. Section 7(2) of the Supreme Court Act 1998 states:

> *"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; or*
> *(c) Substantial and grave injustice may otherwise occur."*

Factual Background

[6] The Petitioner was charged on an Amended Information dated 18th March 2008 with three others before the High Court at Suva for one count of Robbery with violence contrary to section 293(1) of the Penal Code, for robbing the MH Supermarket on the 7th of July 2007 at Samabula in the Central Division of $21583.73 in cash having threatened to use personal violence on the cashiers and customers at the MH Superfresh Supermarket at Tamavua.

[7] After trial the Assessors by a majority opinion found the Petitioner guilty of the offence and the learned High Court Judge concurred with the majority opinion and the petitioner

and the other three accused were convicted on 10th September 2008. On 15th September the Petitioner was sentenced to a term of 13 years imprisonment.

[8] The Petitioner being aggrieved by the said judgment and sentence of the High Court sought leave to appeal from the Court of Appeal on the following grounds:

1. The trial Judge erred in admitting photocopies of their caution interviews and charge statements because no due diligent search had been conducted for the originals and the State failed to call the relevant witnesses.
2. The Petitioners were prejudiced by lack of legal representation.
3. The trial judge failed to rule on the voir dire.
4. The trial Judge was biased against the Petitioner.
5. The sentence was harsh and excessive.

[9] The Single Judge of the Court of Appeal by a Ruling dated 4th May 2012 refused leave to appeal against conviction and sentence and dismissed the application in terms of section 35(2) of the Court of Appeal Act.

The Present Application

[10] The Petitioner in his application seeking special Leave to Appeal has set out 4 grounds against conviction and 3 grounds against sentence. Of these grounds, grounds 1, 2 and 4 are same as the grounds that he had canvassed before the Court of Appeal while he has elaborated the grounds against sentence by adding two more grounds.

[11] Ground 3 is a new ground urged by the Petitioner which was not canvassed before the Court of Appeal. In **Dip Chand v State** [2012] FJSC 6; CAV0014.2010 (9 May 2012) the Supreme Court referring to the criteria for granting special leave in terms of section 7(2) of the Supreme Court Act stated:

> *"[35] It is necessary to stress that the said criteria in a sense curtail the power of the Supreme Court to grant special leave to appeal against a final judgment of the Court of Appeal, and as was observed by this Court said in **Aminiasi Katonivualiku v The State** (Criminal Appeal No.CAV0001/1999S) at page 3 :-*

> *It is plain from this provision that the Supreme Court is not a Court of Criminal appeal or general review nor is there an appeal to the court as a matter of right and ... ... the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal... ."*

The above passage was cited with approval by this court in **Raura v The State** [2006] FJSC 4; CAV0010u.2205S (4th May 2006).

> *[36] The Supreme Court has been even more stringent in considering applications for special leave to appeal on the basis of grounds of appeal not taken up or argued in the Court of Appeal. In **Josateki Solinakoroi v The State** – Criminal Appeal No: CAV 0005 of 2005, the Supreme Court of Fiji in an exceptional case took into consideration the principles developed by Privy Council in similar situations, and in particular relied on the following observation in **Kwaku Mensah v The King** (1946) AC 83.*
>
> > *Where a substantial and grave injustice might otherwise occur the Privy Council would allow a new point to be taken which had not been raised below even when it was not raised in the appellant's printed case."*

[12] Since this is a ground which was not canvassed before the Court of Appeal, I would consider whether this ground merits consideration on the basis of whether a substantial and grave injustice might occur.

[13] The basis of this ground is that the Petitioner was prejudiced by being denied an adjournment before the commencement of the trial because his disclosures had just been returned to him by Legal Aid Commission.

[14] The record reveals that when the matter was called on 11th April 2008, the Petitioner had informed Court that he was going to engage a private lawyer. On 28th of July 2008 State had moved for the Trial within Trial to commence on Wednesday 30th July 2008 to which the petitioner had objected. When the matter was called on 30th July 2008 there was no application made by the Petitioner for an adjournment regarding his disclosures being

with the Legal Aid Commission. He had raised an objection regarding severance of the charge and that he wanted to wait for the 4th accused.

[15] In view of this position borne out by the record, it would seem that the Petitioner had not been prejudiced by the fact that the disclosures had just been returned to him and that he had not made an application for an adjournment but had in fact objected when State moved for an adjournment.

[16] The Petitioner has not shown as to how there has been a substantial and grave injustice caused to him. Therefore this ground fails to meet the threshold of section 7(2) referred to above and is dismissed.

[17] The first ground urged by the Petitioner is regarding non delivery of a written ruling against the admissibility of the disputed photocopied caution and charge statements.

[18] The Single Judge of the Court of Appeal in refusing leave on this ground stated in his Ruling stated that there was a verbal ruling before the written reasons were given which was a practice that was in order.

[19] At the end of the voire dire inquiry the learned High Court Judge had stated on 1st September 2008 that he would give his Ruling on the next day. The proceedings of 2nd September 2008 show the following entry:

> *"**Ruling** – 1st accused's charge statement is admissible. Prosecution may lead it in evidence. I will publish my reasons on notice."*

[20] Having stated so, the learned High Court Judge has subsequently given his Ruling and at paragraph 21 of the said Ruling has stated:

> *"[21] Having considered the demeanour of the witnesses, and of the allegations put to the police officers who were involved in the arrest, interview and charge of the accused persons, I am satisfied beyond*

reasonable doubt that their caution interview statements were obtained voluntarily and not by any unfairness or oppression. I am satisfied beyond reasonable doubt that there was no assault or threats to the accused persons. I am satisfied beyond reasonable doubt that the accused persons Constitutional rights were not breached by the police officers."

[21] It is clear therefore that the learned High Court Judge had delivered a written ruling regarding the admissibility of the disputed photocopied caution and charge statements. The ruling of the learned single Judge of the Court of Appeal under section 35(2) therefore justified. Thus this ground of appeal also fails and does not meet the threshold of section 7(2) of the Supreme Court Act. The learned Judge also dealt with the position regarding the admissibility of photocopied caution and charge statements in his ruling and dealt with the law relating to same as well. This aspect of admissibility of photocopied statements would be dealt with under the discussion on ground 2 of the grounds of appeal.

[22] The 2nd ground of appeal is as regards the admissibility of photocopied caution and charge statements.

[23] The learned High Court Judge dealt with this position in his Ruling referred to above in the following manner:

"[23] In order to admit photocopies of any documents, the prosecution must prove firstly that the original existed which would have been admissible in itself, that the copy is a true and faithful copy of the original, that the original is lost was kept safely before it was photocopied and a copy made from it.

*[24] This was the law established in the case of **R v Vincent Lobendahn** [1972] 12 FLR 1, and since then has remained the law (see, **Drodroveivali v The State**, Cr. App. No. AAU0019/03).*

[25] All four accused persons dispute authenticity of the copies.

[26] The State called Cpl. Ana Vuniwaqa said in July 2007 she was based at Samabula Police Station. She provided

administrative support for the Strike Back Unit. She typed and photocopied the hand recorded caution statements of the accused persons. She photocopied the statements from the originals and placed them in a folder. The originals were kept by the investigating officer who currently is on an overseas mission. She searched for the originals but could not locate them. She conducted her search in the exhibit room and the lockers at the Samabula Police Station. Constable Maria assisted her to search for the documents. The originals are missing.

[27] She was shown the photocopied statements. She said she was the one who made the photocopies. She said the statements are true copies of the originals. In cross examination she denied altering the documents.

[28] Each accused person gave evidence denying making the statements and signing them.

[29] On the evidence of Cpl. Ana, I am satisfied beyond reasonable doubt that the photocopies of all statements made by the accused persons are now lost, and that true and faithful copies are in the possession of the prosecution. I am satisfied that the originals would have been admissible in themselves, and that the police have conducted a diligent search for the originals, without success. The weight to attach to the photocopies is a matter for the assessors."

[24] The Single Judge of the Court of Appeal in his Ruling refusing leave stated that the learned trial Judge had heard the evidence as to the loss of the originals and diligent searches that were made and had properly dealt with same and that no prejudice was caused to any of the Appellants.

[25] In **R v Vincent Lobendhan** (supra) which was cited by the learned trial Judge in his Ruling to decide the admission of photocopied caution and charge statements the factors to be considered in order to admit a photocopy of the cautioned interview statement were laid down as follows:

"i. The prosecution must prove that the original formerly existed which would have been admissible in itself;

ii. *That the copy tendered is a true and faithful reproduction of the original;*

iii. *That the original must be proved to have been lost or destroyed;*

iv. *If lost, that a diligent search was conducted;*

v. *That it must be shown as to what happened to the original up to the time when it was lost and the original was kept safely before it was photocopied and a copy made from it."*

[26] The learned trial Judge's ruling had met with the above factors and the Ruling of the single Judge of the Court of Appeal in refusing leave and dismissing same in terms of section 35(2) is justified.

[27] This ground therefore lacks merit and fails to meet the threshold of Section 7(2) of the Supreme Court Act.

[28] The 4th ground of appeal relates to the allegation of bias on the part of the learned Trial Judge towards the Petitioner before, during and after the trial.

[29] The Petitioner had made an application for recusal on the basis that the learned Trial Judge was the State Counsel in a matter in the Court of Appeal. On the said application being made, the learned trial Judge had given his ruling refusing the application stating that the Court of Appeal matter was a different matter and that the present case had nothing to do with that.

[30] The Single Judge of the Court of Appeal refused leave on the basis that the Petitioner had no grounds to make such an allegation and therefore dismissing this ground in terms of section 35(2) was justified.

[31] In order to establish an allegation of bias, it is necessary to show that there is a real likelihood of bias. In **Amina Koya v State** [1998] FJSC 2 the Supreme Court agreed

with the view expressed by the New Zealand Court of Appeal in **Auckland Casio Ltd v Casino Control Authority** [1995] 1 NZLR 142 that:

> *"There was little if any difference between the Australian test of whether a fair-minded observer might reasonably apprehend or suspect that the judge had prejudged and the English test of whether there is a real danger or real likelihood, in the sense of possibility of bias."*

[32] Justice Shameem in the High Court case of **Peniasi Tirikula v State** HAC 105 of 2006, stated:

> *"[10] Finally it is now trite law that a court is not disqualified simply because the Accused's other cases have been handled by the same tribunal of fact. (see **RE-Cau Juan Wen** HBM 73 of 2002S (per Scott J, and **R v Resident Magistrate ex parte Veitata** (1977) 23 FLR 172. In **Cau Juan Wen**, Scott J said, at page 6 of his Ruling:*
>
> > *It is perhaps also worth repeating that in a small jurisdiction like Fiji it frequently occurs that a Judge or Magistrate is aware of facts detrimental to a party appearing before him. That is no ground for his removal* for bias (see **R v Resident *Magistrate ex parte Veitata*** *(1977) 23 FLR 172)."*

[33] The Petitioner had made a mere assertion of bias on the basis that the learned Trial Judge had been the State Counsel in a Court of Appeal matter. As to how he would be prejudiced as a result has not been demonstrated by the Petitioner in relation to what he asserted in respect of that Court of Appeal matter. In such a situation an allegation of bias cannot be said to be made out.

[34] The learned trial Judge had adequately dealt with this allegation and the Single Judge of the Court of Appeal had considered the manner in which that allegation had been considered as being justifiable and found no error.

[35] This ground therefore lacks merit and does not meet the threshold of section 7(2) of the Supreme Court Act.

[36] The 5th ground of appeal is that the starting point of the sentence was wrong. The starting point chosen by the learned Trial Judge was 12 years.

[37] The learned trial Judge in his sentencing judgment traversed the law in Fiji as it stood and compared the same with case authorities from England on the basis that that law in Fiji as provided in the Penal code was close to that in the English Law. He also considered the Court of Appeal decision in **Wainiqolo v The State**, Crim. App. No.AAU0077 of 2006 where the starting point of 12 years chosen by the trial Judge had been confirmed on appeal.

[38] The learned trial Judge considering the severity of the offence and with a view to deter the accused from committing further offences chose a starting point of 12 years. The tariff for aggravated robbery with violence is 10 to 16 years (**State v Rasaqio** (unreported HAC 155 of 2007; 9 August 2010).

[39] Considering the decision in **Wainiqolo** (supra) where too the starting point was 12 years, this Court sees no error in the learned trial Judge choosing that point in sentencing the Petitioner in the circumstances of the case.

[40] The 6th ground is that the Aggravating Factors were erroneously considered by the learned trial Judge when sentencing the Petitioner.

[41] The learned trial Judge added 5 years to the starting point for the following aggravating factors listed in his sentencing judgment:

> *"* The offence was well planned.*
> * The offence was committed in a supermarket in the presence of children.*
> * Some customers including women were robbed.*
> * Weapons like knives, pinch bar and bottles were used to frighten the employees and customers.*
> * The offence was committed by a gang of men.*
> * The robbers were intoxicated.*
> * Substantial value of cash was stolen.*
> * None of the cash has been recovered.*
> * The prevalence of violent robberies in our community."*

[42] The Petitioner has failed to point out any particular factor that has been erroneously considered except in making a sweeping statement that erroneous aggravating factors have been considered.

[43] Considering the severity of the offence and the manner in which it was committed, the consideration of these factors as aggravating factors cannot be said to be erroneous.

[44] The 7th ground of appeal is that the sentence is manifestly harsh and excessive.

[45] The learned trial Judge electing 12 years as the starting point, reduced 2 years for the mitigating factors and added 5 years for the aggravating factors. Thereafter 2 years was reduced to reflect the period spent in remand and a final sentence of 13 years was arrived at.

[46] As stated above the severity of the offence and the circumstances in which it was committed, the final sentence of 13 years which is within the tariff, is not manifestly harsh and excessive and there is no error in arriving at that final sentence.

[47] **Kim Nam Bae v The State** (unreported AAU 15 of 1998; 26 Februar5y 1999) set out the principles on which the Court could interfere with the sentence imposed by a trial Judge:

> *"It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may imposed a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v R** (1936) 55 CLR 499)."*

[48] The grounds of appeal against sentence, being the 5th to 7th grounds of appeal discussed above do not come within the principles set out in **Kim Nam Bae** and have no merit. The learned single Judge of Appeal had considered these grounds as the sentencing judgment was available to him when deciding that the grounds urged by the Appellant were frivolous and vexatious. They do not meet the threshold of section 7(2) of the Supreme Court Act and are dismissed.

[49] For the reasons stated above, the application of the Petitioner for special to appeal is dismissed.

Calanchini J

[50] I agree that the petition for special leave should be refused.

Orders of Court:

The application for special leave to appeal is dismissed.

Hon. Mr. Justice Anthony Gates
PRESIDENT OF THE SUPREME COURT

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

Hon. Mr. Justice William Calanchini
JUDGE OF THE SUPREME COURT