IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0012 of 2021
[On Appeal from the Court of Appeal Criminal Appeal No: AAU0014/16; HAC 257/2015]

BETWEEN : **ILAITIA NALAWA**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Mr. Justice William Calanchini, Judge of the Supreme Court
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court
The Hon. Mr. Justice Isikeli Mataitoga, Judge of the Supreme Court

Counsel: Mr S. Waqainabete for the Petitioner
Ms E. Rice for the Respondent

Date of Hearing: 10th August, 2023

Date of Judgment: 30th August, 2023

JUDGMENT

Calanchini, J

[1] I have read the draft judgment of Goddard J and agree with her reasoning and conclusions. Leave to appeal should be refused.

Goddard, J

[2] The petitioner was tried and convicted in the High Court at Suva on four counts: one count of burglary contrary to section 312(1) and (2)(a) of the Crimes Act, 2009, one count of theft contrary to section 291(1) of the Crimes Act, 2009, one count of assault with intent to commit rape contrary to section 209 of the Crimes Act, 2009 and one count of rape contrary to section 207(1) and (2)(a) of the Crimes Act of 2009. At the conclusion of his trial in the High Court, the assessors returned a majority opinion of guilty on all counts and this was confirmed by the learned trial judge. The petitioner was duly convicted on all charges and sentenced on 8th of February 2016 to 18 year's imprisonment with a non-parole period of 17 years imprisonment.

[3] The petitioner filed a timely application for leave to appeal against conviction. Leave to appeal his four convictions was granted by a single justice of the Court of Appeal. His substantive appeal was heard by three judges of the Court of Appeal on the 3rd of May 2021. On 25th of June 2021, a fully reasoned judgment was delivered and the appeal was dismissed.

[4] The petitioner now seeks the leave of this Court to appeal against conviction from the decision of the Court of Appeal on two grounds:

(a) that the learned appellate judges erred in law in relying on the confession made by the appellant in his caution interview statement, when the assessors had not been adequately and properly directed about convicting the petitioner at his trial in the absence of any other evidence apart from his confession.

(b) the learned appellate judges may have fallen into an error in law and fact, thereby causing a real and substantial miscarriage of justice, in totally disregarding the facts and evidence regarding identification.

[5] These two grounds, as advanced in support of the petitioner's application for special leave to appeal, effectively focus on the same issue: whether, in the absence of clear identification evidence, there was a sufficient evidential basis on which the appellant could be convicted and how the assessors should have been directed in relation to that issue.

Jurisdiction for granting special leave to appeal

[6] Under section 98(4) of the Constitution of Fiji, an appeal from a final judgment of the Court of Appeal can only be brought by the leave of this Court. The granting of leave is a discretionary matter.

[7] Under section 7(2) of the Supreme Court Act, leave must not be granted in a criminal matter 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****.*

[8] The only provision of possible relevance in this case is section 7(2)(c).

[9] What might constitute a substantial and grave injustice was considered by the Judicial Committee of the Privy Council in **Re Dillet** (1887) 12 App Cases 459 at 467, an appeal from the Supreme Court of British Honduras. In **Re Dillet,** their Lordships held that, in considering a grant of special leave to appeal, criminal proceedings would not be reviewed or interfered with "*…unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done*."

[10] The stringent nature of the threshold was confirmed by this Court in **Dip Chand v State** [2012] FJSC 6; CAV0014.2010 (9 May 2012):

> *".... the threshold set in s.7 of the Supreme Court Act 1998 is "extremely stringent"* and *"....special leave to appeal is not granted as a matter of course ..."*

[11] In **Matalulu v Director of Public Prosecutions** [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003), this Court similarly found that a risk of substantial grave injustice must be present:

> *"…… the Supreme Court, as the final appellate body, will not lightly grant a petition for special leave unless there is the risk of "substantial grave injustice"."*

The petition is out of time

[12] There is a preliminary matter to deal with.

[13] At the time at which the petitioner's application for special leave to appeal to this Court was filed, it was 42 days out of time.

[14] The petitioner has provided the following explanation for this delay:

> *"(a) Following delivery of the Court of Appeal judgment, he was informed of his right to appeal the matter further to Supreme Court. However, he was reliant upon his then legal aid counsel, Mr Lee, to draft his petition as he is only educated to Class 8. After the COVID restrictions were lifted, he was visited by different legal aid counsel, Mr Waqainabete, to discuss his appeal to Supreme Court. A petition, dated 09 September 2021, was then drafted on his behalf and filed by 15 September 2021.*
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> *(b) This sequence of events resulted in a delay of 42 days in the filing of his special leave petition in this Court."*

[15] The Supreme Court's jurisdiction to exercise discretion in granting an extension of time in which a petition for special leave may be heard is found in Rule 17(4) of the Supreme Court Rules 2016, which provides:

> *"(4) Notwithstanding the preceding provisions of this Rule, a Petitioner may apply to the Court for an extension of time in which to fulfil the conditions of the Petition imposed by these Rules or by the full Court or single judge and the Court may, for good and sufficient cause, grant an extension of time subject to any conditions the Court may impose."*

[16] The delay of 42 days in filing this petition for special leave to appeal is not unduly lengthy when regard is had to the explanation given by the petitioner of his reliance on legal aid counsel and the intervention of COVID restrictions. As the delay was not due to any dilatoriness on his part and given the nature of his explanation and the seriousness of the offences, the Court will exercise its discretion in favour of granting leave to hear the petition out of time, although such leave is necessarily very sparingly given. The petition will therefore be considered and determined on its merits and in light of the leave criteria in section 7(2)(c) of the Supreme Court Act.

The facts

[17] The facts are extremely serious. The essence of the evidence, as adduced at trial, is set out as follows.

[18] In the early hours of 7 July 2015, a private dwelling house at Salua Road, Nakasi was broken into and property belonging to the householder (count no. 2 in the information) was stolen. She identified all of the missing items, including a pompom (mask), subsequently recovered by the police. According to this witness, the pompom had belonged to her son and when found had its eyes and nose cut out. It had not been in that condition before it was stolen. The householder was not able to identify the burglar.

[19] The 9 year old female victim lived in a house in Nakasi with her parents. She was a Class 4 student. Every morning her father would drop her off at school in a van and when school finished she would normally walk home with her friends. That same day, 7 July 2015, she was dropped off at school as usual by her father. At about 3pm, she took a short cut home down a lane leading towards her home and as she was walking past some bushes, a i-taukei male wearing a black pompom mask came out of the bushes, grabbed her by her right hand, clamped his left hand over her mouth and dragged her back into the bushes.

[20] He then assaulted the victim by striking her twice on the left and right side of her face. He then pushed her to the ground, pulled up her dress and took off her undergarments and

gagged her with her tights. He then pulled her legs apart and forcefully inserted his penis into her vagina. The girl cried in agony and struggled against the pain in her vagina and fainted. She fainted again during the ordeal and could not remember what happened thereafter. A while later, she regained consciousness and was making her way home when she met her mother on the path at around 4.05 p.m. Her mother had come to look for her because she was so late arriving home. When she saw the disheveled state the child was in she thought she must have been hit by a car. The child told her mother what had happened. Her mother observed blood in the child's eyes, a black spot underneath her eye and saw blood was coming from between her legs. Her hair was in disarray, her tights were around her neck and she had no underpants on.

[21] The victim was first treated at the emergency department. The next day, 08 July 2015, she was examined by Dr. Reapi Mataika. This was some 16 hours after the incident and according to the doctor, the victim was still bleeding from her face and her genitalia despite the doctors having attempted to stop the bleeding. The doctor found the victim to be distressed, fearful, bruises on her face, swelling over her face and eyes and on the left side of her face. The bleeding in the victim's eye was described as a subconjunctival hemorrhage. There were bruises on her neck area which the doctor thought were consistent with something having been tied around her neck. Vaginal examination revealed serious internal vaginal injuries. The victim remained hospitalised for 3 days after the incident.

[22] The petitioner was initially arrested on 08 July 2015 but released at that time, as he had given a false name to police and the child victim was not able to identify her assailant as his face had been covered.

[23] He was arrested again on 21 July and taken into custody at Nausori Police Station. The next day, 22 July, he was medically examined at Nausori Health Centre and found to be medically fit to be interviewed. During the interview, carried out by one officer in the presence of another, he admitted the rape allegation. He also admitted the burglary of the private dwelling house and of taking various items from it, including the pompom mask.

The following morning the interview continued and later that same day the petitioner was taken to the crime scene for a reconstruction viewing. He alleged he was not cautioned during the interview or during the crime scene visit and the interview continued again the following morning, 24 July. It was concluded at 1pm that day and his legal rights were then explained to him. That afternoon he was taken back to the Nausori Health Centre and medically examined again. The doctor found no fresh injuries to his body. On 25 July, he appeared in the Nasinu Magistrates Court but was not legally represented. He did not complain to the Court about any mistreatment by the police. He did however complain about alleged mistreatment when he later appeared in the High Court on 7 August, by which time he was represented by a lawyer.

The trial

[24] At trial the petitioner pleaded not guilty to all charges and gave notice challenging the admissibility of the admissions and confessions in his caution and charge statements, on the grounds that these were not voluntarily made and had been obtained under duress through force and oppression by the police officers, both before and during his interview.

[25] Accordingly, a *voir dire* inquiry was held on 18 December 2015, at which both the petitioner and his uncle, Mataiasi Ligacivia, with whom he had been living at the material time, gave evidence. Following the hearing, the trial Judge ruled both the caution statement and the charge statement into evidence, on the basis the petitioner had given both statements voluntarily and not under duress, finding as follows:

> *"I have carefully considered the evidence of all the prosecutions' and defence's witnesses. I have compared and analyzed all of them. After considering the authority mentioned in paragraph 5 hereof, and after looking at all the facts, I have come to the conclusion that the accused gave his caution interview and charge statements voluntarily and out of his own free will. I therefore rule that the caution interview and charge statements are admissible evidence, and could be used in the trial proper, but its acceptance or otherwise, are matters for the assessors."*

[26] The trial subsequently took place over three days in February 2016 before the trial Judge and three assessors.

[27] Prior to trial, the petitioner had filed a notice of alibi, stating he would call Mataiasi Ligacivia and three other relatives, Apenisa Vunivii, Livai Navudi and Semisi Salusalu, with whom he was also living on 7 July, to give evidence that he was with them on the date and at the time of the attack and rape of the child and therefore he could not have been the perpetrator.

[28] At the end of the prosecution' case, the petitioner elected to give evidence and also called his four relatives as alibi witnesses in his defence. In his evidence, the petitioner denied all of the allegations against him and said the police had forced the confessions out of him by assaulting him and swearing at him. His alibi witnesses, in statements to the police had said the petitioner was not with them at the time of the rape but they later resiled from this position and at trial said the petitioner was with them at the material time and therefore he could not have committed the alleged offences. They said their former statements to the police were not true and they had only said what they did because they were threatened by the police.

[29] In relation to possible mistaken identity, the victim's mother, under cross-examination at trial, agreed that the victim had said her assailant had a green tattoo on the back of his leg somewhere below the knee which looked like a bird design with long legs and beak. The victim under cross-examination agreed she had told the police about such a tattoo and that the man had a small black mole above his fingernail. The learned trial Judge reminded counsel that any such discrepancies in identification of the child's assailant were irrelevant as the prosecution was not relying on identification but on the admissions the petitioner had made in his interviews.

The Court of Appeal Judgment

[30] Before the Court of Appeal the issue of mistaken identity was again raised, as well as the alleged involuntary nature of the petitioner's confession during his police interviews. Counsel for the petitioner submitted that he had been forced to make such false confessions through police brutality. Counsel also pointed to a lack evidence establishing that the petitioner had a mole above his finger nail or a bird tattoo on his leg. On that

basis, it was submitted the petitioner could not have been the rapist and it was a case of mistaken identity and wrongful conviction.

[31] In dismissing the petitioner's appeal on all grounds, the learned Court of Appeal judges observed that trial counsel should have sought redirections from the trial judge on the matters now complained of and further found that the contention about the presence or otherwise of a black mole and a bird tattoo was of no consequence to the veracity of the petitioner's police' statements or to the elements of rape:

> *"[13] The counsel has developed his argument on the initial police statement of the 09 years old victim made on 10 July 2015 where she had stated that the assailant had a black mole above the finger nail of his right small finger and a green tattoo which looked a bird design with long legs and beak on the back of his leg. This argument is not about the elements of the offence of rape. What the counsel seems to contend is that this may cast a doubt on the truthfulness of the cautioned statement regarding the identity of the appellant. However, there is no evidence on record to ascertain whether the appellant did or did not have such body marks at the time of his arrest or thereafter.*
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> *[15] There are three matters to be considered here. Firstly, the prosecution quite understandably did not depend on the victim's evidence at all to prove the identity of the appellant. She admittedly did not identify the assailant. Therefore, a discrepancy, if any, in her description of the assailant does not affect the proof of the appellant's identity via his cautioned statement and charge statement. The confession made by the appellant of his involvement in rape and other crimes is independent of the victim's evidence as to any marks that she thought she had seen in her rapist."*

[32] The Lordships referred also to the young age of the child victim and to developments in judicial thinking about the wisdom and fairness of judging the evidence of a child victim using the same yardstick employed for adult witnesses, (citing the approach to the veracity of child witnesses discussed by the Supreme Court of Canada in **R v W (R)** [1992] 2 SCR 122).

[33] In considering the evidence overall their Lordships were satisfied that the petitioner had been properly convicted and that no miscarriage of justice had occurred:

"[23] Considering the appellant's cautioned interview where he had admitted all the elements of the offence of rape (and other offences) as opposed to the appellant's submission, in my view, any reasonable assessors having been directed on the above item of evidence could and would still have found the appellant guilty on his cautioned statement alone. In addition, the appellant had admitted his culpability in the charge statement too.

[24] Unlike in ***Chand v State*** *[2016] FJCA 61; AAU0015 of 2012 (27 May 2016) relied on by the appellant where the cautioned interview taken at its best did not prove the elements of the offence the accused was charged with, in the case of the appellant, it is clear that all elements of the offences had been established by his own confessional statements in the cautioned interview (see questions and answers 51-73, 81-100, 102, 103, 105-110, 132-148, 152 to 160 and 184 of the cautioned statement).*

[25] If the appellant has any grievance on insufficiency of evidence to bring home the conviction, it is clear that once the assessors and the trial judge accepted and relied upon the cautioned interview and the charge statement there was sufficient evidence to establish all elements of the offence the appellant was charged with beyond reasonable doubt. It is well settled in Fiji that an accused may be properly convicted on evidence consisting of an uncorroborated confession alone (vide: ***Kean v State*** *[2013] FJCA 117; AAU 95.2008.2008 (13 November 2013) and* ***Kean v The State*** *[2015] FJSC 27; CAV 7 of 2015 (23 October 2015)].*

…………..

[39] As pointed out earlier, once the cautioned interview and the charge statement were accepted by the assessors any description in the evidence of the child victim as to her assailant's body marks inconsistent with those of the appellant would not make a significant dent in the matter of identity of the appellant. Rather than harping on the victim's evidence on this issue, the appellant's counsel had not been able to demonstrate as to how even a description of body marks not tallying with those of the appellant, made obviously on the spur of the moment and in extremely trying circumstances by the victim, should cast a reasonable doubt on the appellant's own admissions of him being the perpetrator in the cautioned statement and the charge statement. As already discussed, a cloud of uncertainty was hovering over the question whether the appellant in fact did or did not have those body marks but such an eventuality in the negative could not be ruled out. But, in the light of the cautioned interview and the charge statement it did not matter in the end."

Discussion

[34] The petitioner elected to give evidence at his trial and to call witnesses in his defence. There was no obligation on him to do so and the burden of proof did not shift. It is clear however that the evidence given in his defence did not raise a reasonable doubt, either in mind of the majority of the assessors or the trial Judge.

[35] What must have been very clear to the Court was that critical aspects of the statements the petitioner's alibi witnesses made to the police, from which they resiled; and the petitioner's own statement to the police from which he too resiled, were remarkably coincidental and extremely damning.

The alibi witnesses statements:

[36] In his police statement, Mataiasi Ligacivia had initially said that on 7 July, the petitioner and Apenisa Vunivii, Livai Navudi and Semisi Salusalu were all working on his farm and he clearly recalled that at about 3 pm the boys left to buy biscuits from the store. He said "*...after sometime all of them came back except Nalawa*". It was later while they were having tea that Nalawa came back and had his tea and also his bath.

[37] Apenisa Vunivii said in his police statement that they went to the store to buy biscuits, the petitioner being one of them. He said they took the shortcut through the lane to Salua Road. On the way the petitioner asked to use Livai Navudi's cellphone. He looked back and saw the petitioner using the phone. When they got to Salua Road he looked back again but couldn't see the petitioner anymore. He saw some children get off the school bus. After they got home, they had tea with their uncle and it was after tea that he saw the petitioner come out of the bathroom wearing a blue towel. He asked him where he had been but received no answer.

[38] Semisi Salusalu similarly said that he, Viliame, Livai, Apenisa and the petitioner went to the shop after lunch to buy bread for tea. There was no bread so they bought biscuits. He said that whilst they were walking there, the petitioner asked to use Livai's phone and was talking to someone on the phone. At that point, he checked the time on his mobile phone and noticed that it was 2.30pm. He said the petitioner started to fall back as he was

talking on the phone and was walking leisurely, about 60 meters behind them. He then lost sight of him. He did not see him again until later, when the petitioner was having a shower at the house.

[39] In his police statement, Livai Navudi said that, after 2pm, he clearly recalled walking to the shop with the others. He was in front with Viliame and behind them were Semisi and Apenisa and the petitioner was behind them talking on his cellphone which he had borrowed. As they came towards the main road the petitioner was far behind them talking on the phone. It was when they were back at home having their tea that the petitioner arrived home. He said the next day the petitioner told him that he was the one who had pulled the girl into the bushes and forced penetration on her but when she bled he was afraid and ran away. He said the petitioner told him not to give his name when the police came.

The petitioner's police statement:

[40] In his statement the petitioner said that when they reached the shortcut through the lane he asked Livai for his phone and then called his girlfriend. After that he sat down in the place where he had hidden the stolen items from the house he had burgled earlier. He was sitting there when a small girl walked past and he put on the pompom mask and grabbed her. He then described his attack on her in some detail but said that when he saw she was bleeding excessively he pulled up his pants and "*took the girl's under garment and tore it in front of her face and took off my pompom and went away*".

[41] He also admitted having burgled the house, which he had visited some days earlier for a birthday. He said he had cut the face of the pompom while at the house to make it useful for hiding his identity for a job he was preparing for, which was breaking into a shop at Vusuya.

[42] Finally he said to police:

> "*I want to say that I want to ask for forgiveness from the police and the government and the family of the young girl for denying the first time when I was brought from Lautoka. I have now told the truth that I did it and I ask for forgiveness for what I did. What I did was due to my anger when I was sitting at that place and thinking about my wife and my girlfriend at that time when she said she was married. I know what I did was wrong and ask for forgiveness for what I had done.*"

[43] These statements from the alibi witnesses and the petitioner and which were later resiled from, have the ring of truth about them and in combination they were damning. In particular, the petitioner's admission that he was having an argument on the telephone with his girlfriend was a statement of some singularity and unlikely to be a fabrication by the police. The same applies to other admissions he made, including his cutting of the pompom for the purpose of a planned burglary. The pompom provided a strong evidential link between the person who carried out the burglary earlier that day and the man who later that same day attacked the child while wearing it.

[44] As was made abundantly clear from the outset by the prosecution and by the learned trial Judge, the allegation of mistaken identity was never an issue. Once the petitioner's police statement was ruled admissible, that formed the primary evidential basis on which the case was to be determined, along with the proximate and relevant circumstantial evidence of the burglary and the location of the stash of burgled goods and the pompom.

[45] The child's mention to her mother and the police of a tattoo and a mole was of no consequence. Notably, following the summing up, defence counsel did not seek any direction or redirection from the trial Judge on that issue.

[46] Although identification was of no consequence, we note in passing that the prosecution produced the accused's medical report dated 24 July 2015 as Exhibit No. 6 at trial and this recorded as follows: *"Dr Rayneel Singh noted in his medical examination of the petitioner that he had 'a small tattoo on medical aspect of the right knee and a small tattoo on the medical aspect of the left calf.*"

[47] In terms of the child being unable to identify her assailant, common sense dictates that she would have been stunned by the blows to her face which caused her eye to haemorrhage and by the further brutality inflicted on her. She must have been in a state of severe shock from the suddenness of the attack by a masked man who was a stranger to her. The pain she was suffering at the time was so great that she fainted twice.

[48] In this regard we take note of the learned opinion of the Supreme Court of Canada in **R v W (R)** [1992] 2 SCR 122), referred to by the Court of Appeal, concerning the judging of evidence given by child victims and which applies also to statements made by traumatized children.

[49] There was no error by the learned trial Judge and the summing-up was impeccable.

[50] The Judge's reasons for accepting the majority verdict of the assessors were:

- the verdict was not perverse and was open to the assessors on the evidence;
- the child victim's evidence that she was raped was accepted and consent was not an issue;
- corroboration was not required;
- the accused's police' statements were voluntarily made and truthful and there were no injuries found on him consistent with his allegations of police brutality.

Conclusion

[51] We find no error of law in either the directions of the learned trial Judge or in their Lordships' judgment on appeal. There was ample evidence on which to convict the petitioner. As their Lordships found:

> "*….once the assessors and the trial judge accepted and relied upon the cautioned interview and the charge statement there was sufficient evidence to establish all elements of the offence the appellant was charged with beyond reasonable doubt.*"

[52] Therefore, no substantial or grave injustice has occurred.

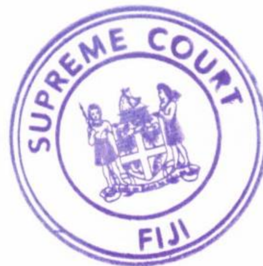
Mataitoga, J

[53] I concur with the reasons and conclusions of Hon Madam Justice Goddard's judgment.

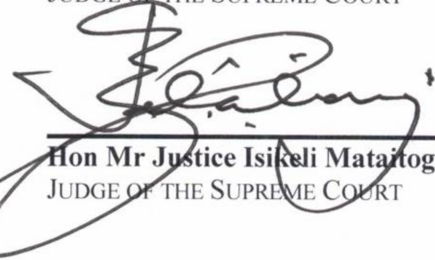
Orders:

1) *Leave to appeal out of time is granted.*
2) *The application for special leave to appeal is dismissed.*

The Hon Mr Justice William Calanchini
JUDGE OF THE SUPREME COURT



Hon Madam Justice Lowell Goddard
JUDGE OF THE SUPREME COURT



Hon Mr Justice Isikeli Mataitoga
JUDGE OF THE SUPREME COURT