IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

Criminal Petition No. CAV0030 of 2018
[On Appeal from Court of Appeal No: AAU0076/15]
[On appeal from High Court Case No. HAC052/2014 – Extended Jurisdiction Magistrates Court Case No. 181/2014]

BETWEEN: **PENISONI SAUKELEA**

Appellant

AND: **THE STATE**

Respondent

Coram: The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court
The Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court
The Hon. Mr. Justice Madan Lokur
Judge of the Supreme Court

Counsel: Appellant in person
Ms. P. Madanavosa for State

Date of Hearing: 21st August 2019

Date of Judgment: 29th August 2019

JUDGMENT

Gates J

[1] On 13th December 2018 the Petitioner lodged a timely petition against the decision of the Court of Appeal. The petition is headed as an appeal against sentence as well as against conviction. However, before the single judge seeking leave the Petitioner abandoned his appeal against sentence. The Court of Appeal in its judgment of 29th November 2018 [at para 6] noted that the Petitioner had reiterated that abandonment which he had made before the single judge earlier.

[2] There is before us therefore no petition against sentence to be considered.

[3] The petition against conviction, its grounds and arguments before the Court of Appeal, have been repeated before this court. They were as set out by the Petitioner:

(a) Incompetent counsel
(b) Defective Charge
(c) Challenge to the caution interview
(d) Inconsistencies
(e) Identification
(f) No direct evidence

[4] A fresh ground was also raised which was not before the Court of Appeal. It suggested the learned trial judge had not exercised judicial discretion properly to grant an adjournment for good cause when the Petitioner had requested one. This had denied the Petitioner's right to a fair trial, it was said, and thus a miscarriage of justice had occurred.

[5] The last 3 grounds (d) to (f) were not referred to in the written submission of the Petitioner nor were they argued at the hearing.

[6] In arguing the additional ground the Petitioner was aware of, and made mention of, the restrictive criteria limiting the Court's powers of intervention, even in cases where a Court of Appeal might at that stage have been able to act. These are contained in the Supreme Court Act at section 7(2) which reads:

> "(2) 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;
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> (b) a substantial question of principle affecting the administration of criminal justice is involved; or

(c) substantial and grave injustice may otherwise occur."

[7] It is well known that the Supreme Court rarely considers an entirely fresh ground of appeal which has not been dealt with by the Court of Appeal earlier in the proceedings.

[8] However the fresh ground can be satisfactorily covered in the consideration of the ground dealing with the miscarriage said to have occurred from his counsel's alleged incompetence in handling his case and the trial.

[9] It must be clearly stated that the practice of repeating before the Supreme Court all of the unsuccessful grounds urged in the Court of Appeal is not the correct approach. The Supreme Court is not a Court of Appeal. It is not a court of review, or a second tier Court of Appeal. It can only act on a ground that meets the criteria set out in section 7(2) above. Arguments must therefore address that limited power. Not every error identified will be corrected by the Supreme Court: **Ibrahim v Rex** [1914] AC 599 at p614; **Badry v Director of Public Prosecutions** [1982] UKPC1; **Aminiasi Katonivualiku v The State** [2003] FJSC 17, CAV0001.1999 (17 April 2003) at p3.

The proceedings at trial in the Magistrates Court

[10] The Petitioner was charged with a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act 2009. He was charged with one other who was subsequently acquitted after a submission of no case to answer. The Petitioner was found guilty and sentenced on 10th July 2015 to 9 years 7 months imprisonment with a non-parole period of 8 years. The trial took place before a Resident Magistrate exercising extended jurisdiction sitting alone as a High Court.

[11] A voir dire was held on the admissibility of his caution interview, which was held to have been voluntary by the Magistrate.

[12] The trial proper commenced on 9th April 2015. The complainant James Kumar was a pawnbroker operating from an upper floor in Cumming Street. He had been in the business for 10 years. He was at work on 1st February 2014 together with his wife.

The incident happened he said between 10-11am. Two men came in and told him to open the door to the inner part of his shop. Mr. Kumar did not open the door. He thought they were coming to his shop to commit a theft. They were shouting and aggressive. They were both intoxicated.

[13] However the Petitioner got in through a gap. The witness said the Petitioner had been to his shop on the Friday before this happened. He had spoken to him then. He had brought in a pair of rugby boots to pawn, but Mr. Kumar said no. Mr. Kumar had not seen the other Accused before.

[14] He said the Petitioner was in his shop for a minute on the Friday, and 5 minutes on the day of the robbery. The Petitioner opened the drawer and took some cash. In all Mr. Kumar lost a Samsung Galaxy mobile phone, assorted jewelleries, and cash of $1,000. He could not remember all the values in his evidence, but said he had written them down and given them to the police.

[15] Before they left the shop, Mr. Kumar went out to obtain a police officer. There were no police on the street. He said he called for help and there was none. "Everybody was standing and looking at the scene" he said.

[16] He followed the 1st Accused towards Tappoos, then towards the market. He informed the Market Police and when he looked round for the man he was gone.

[17] The 2nd Accused had been the person outside, who had tried to punch him. He took $300 cash from Mr. Kumar's shirt pocket. He too disappeared, presumably in the Saturday crowd. Mr. Kumar identified the Petitioner as the person who had committed the theft in the shop.

[18] Detective Sergeant Mikaele Koro was the second and final witness for the prosecution. He was the Investigating Officer in the case. He called the complainant to identify the two Accused at the CID Office at Central Police Station.

[19] The detective admitted he should have held an ID parade in the proper way. He said the complainant told him he could clearly identify the two persons. A search was conducted at the Petitioner's house but no connecting items were recovered. The detective interviewed the Petitioner under caution. He exhibited a record of that interview.

[20] In the interview, the Petitioner had said he was 38 years old and was residing in Makoi with his wife and two daughters. His wife worked for the Hart Office in Valelevu. He came to Suva on the day in question in order to eat. He ate at the Market. After that he went straight to Joe's Pawn Shop. This was the shop run by Mr. Kumar. On the way he met a man known to him called Metui who came with him to the pawn shop.

[21] The Petitioner said he had been to the Pawn Shop before. Indeed on the previous Friday he had taken a pair of rugby boots to pawn, but the owner had declined to take them. The shop was on the top floor. Mr. Kumar was there with his wife. The Petitioner in the interview is recorded as saying he jumped over the counter to where the couple were standing. He opened the draw of the table and took out the money. He said he took $30. This was considerably less than the complainant said he had lost. He was questioned on the other money, the jewellery, and the Galaxy phone. The Petitioner insisted he did not take any phone, or the other money. He said he used the $30 for his taxi home and for some cigarettes.

[22] The complainant had pointed out the Petitioner at the Police Station at Totogo. He was in a cell with others. He remembers seeing the complainant outside the cell, but does not remember any identification.

[23] The Petitioner gave sworn evidence in his own defence. He said he did not know anything about this case, because he was at home on that morning. He was with his wife and daughters.

[24] He said Sgt. Mika was most of the time doing the writing of the statement. He gave the statement to the Petitioner to sign, who said he did not know what Sgt. Mika had

written. He said the interview statement was fabricated. In the police vehicle driven to the Station he had been threatened. They told him to admit it "or he would be taken up to the camp." He denied he was drunk on that Saturday.

[25] The Petitioner did not call any witnesses, nor any alibi witnesses. He did not ask for the court's assistance. He had not given any alibi details after the notice.

Ground 1 – Incompetent Counsel

[26] The Petitioner says in his written submissions "the new counsel had incompetently defended me due to lack of instructions and advice coupled with an adequate time to better prepare a defence." He also mentioned that his counsel had failed to file submissions at the close of evidence in the voir dire and said this was an example of his incompetence.

[27] The Court of Appeal dealt with this ground sufficiently and said at paragraphs 9-11:

> "[9] …. It is clear from his Ruling that the trial Judge had fully considered the totality of evidence including that of the Appellant before allowing the Appellant's caution interview to be led at the trial. I do not think that the failure to file written submissions on behalf of the Appellant had resulted in any miscarriage of justice.
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> [10] On the other hand after the leave to appeal Ruling the Appellant seems to have abandoned his earlier criticism of his counsel and changed his stance, in that his written submissions filed thereafter states that the Learned Magistrate had not given him sufficient time to instruct his counsel on his defence coupled with the fact that several counsel had represented him. His complaint is with regard to the *voir dire* inquiry.
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> [11] Upon a perusal of the case record I find that the Appellant had been on bail from 10 July 2014 and the *voir dire* inquiry had commenced on 08 December 2014 as fixed on 19 November 2014. In the circumstances, the Learned Magistrate had refused the Appellant's application for an adjournment on the basis that he could not find any reason for the Appellant not to go and give instructions to the counsel of the Legal Aid Commission. His counsel, Mr. Vuki had appeared throughout the *voir dire* inquiry for the Appellant."

[28] Even if the allegation about being taken up to the camp was not put to Sgt. Mika the Petitioner himself informed the court of this significant threat in his own evidence. This evidence was rehearsed in the trial Magistrate's ruling on the voir dire. Properly briefed the defence might have been more co-ordinated. However the fault lay with the Petitioner in not contacting Legal Aid to provide them with proper instructions in good time.

[29] Significantly the Petitioner had not at any stage disclosed what instructions he could not give to his counsel due to insufficient time regarding the voir dire inquiry. But if it were about the threat to take him to the camp, that was fully taken into account by the Magistrate.

[30] The fresh ground raises the question of the adjournment refusal. The Magistrate was asked by the Petitioner on the date fixed for the voir dire for an adjournment. The Magistrate ruled:

> "**RULING**
>
> 1st Accused is on bail. This case was called on 19/11/2014 to fix Voir Dire hearing date. The accused says he has given his phone number and was waiting for the Legal Aid to call. The accused had voir dire 18 days. He has not taken sufficient instruction to give the instruction to the Legal Aid. Therefore I do not see any reason to grant an adjournment. As mention earlier he is on bail and I do not find any reason for him not to go and give instruction to the Legal Aid. Therefore adjournment refused on the 1st Accused."

[31] No miscarriage of justice occurs from this ruling. The Petitioner was represented. The instructions concerning the specific threat could have been communicated to counsel in the voir dire itself. But the Petitioner should have ensured he himself briefed his solicitor at the Legal Aid Commission so that defence counsel for the voir dire would be armed with a copy of the Petitioner's statement of evidence for that proceeding, that part of the trial. This ground fails.

Ground 2 – Defective Charge

[32] After the Magistrate had ruled there was no case to answer against Accused 2 and acquitted him, the charge remained against the Petitioner. The charge read:

> Statement of Offence
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> **AGGRAVATED ROBBERY**: Contrary to Section 311(1)(a) of the Crimes Decree Number 44 of 2009.
>
> Particulars of Offence
>
> PENISONI SAUKELEA and METUISELA TUINARO on the 1st day of February, 2014 at Suva in the Central Division robbed JAMES KUMAR of 1 Samsung Galaxy mobile valued $900.00, assorted jewelleries valued $400.00 and cash valued $1000.00 to the total value of $2,300, the property of the said JAMES KUMAR.

[33] The charge as drafted by the Police Prosecutions does not contain the circumstances of aggravation alleged in this case, namely "in company with one or more other person."

[34] The charge commenced with two names. It was clear that a section 311(1)(a) offence was alleged as in the correctly worded statement of offence, two persons acting together to commit the robbery. However after the ruling of no case to answer which acquitted the Accused 2, the case proceeded against Accused 1 (the Petitioner) alone. That is not to say the allegation had changed. He was charged with acting whilst in the company of another in committing the robbery. The Accused or his counsel would have been under no illusion as to what allegation he faced when the case resumed after the ruling. The prosecution had failed to prove the identity of the second participant in the crime. The allegation that the Petitioner acted together with another remained.

[35] In the Court of Appeal Prematilaka J rightly observed that the full particulars should have been drafted into the Statement of Offence namely "in the company of each other."

[36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: **Koroivuki v The State** CAV 7 of 2017. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted: **Skipper v Reginam** Cr. App. No. 70 of 1978 29th March 1979 [1979] FJCA 6. The Court of Appeal whilst not conceding merit in the point properly applied the proviso under section 23 of the Court of Appeal Act and dismissed the ground of appeal. Similarly in this Court, Ground 2 fails.

Ground 3 – Challenge to the Caution Interview

[37] The voir dire took place in a full hearing. The learned Magistrate gave a 6 page Ruling. It resulted in the rejection of voluntariness in the case of the Petitioner's Co-Accused. The Petitioner's allegations were different from those of Accused 2 who had alleged that he had been assaulted by the police. The Petitioner said that his statement had been obtained by oppression and that his rights under the Constitution had been breached.

[38] The Petitioner's detailed complaints of the handling of his allegations were addressed by the Court of Appeal fully.

[39] In written submissions to this Court the Petitioner claims the Magistrate failed to take into consideration the denial of his rights at interview to go before a Justice of the Peace, a medical officer, and a witnessing officer whilst detained at the police station. These facts, if correct, were never raised in the Petitioner's evidence in the voir dire and never put in cross-examination to the prosecution witnesses. Nor was this submitted to the Court of Appeal. If they were of any significance they were never raised as a trial issue. This is not something this Court should entertain.

[40] The Petitioner complains that the evidence of the Investigating Officer was not corroborated. This issue also was not raised either in cross-examination or in any closing submissions, nor in the Petitioner's evidence. An explanation was given in examination in chief which whilst a lapse in police procedure was plausible enough. No doubt because the defence did not make more of the lack of a counter-signing police witness, the matter was not a live issue for the Magistrate in his ruling.

[41] Because the Petitioner and Co-Accused were both arrested on the same day and both interviewed on the same day and time in police custody, the Petitioner considers the ruling should have provided the same outcome. The allegations were as I have said different. Accused 2 alleged assault. There was no such allegation made by the Petitioner. Each case and its evidence was to be considered separately, and this the learned Magistrate followed in his ruling.

[42] The Petitioner complains of excessive pre-charge detention. This was never pursued by the Petitioner either in his evidence in the voir dire or by his counsel, or in the Court of Appeal. It is not a live issue in our Court. This ground must fail.

[43] I do not propose to deal with (e) and (f) which were not urged on us, and which the Court of Appeal dealt with fully.

[44] All grounds must fail for the reasons I have given. None of them would pass the threshold of the Section 7(2) criteria to provide this Court with jurisdiction. There is no merit therefore in the petition.

Jayawardena J

[45] I have read the draft judgment, and I am in agreement with the findings, and conclusions and the orders stated therein.

Lokur J

[46] I respectfully agree with the judgment and order proposed by Justice Gates.

Gates J

[47] Accordingly we order as follows:

1. Leave to appeal is refused.

2. The petition is dismissed.

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Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

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

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Hon. Mr. Justice Madan Lokur
Judge of the Supreme Court

Solicitors

For the Petitioners: In person
For the State: Office of the Director of Public Prosecutions

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