IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0004 of 2022
[On Appeal from the Court of Appeal No: AAU0049/2017]

BETWEEN **RAMNIK CHAND**

Petitioner

THE STATE

Respondent

Coram The Hon. Acting Chief Justice Salesi Temo, Acting President of the Supreme Court
The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: Mr A. K. Singh for the Petitioner
Mr E. Samisoni and Ms B. Kantharia for the Respondent

Date of Hearing: 4th October, 2023

Date of Judgment: 26th October, 2023

JUDGMENT

Temo, AP

[1] I have read the draft judgment of His Lordship Mr Justice A. Qetaki. I agree entirely with his judgment and proposed orders.

Arnold, J

[2] I have read the judgment of Qetaki J in draft and agree with the orders he proposes for the reasons he gives. I wish to add a brief comment on one feature of the case.

[3] The Summary of Facts to which the Petitioner entered his guilty pleas is set out at paragraph [11] of Qetaki J's judgment. It says that the Petitioner and his companion first attacked one of the two schoolgirl victims and stole items from her, then attacked the second victim and attempted to steal items from her.

[4] However, as noted in Qetaki J's judgment, that narrative of a joint attack by both perpetrators on one victim, then a joint attack on the other was not supported by the victims' statements to Police, or by the interview statements given by the Petitioner and his companion. For example, one of the victims, referring to the Petitioner and his companion, said:

> *"They were walking on each side of the foot path so when they got close to us, I walked behind my friend to make space for them when the smaller one of the two attacked my friend while the other attacked me."*

The other victim's statement was similar.

[5] In my view, the prosecution should have prepared a Summary of Facts that was consistent with the statements given by the victims and the two accused. I think it likely that the unduly harsh sentence imposed by the Magistrate resulted from the misleading impression created by the Summary of Facts.

Qetaki, J

Introduction

[6] The petitioner is seeking special leave to appeal against the Judgment of the Court of Appeal dated 3 March 2022 against his conviction by the Magistrates' Court in Suva,

exercising its extended jurisdiction . On 15 March 2017 the petitioner with another were convicted and sentenced for a period of 8 years 11 months of imprisonment with a non-parole period of 5 years on one count of aggravated robbery and one count of attempted aggravated robbery. The petitioner's accomplice also received the same sentence.

[7] The information stated:

Count 1
Statement of offence

Aggravated Robbery: *Contrary to section 311(1) (a) of the Crimes Decree Number 44 of 2009.*

Particulars of Offence

Rajit Singh *and* ***Ramnik Chand*** *on the 29th day of September 2016 at Fletcher Road, Vatuwaqa, Suva in the Central Division, stole 1x Samsung S5 mobile phone valued at $200.00 and 1x Rip Curl wallet valued at $15.00 all to the total value of $215.00 the properties of AYA YAMAGUCHI MURRAY.*

Count 2
Statement of offence

Attempted Aggravated Robbery: *Contrary to section 44(1) and section 311(1)(a) of the Crimes Decree Number 44 of 2009.*

Particulars of Offence

Rajit Singh *and* ***Ramnik Chand*** *on 29th day of September, 2016 at Fletcher road, Vatuwaqa, Suva in the Central division, attempted to steal 1x iPhone 5S mobile phone valued at $300.00 the property of JEAN WALKER GUBON.*

[8] The petitioner filed a timely appeal against conviction and sentence under section 22(1) of the Court of Appeal, urging 4 grounds against conviction, and 1 ground against sentence. The learned single judge (Calanchini JA), on 24 May 2019, granted the petitioner leave to appeal against conviction on one ground only i.e. ground 3. Leave was refused with respect of Grounds 1, 2 and 4.The application for leave to appeal against sentence was allowed, however, his application for bail was refused.

[9] After the Ruling of the learned single Judge, the petitioner then filed a timely appeal against both conviction and sentence before the Full Court of Appeal. His accomplice

was appealing against sentence only. The petitioner urged 4 grounds of appeal against conviction, and one ground was urged against sentence. The grounds of appeal are set out in paragraph [6] of the Court's judgment.

[10] The Court of Appeal chose to deal first with the sentence grounds as both the petitioner and his accomplice have been given leave to appeal against sentence. It allowed the appeal against sentence. The orders made by the Court of Appeal on 3 March 2022 are*: "(1) 01st and 02nd appellants' appeal against sentence is allowed. (2) 01st and 02nd appellant should be released from imprisonment forthwith."* It did not deal with the conviction grounds, and that substantially is the focus of the present proceedings.

[11] The facts are not complicated, although it is disputed by the petitioner, and a summary is reproduced below, as adopted from the judgment of the Court of Appeal, at paragraph [5], as follows:

> *"On 29 September, 2016 Aya Yamaguchi Murray (complainant 1) and a friend were walking along Fletcher Road at Vatuwaqa, Suva at around 3:30pm-4pm on their way to complainant's house when they saw Ranjit Singh (A1) 29 years old together with Ramnik Chand (A2) walking towards them from the opposite direction as they were approaching the Suva Point Apartments.A1 was recognized by the complainant when they had passed the Vodafone Arena earlier.*
>
> *A1 and A2 attacked the complainant and her friend and managed to steal a Samsung S5 mobile phone and a 'Rip Curl" brand wallet by grabbing from the complainant. Bothe items were valued at $200.00 and $15.00 respectively.*
>
> *Afterwards, A1 and A2 then attempted to rob Jean Walker Gubon (complainant 2) who was walking with complainant 1, of her iPhone 5S mobile phone valued at $300.00. A1 then ran towards Laucala Bay Road and complainant 1 gave chase and alerted bystanders who helped apprehend A1.Only the wallet was recovered.*
>
> *A1 was interviewed under caution where he admitted the first count at Q &A 36 onwards. The wallet was identified by A1 at Q &A 53. A2 was interviewed under caution where he admitted to both counts at Q & A 43 onwards.*
>
> *A1 and A2 were charged with one count of aggravated robbery contrary to section 311 (1(a) of the Crimes Act and one count of Attempted Aggravated Robbery contrary to section 44 (1) and 311 (1) (a) of the Crimes Decree No.44 of 2009."*

The Law

[12] **Jurisdiction of the Supreme Court with respect to grant of leave to appeal.**

Section 98 subsections (3) (b); (4) and (5) of the Constitution state:

> *"(3) The Supreme Court - ...(b) has exclusive jurisdiction, subject to other requirements as prescribed by written law, to hear and determine appeals from the final judgments of the Court of Appeal;...*
>
> *(4) An appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.*
>
> *(5) In exercise of its appellate jurisdiction, the Supreme Court may –*
>
> *(a) review, vary, set aside or affirm decisions or orders of the Court of Appeal, or*
> *(b) make any other order necessary for the administration of justice, including an order for new trial or an order awarding costs."*

[13] Section 7(1) of the Supreme Court Act, requires the Court to have regard to the circumstances of a case when exercising its jurisdiction, with respect to appeals in any civil or criminal matter, and it may –

> *"(a) refuse to grant leave to appeal;*
> *(b) grant leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or*
> *(c) grant leave and allow the appeal and make such other orders as the circumstances of the case require."*

[14] For a criminal matter, section 7(2) of the Supreme Court Act, requires that the Supreme Court must not grant leave to appeal unless-

> *"(a) a question of 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."*

[15] **Powers of the Supreme Court generally.**

Section 14 of the Supreme Court Act, states:

"14. For the purpose of the Constitution and this Act, the Supreme Court has, in relation to matters that come before it, all the power and authority of the Court of Appeal and that power and authority may be exercised, with such modifications as are necessary according to the circumstances of the case."

[16] There have been pronouncements (in the past) made in Fiji and other jurisdictions on, what might constitute, the occurrence of substantial and grave injustice. The threshold for the grant of special leave is high and stringent. In the case of Livai Lila Matalulu & Another v The Director of Public Prosecutions [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003), this Court held that:

"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal is reviewed. The requirements of special leave is to be taken seriously .It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance of principles or in the criminal jurisdiction, substantial and grave injustice."

[17] A similar provision to section 7(2) of the Supreme Court Act exits in section 32 (2) of the Hong Kong Court of Final Appeal Ordinance, Cap 484, as follows

"Leave to appeal shall not be granted unless it is certified by the Court of Appeal or the High Court, as the case may be, that a point of law of great importance is involved in the decision or it is *shown that substantial and grave injustice has been done."*(Underlining added)

[18] The provision is said to have originated from the decision of the Privy Council in **Re Dillet** (1887) 12 App Case 459. Mr Dillet was a legal practitioner from British Honduras who challenged his conviction for perjury and a consequential order striking him off the roll of practitioners: see also the case So Yiu Fung v Hong Kong Special Administrative Region [1999]2 HKCFAR 539; [2000] 1HKLRD 179. Delivering the Privy Council's advice, Lord Watson said (at page 467) that:

".....the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings 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."
(Underlining added).

[19] In So Yiu Fung (supra) the appellant, a man aged 22 was tried in the High Court on two counts of rape .He was at the time a man of previous good character. The jury returned their verdict and on count 1 they convicted the appellant (by a majority of 5 to 2) of alternative offence of attempted rape. On the 2nd count they convicted him (by a majority of 6 to 1) of rape as charged. The appellant received a 7 years term of imprisonment. Appellant appealed to the Court of Appeal seeking the quashing of his conviction. His conviction was affirmed by the Court of Appeal. He further appealed to the Court of Final Appeal of the Hong Kong Special Administrative Region , where the leave to appeal was granted by the Appeal Committee , on the basis that it had shown that it was at least reasonably arguable that substantial and grave injustice had been done. The comment below by Mr Justice Bokhary PJ, (Permanent Judge of the Court) is worthy of note, at pages 3-4 of judgment:

> *"In common with the systems of criminal justice for which tribunals like the House of Lords and Privy Council have ultimate judicial responsibility, our system of criminal justice aims to be careful and speedy at the same time. It is geared to that objective. Reviewing convictions to see if they are safe and satisfactory is entrusted to the intermediate appellate court. If the matter proceeds further to his court, our task does not involve repeating that exercise. We perform a different one. In order for an appeal brought under the "substantive grave injustice" limb of section 32(2) of the Hong Kong Final Appeal Ordinance to succeed, it must be shown that there has been to the appellant's disadvantage a departure from accepted norms which departure is so serious as to constitute a substantial and grave injustice."* (Underlining added)

[20] It is the Petitioner who has to establish that his/her request comes within the ambit of section 7(2) (c) of the Court of Appeal Act. This Court had explained the underlying rationale for the stringent test, for the Court to grant special leave in the case Livai Lila Matalulu and Another v Director of Public Prosecutions (supra), see also paragraph [13] above.

[21] The Court of Final Appeal of Hong Kong Special Administrative Region had taken the matter further in a fairly recent decision in Kosar Mahmood v HKSAR FAMC No.31 of 2012 (unreported), where the Court having adopted the principles stated in So Yiu Fung (supra),see also paragraph [7] above, added:

"6. We wish to stress that in all future applications on the substantial and grave injustice ground, the application for leave to appeal must identify the specific way in which it is submitted that the court below has departed from established legal norms; and why such departure is so seriously wrong that justice demands a hearing before the Court of Final Appeal notwithstanding the absence of any real controversy on any point of law of great and general importance. It will simply not be sufficient merely to set out the same arguments that were canvassed in the court below.

7. If the application for leave to appeal does not provide a reasonably arguable basis for such submissions, it may expect to be dismissed summarily……"

[22] Having discussed applicable laws, I now turn to the question whether the appellant has met the test under statute and case law. In order to effectively answer the question, it is necessary to consider all the circumstances of the case, including, grounds of appeal, the final judgment of the Court of Appeal, and the law.

Discussion

(A) Court of Appeal

[23] It is obvious from the Judgment of the Court of Appeal that, its approach is to deal first with the sentencing grounds, as both the petitioner and his accomplice were granted leave against sentence by a single Judge. The accomplice appealed against sentence only, while the petitioner is appealing both conviction and sentence.

[24] The main complaint against sentence is based on the learned Magistrate having adopted a wrong sentencing tariff resulting in a sentence that is both harsh and excessive. The Court of Appeal (per Prematilaka), having considered and reviewed the legal policy and principles of sentencing in aggravated robbery and similar cases, and the legal authorities on the matter (paragraphs [8] to [30] of Judgment), continued by making (from paragraphs [31-33]) a number of important observations on sentencing as developed over the years and from authorities, which are captured below:

(a) The summary of facts before the court reveals a case of aggravated robbery in the form of street mugging.

(b) The sentencing tariff of 8-16 years was set for home invasions or similar offending mostly at night with violence inflicted, by a group of men, armed with weapons (as in **(Wise)**.

(c) Higher sentencing tariff of 10-16 years was decided for spate of robberies with more or less the same aggravating factors associated with home invasions or similar offending (as in **Nawalu);**

(d) The sentencing tariff for street mugging has been taken between 18 months and 5 years but the upper limit can go up further if one or more or all (the list is not exhaustive) aggravating features mentioned in **Raqauqau** are present.

(e) When a sentence is challenged in appeal the guidelines are whether the trial Judge (i) acted upon a wrong principle ;(ii) allowed extraneous or irrelevant matters to guide or affect him;(iii) mistook the facts; and (iv) failed to take into account some relevant consideration. See: Naisua v State; House v The King; Kim Nam Bae v The State.

[25] On the completion of above exercise, the Court of Appeal was able to establish that there was a sentencing error by the Learned Magistrate, and in paragraph [33] of the Judgment, it states:

"Therefore, there is a sentencing error on the part of the Magistrate in adopting the sentencing tariff set in Wise v State (supra) and then picking a starting point at 11 years of imprisonment. After making adjustments upward for aggravating features and downward for mitigating factors and discounting the remand period, he had fixed the final sentence at 08 years and 11 months which to me is harsh and excessive given the nature and gravity of the offending. In my view, the sentence does not fit the crime. Therefore the sentence appeal of both appellants should be allowed."

[26] This finding by the Court of Appeal has implications in the context of the charges laid against the petitioner and his accomplice, and the grounds of appeal which also raise issues on the petitioner being charged incorrectly for committing aggravated robbery and attempted aggravated robbery, when (according to the petitioner's submissions) he should

be charged for a lesser charge of theft. Also, that the evidence, does not support the charges laid against him.

[27] Having allowed the appeal against sentence for both the petitioner and his accomplice., the Court directed that the petitioner and his accomplice be released forthwith as they had already served 5 years of imprisonment (including the period in remand).In doing so the court relied on Koroicakau v State [2006] FJSC 5; CAV0006U.2005S (4 May 2006).a decision of this Court, and followed in Sharma v State [2015] FJCA 178; AAU0048.2011 (3 December 2015). In Koroicakau, it was held that it is the ultimate sentence that is of importance, rather than each step in the reasoning it is the ultimate sentence rather than each step in the reasoning process that must be considered.

[28] In relation to the petitioner's grounds of appeal against conviction, the Court stated at paragraph [39]:

> *"The 02nd appellant had also appealed against his conviction. His counsel had submitted that the 02nd appellant's conviction should be set aside and a retrial should be ordered. Thus, the counsel has conceded that even if the 02nd appellant succeeds on his ground of appeal against conviction the end result is likely to be a retrial. I am not incline to order a retrial in this case and subject the 02nd appellant to the burden of further litigation. Therefore, it would be futile to go into his conviction appeal in view of the order I have proposed on his sentence appeal."* (Underlining added).

The petition grounds have raised issues focusing on this decision of the Court of Appeal, the nature of the guilty plea, and the facts.

(B) Petitioner's Case

[29] Aggrieved by the Court of Appeal's decision (*" it would be futile to go into his conviction appeal'")* the petition for special leave to appeal was brought to this Court , in line with section 98 (3) (b), and (4) of the Constitution and Section 7(1) and (2)(c) of the Supreme Court Act . Counsel for the petitioner had prepared a comprehensive written submissions

which was filed on 22 September 2023, and a list of authorities. Counsel also made oral submissions at the hearing.

[30] The ultimate paragraph of the written submissions, sums up the relief which the petitioner seeks, stating:

> *"80. **That** the Petitioner respectfully submits that by reason of the foregoing **he has suffered and will suffer substantial and grave injustice** unless his **conviction is set aside**. The Petitioners therefore humbly pray that the Supreme Court of Fiji may graciously be pleased to grant special leave to appeal from the Judgment of the Court of Appeal dated 3rd. March 2022 and for such further or other relief in the premises as to the Supreme Court of Fiji may seem fit."*
> (Underlining and emphasis added)

[31] **Grounds of Appeal:** There were 5 grounds of appeal raised by the petitioner, as follows:

Ground 1

Whether the Court of Appeal was correct in not considering the Petitioner's grounds of appeal and not giving proper reason why it rejected or did not properly consider the Petitioner's Conviction Appeal?

Ground 2

Whether the Court of Appeal was correct when it dismissed the Petitioner's conviction appeal based on the facts that the overturning of the conviction will result into retrial and will burden the Petitioner of further litigation?

The petitioner argued the above two grounds together. He states that he was wrongly convicted for an offence he did not commit, alleging that the facts were altered. The petitioner's version of the facts appear in paragraphs 19 and 20 of the submissions, as follows:

> *"19. On 29 September2016, Petitioner with another was walking along Fletcher road when they saw two girls walking towards them. Seeing that they were holding phone, Petitioner attempted to grab the phone from one of the girls (complainant 2) but she held on and Petitioner left when he saw at the same time the other person with him took something from another girl and was running away. The petitioner*

had no part in other person's action when he grabbed from the other girl and was running away.

20. *According to Petitioner in his affidavit that they never planned about ant robbery in advance. It was two separate incidents at the same time by two different persons. What happened was Appellant's attempted to grab and other person grabbed the properties and run away. No violence was used. More than one person also does not apply since there was two separate offence."*

The petitioner also submitted that his conviction is unreasonable or cannot be supported having regard to the evidence that was before the Court and as the result of an error or irregularity there has been a substantial miscarriage of justice. He challenged the reason(s) given for the Court not to deal with the conviction grounds, and submits that, that is a miscarriage of justice

Ground 3

Whether the offence for which the Petitioner was convicted by the Learned Magistrate should have been Robbery and Attempted Robbery rather than Aggravated Robbery and Attempted Aggravated Robbery.

The Petitioner submitted that, the statements made by the complainants which were part of the Record do not show the petitioner or the other person used violence. Those statements, were not accepted by the prosecution or by the trial Court. The petitioner challenged the facts accepted by the trial Court as not true or reflective of the statements of the complainants and evidence adduced. Further submissions on this ground are reproduced below:

"52. The issue for this Court is to decide that based on the Summary of Facts and Statement of two witnesses whether Attempted Aggravated Robbery and Aggravated Robbery had been committed. Section 311(1) (a) states Aggravated Robbery as: "a person commits an indictable offence if he or she: (a) Commits robbery in company with one or more other person.

53. We now look what is Robbery defined under section 310 which then confirms whether there is an offence committed by Petitioner under section 311(1) (a).

Elements of the offence of robbery.

54. *The prosecution must prove beyond reasonable doubt that Petitioner stole something; and at the time of, or immediately before, or immediately after, stealing it; that he used or threatened to use actual violence to any person or property.*

Actual violence

55. *In R v De Simoni (1981) 147 CLR 383; 5 A Crim. R 329; [1981] HCA 31 the concept of using or threatening actual violence was considered in relation to a similarly phrased provision under the Criminal Code 1913 (WA).It was stated by Gibbs CJ that "actual violence means no more than physical force which is real and not merely threatened or contemplated."*

56. *In establishing that actual violence was used or threatened it is sufficient to demonstrate any degree of violence: R v Jerome [1964] Qd R 595.*

Nexus between violence and stealing

57. *There must be a nexus between the use or threat of violence, the purpose of obtaining the thing stolen, or preventing or overcoming resistance to it being stolen. In R v Graham [2011] QCA 187 at [43] it was noted that the relevant direction to the jury was framed as "if you weren't satisfied that the violence was being done in order to facilitate the stealing but the stealing just occurred coincidentally as the violence was occurring, that wouldn't be a robbery."*

58. *It is submitted that in the statement of two witnesses the facts the words "ATTACK 'had been wrongly used or not clarified."*

The Petitioner then discussed the summary of facts as per the complainant's statements against the elements of the crime of Robbery and of simple Theft and submitted that:

"60. It is obvious based on the statements of the two witnesses and the summary of facts Petitioner may be guilty of Attempted theft and not Robbery and Aggravated Robbery.

61. *It is submitted that it would have been robbery only if any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen, is said to be guilty of Robbery or both of them first attempted one complainant then went to the other. That is not the case here. Aggravated Robbery would be if both Appellant robbed one complainant together then attempted to rob the other together that is not the fact of the current matter.*

Alternative count of theft

62. *It is submitted that Petitioner can be convicted for the alternative offence of attempted theft, as the statement of witnesses reveals all the main elements of attempted theft.*

63. *Section 160 and 162(1) (i) of the Criminal Procedure Act, allows the court to convict an accused for a lesser or alternative offence, ..."*

Ground 4

Whether Petitioner's plea was equivocal in that the Resident Magistrate had put extreme pressure on the appellant to plead guilty.

This ground relates to Ground 3 of the appeal grounds against conviction that was allowed at the leave stage, and in summary, the petitioner's submissions are:

(a) That petitioner disputed the facts, and he was forced by the Learned Magistrate to accept the facts. Cited State v Isaia Saukova (2000) 1 FLR 135, for the proposition- *" But the Magistrate should ensure that the accused is not simply pleading guilty out of feeling of remorse for being involved in a result as opposed to causing a result".*

(b) A plea of guilty must be unequivocal and entered with full understanding of the charges: Mohammed Khalil v Reginam 24 FLR 78.For the guilty plea to be valid it must be a genuine consciousness of guilt voluntarily made without any form of pressure, promise or inducement to plead and is entered in the exercise of free choice: Nalave v State [2008] FJCA 56; AAU0004.2006; AAU0005.2006 (24 October 2008).

(c) A plea of guilty must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty; it is one that is entered in the exercise of free choice: R v Murphy [1975] VR 187; Meissner v The Queen (1995) 184 CLR 132.).See also: Maxwell v The Queen (1996) 184 CLR 501, High Court of Australia; Bulivou v State AAU 78/2010 FCA.

(d) The Magistrates' Court Record confirms that the petitioner was not pleading guilty. At paragraph 71 of the submissions, the petitioner cites 11 instances during the trial where his plea was raised. The court entry on 13/3/17 states:

"(k) 13/3/17 State is seeking time for voir Dire disclosure. The accused wants to change the plea.

Later at 2:30pm both accused submits that they get legal advice about the case. But accused now wants to change their plea after getting proper advice."

(e) That Court proceedings confirms the petitioner's plea was not unequivocal and as such leave should be granted and upheld.

Ground 5

Whether there had been a miscarriage of Justice when the learned State Counsel produced summary of facts to the Learned Magistrate that were contrary to the witness's statement?

The petitioner submitted that there had been a miscarriage of justice when the learned prosecutor produced summary of facts to the Magistrate that were completely contrary to the witness's statement. Submissions were made on the duty of the prosecutor referring to the Judgment and observations made by His Lordship Mr Justice Marshall, the then President of the Court of Appeal, in Ali v State [2011]FJCA 28; AAU0041,2010 (1 April 2011); and on a recent publication **"Prosecuting"** by Raymond Gibson KC, Senior Crown Prosecutor , 2nd Edition, Lawbook Co.2022.

(c) Respondent's Case

[32] The respondent filed a written submissions on 3 October 2023 which together with the oral submissions made by Counsel at the hearing constitute the case for the respondent. The respondent argued that Grounds 1 and 2 are contradictory as the reasons for not dealing with the conviction grounds were given by the Court of Appeal. It defended the decision of the Court of Appeal in not dealing with the conviction grounds on the basis that the Court had allowed appeal against sentence. Additionally, it asserts that in case a

retrial is ordered, there is no guarantee that the petitioner would be successful if a retrial were held.

[33] On the use of force (Ground 3) by the petitioner, the respondent differed from the argument of Counsel for the petitioner, and submitted that force was inflicted upon both complainants, negating the assertion that the charge should have been that of theft. Also, that the petitioner and his accomplice confessed to knowing each other and approaching the two complainants before they robbed them. That would negate the assertion that the charge should have been one of robbery simpliciter given they acted together in a joint enterprise.

[34] With respect to Ground 4, the respondent submitted that the petitioner had changed his plea a number of times before the learned Magistrate and *"eventually at the behest of the Court."* He sought the assistance of the Legal Aid Commission regarding his plea and on 13th March 2017, the Petitioner pleaded guilty to both the counts, after receiving legal advice. There was no reason for the learned Magistrate to doubt the petitioner and the Magistrate accepted his plea as unequivocal. There is no evidence in the Court record of the Magistrate Court that the Court had in any way influenced the petitioner to plead guilty.

[35] The respondent took exception to Ground 5, and denied that the State counsel mislead the Court via the summary of facts as alleged by the petitioner. That the summary of facts were drafted ensuring that all elements of the offending were present and in accordance with the statements of the two complainants as well as of the accused persons. In concluding, the respondent urged that, the petitioner's application for special leave to appeal his conviction may be properly dismissed.

Discussion

[36] It is an appeal on the *"final judgment"* of the Court of Appeal that this Court is empowered to hear and determine under section 98 (3) (b) of the Constitution. Although

the Court of Appeal did not consider the merits of the appeal grounds against conviction, and, no orders were made in relation thereto, I accept that the Court of Appeal had made a final decision and decided on the fate of the appeal against conviction grounds, as stated in paragraph [39] of its judgment:

> *"[39] The 02nd appellant has also appealed against conviction. His counsel had submitted that the 02nd appellant's conviction should be set aside and a retrial should be ordered. Thus, the counsel has conceded that even if the 02nd appellant succeeds on his grounds of appeal against conviction the end result is likely to be a retrial. I am not inclined to order a retrial in this case and subject the 02nd appellant to the burden of further litigation. Therefore, it would be futile to go into his conviction appeal in order I have proposed in his sentence appeal."* (Underlining is mine)

[37] I have carefully considered the Records of the Magistrates' Court; the Ruling of the learned single Judge dated 24 May 2019; the Judgment of the Court of Appeal, the Petition and the written and oral submissions by the parties. At the hearing, Counsel for the petitioner had spent some time covering Grounds 3 and 4 ; Ground 3 seeks an answer with respect to whether the charges laid was appropriate under the circumstances, and whether, the facts or evidence adduced supported the charges. In Ground 4, the petitioner contested the plea of guilty that was accepted by the learned Magistrate, arguing that the plea of guilty was unequivocal. These are closely related grounds, as with the other grounds as well.

[38] Ground 1 poses the question: Whether the Court of Appeal was correct in not considering the petitioner's grounds of appeal and not giving proper reason why it rejected or did not properly consider the petitioner's conviction appeal? This ground is misconceived to the extent that the Court of Appeal (per Prematilaka JA), gave reasons, and did not reject the grounds. The Court decided not to deal with the conviction grounds for the reason(s) given in paragraph [39] of its judgment, quoted in full in paragraph [36] above.

[39] The proper question that may be asked is: Whether a substantial and grave injustice occurred by reason of the Court of Appeal not dealing with the conviction grounds? I believe so. **Ground 3**, at least, if not all of the grounds that was before it, could have

been considered for a decision, since the learned single judge had allowed that ground at the leave stage, while rejecting grounds 1, 2 and 4. It would have been fair and just that it be considered. Also, it would acknowledge in some way the procedural steps that had been taken at the leave stage. The reason(s) given for the Court not considering the petitioner's appeal against conviction, is, well meaning, given the context. If an appeal against conviction is allowed, the option for the Court is to quash the conviction and direct a verdict of acquittal, or, in the interests of justice, order a new trail. In a retrial, there is no guarantee that the petitioner would be successful, however, and on the other hand, there may be opportunity for the petitioner to be acquitted; or the charges to be amended to Robbery and Attempted Robbery or to a charge of Theft.

[40] The petitioner had consistently argued, that he did not plead guilty to the charge of aggravated robbery and attempted aggravated robbery contrary to section 311(1) (a) of the Crimes Act. He obtained the leave of the learned single Judge to proceed on that ground, however, the ground of conviction was not fully dealt with. Ground 3 aforesaid states:

*"**Ground 3***

THAT the appellant's plea was equivocal in that:

(i) *The Resident Magistrate to put **extreme** pressure on the appellant to plead guilty; and or*

(ii) *That if the appellant don't plead guilty and admitted the offence whereby if the Learned Magistrate finds him guilty, the Learned Magistrate will give appellant the maximum sentence; and or*

(iii) *That if the appellant plead guilty, he will be given the discount sentence by the Learned Magistrate."*

[41] On Counsel for the petitioner being questioned at the hearing: Whether the petitioner would have pleaded guilty to the lesser charges of robbery and attempted robbery? Counsel's reply was that the lesser charges of robbery and attempted robbery were not put to the Petitioner at the trial.

[42] The Court of Appeal held that the sentence by the Magistrate is harsh and excessive given the nature and gravity of the offending. That the sentence does not fit the crime as stated in paragraph [33] of the Judgment and paragraph [25] above.

[43] On Ground 4, with respect to the nature of the petitioner's plea of guilty, I do not accept the submission of the petitioner that the plea was equivocal. I accept the respondent's position on the matter, that is, the petitioner had pleaded guilty after taking legal advice from the Legal Aid Commission. The plea of guilty was unequivocal.

[44] It is significant that the Court of Appeal came to a conclusion, that the sentence was harsh and excessive given the nature and gravity of the offending, and that the sentence does not fit the crime. It raises issues touching on the appropriateness of the charges, and whether the charges were supported by the evidence adduced at the trail?

Conclusion

[45] In considering all the circumstances of this case, I hold that substantial and grave injustice occurred with the omission by the Court of Appeal to consider the conviction grounds which included a ground of appeal that was allowed by a single judge at the leave stage. That has caused substantial and grave injustice for the petitioner. That leave ought to be granted, and is granted. Under the circumstances of this case and the totality of the evidenced, the grounds 1, 2 and 3 have merit.

[46] I hold that the petitioner has made an unequivocal plea of guilty. I accept that: (i) the evidence adduced at the trial does not support a charge of aggravated robbery and attempted aggravated robbery, and in consequence thereof, I reduce the charges for which the guilty plea relates and convict the petition on charges of Robbery and Attempted Robbery, contrary to sections 310 (1); and sections 44(1) and section 310(1) (a) of the Crimes Act 2009.

[47] The petitioner is granted leave as requested. The petitioner's conviction in the Magistrates Court for Aggravated Robbery and Attempted Aggravated Robbery is set aside and substituted by an order convicting the petitioner on a charge of Robbery and Attempted Robbery.

Orders of the Court:

1. *Special Leave to appeal granted.*
2. *Appeal against conviction allowed.*
3. *Petitioner's Conviction for Aggravated Robbery and Attempted Aggravated Robbery is set aside and substituted.*
2. *Petitioner is convicted for Robbery and Attempted Robbery.*

The Hon Acting Chief Ju tice Salesi Temo
JUDGE OF THE SUPREME URT

The Hon Mr Justice Terence Arnold
JUDGE OF THE SUPREME COURT

Hon Mr Justice Alipate Qetaki
JUDGE OF THE SUPREME COURT