IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 28 of 2022
Court of Appeal No. AAU 166 of 2017

BETWEEN: **MOSESE ULUICICIA**

Petitioner

AND: **THE STATE**

Respondent

Coram : **The Hon. Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Justice William Young
Judge of the Supreme Court

The Hon. Justice Isikeli Mataitoga
Judge of the Supreme Court

Counsel: **Petitioner in Person**
Shameem, S for Respondent

Date of Hearing: **10 June 2024**
Date of Judgment: **27 June 2024**

JUDGMENT

Temo, ACJ

[1] I agree entirely with Hon. Mr Justice Mataitoga's judgment and order.

Young J

[2] I agree that the petition should be dismissed but my reasons for doing so are not entirely the same as those proposed by Mataitoga J.

[3] The petition seeking leave to appeal is substantially out of time. I agree with Mataitoga J that that no explanation was given for the delay. On the other hand, the petitioner is appearing in person. There is no apparent prejudice to the State and, indeed, the State took no issue with the delay. It is open to the Court to extend time for the filing of the petition and, given circumstances just outlined, I would do so.

[3] The petitioner was convicted of an aggravated robbery that involved a home invasion. Amongst the property that was stolen was a cell phone. The victim had been forced to reveal its password to the robbers.

[4] The case against the petitioner at trial was formidable. There was convincing evidence that within a day of the robbery the petitioner was in possession of the cell phone that had been stolen from the victim and that he knew the password. As well fingerprints found at the victim's premises were matched with fingerprints provided by the petitioner.

[5] Following trial before a Judge and Assessors, the petitioner was found guilty. His appeal against conviction was dismissed by the Court of Appeal in a thorough and careful judgment.

[6] The petitioner's grounds for his proposed appeal to this Court seem to me to come down to contentions that:

(a) His rights were breached because he was not advised of the fingerprint evidence at his caution interview (and perhaps not told of the use to which his fingerprints which he seems to have provided at that time would be put.

(b) Complaints about the fingerprint evidence primarily based on the suggestion that it was fabricated.

(c) A claim that the Judge should have analysed more closely the original statements of the prosecution witnesses.

[7] His complaint that his rights were breached in relation to the caution interview was not advanced to the Court of Appeal. As well, because the caution interview was not tendered in evidence, it is difficult to see where his argument leads. The police officer who took his fingerprints was not challenged as to the process. I see nothing in the point he wishes to raise.

[8] I have carefully read the evidence in relation to the fingerprint evidence. That evidence revealed compliance with my understanding of usual practice, and I have no difficulty with evidence linking the petitioner's fingerprints with those found at the crime scene.

[9] The argument as to inconsistencies between the evidence of witnesses and their earlier statements seems to me to misstate the approach taken by the Judge (as he did address inconsistencies). It was, as well, fully considered by the Court of Appeal and I see no apparent error in the approach it took.

[10] The leave criteria specified in s 7(1) of the Supreme Court Act 1998 have not been satisfied and for this reason I would dismiss the petition.

Mataitoga, J

[11] The Petitioner was charged with one count of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act, 2009. Following a trial in the High Court at Suva the petitioner was convicted as charged.

[12] The assessors returned a unanimous opinion that the petitioner was guilty of the said offence, and the Trial Judge concurred with their opinion.

[13] On 9th November 2017 the petitioner was sentenced to a total period of 10 years and 9 months imprisonment, with a non-parole period of 8 years and 9 months.

[14] The petitioner filed a timely appeal to the Court of Appeal, setting out four grounds of appeal against the conviction and three grounds of appeal against the sentence

[15] The single judge of appeal by his ruling dated 14th June 2019 granted leave to appeal only on the first ground against the conviction.

[16] The petitioner by his written submissions dated 19th October 2020 had urged the full court, to consider the four grounds of appeal against the conviction of which leave was refused by the single judge of appeal. In his written submissions, the petitioner addresses the said four grounds along with the ground on which leave was granted. The State responded to the same. He did not renew any of the grounds of appeal against sentence; nor did he make any oral submission on sentence either. The State also therefore has not dealt with the matter of sentence in its written submission.

[17] There were five grounds of appeal against the conviction submitted by the petitioner before the court of appeal and they were as follows:

> *"Against Conviction:*
>
> *1. The learned trial Judge erred in law and in fact in not analysing deeper each of the prosecution witness statement as it was tendered after the allegation, while it was still fresh in their minds;*
>
> *2. The learned trial judge also ignored and mis-considered the evidence of finger prints given by the PW 12 and PW13 and the last PW14 Mosese Rokobera. It appears to be a work of Police fabrication against the appellant;*
>
> *3. That further the learned trial judge erred in law and in fact in sharing assessors facts of how to refuse appellants evidence of alibi before the judgment of this trial;*
>
> *4. That the learned trial judge was swayed and biased when failing to put weight or consider the evidence of the defence witnesses and appellants which was given under oath;*

5. That further in the judgment of the matter, the learned trial judge did not highlight or explained in court during its ruling why he refused the defence witnesses testimony of the appellant's alibi."

Court of Appeal Hearing

[18] The Court approach was to set out the summary of evidence as reflected at paragraphs 25 – 38 of the trial judge's summing up. Following that he addressed the 5 grounds of appeal submitted by the appellant.

[19] As regards ground 1 in paragraph 8 above, the trial judge analysed the inconsistencies in evidence led by the prosecution and then properly directed the assessors as to what purpose a statement made by a witness to police could be used at paragraph 4 of the summing up:

> *"4. Statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence."*

[20] In paragraphs 8-11 of the summing up the trial judge provided his assessment of credibility of a witness in the context of inconsistencies in his/her evidence:

> *"8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.*

> *9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.*
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> *10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.*
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> *11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony"*

[21] At the hearing the petitioner complained that his rights were breached in relations to the cautioned interview statements. This was not raised in the Court of Appeal. The caution interview statement was not tendered in evidence. This complaint has no basis for the petitioner's claim.

[22] The second issue raised at the hearing by the petitioner was the procedure and process pertaining to fingerprint evidence, but at the trial, this evidence by the police fingerprint expert was not challenged by counsel for the petitioner. There was nothing in the Court of Appeal handling of this issue, that was in error needing the intervention of this court.

[23] The Court raised with the petitioner the fact that his petition was 1 year 2 months 29 days out of time and there was no application for enlargement of time to seek special leave submitted by him. The petitioner had no reasonable explanation to explain the delay.

<u>Section 7 (1)(2) Supreme Court Act 1998</u>

[24] An appeal to the Supreme Court by a petitioner, from a final determination of the Court of Appeal is by petition for special leave to appeal. Pursuant to section 7 (1)

& (2) of the Supreme Court Act 1998, special leave **must not be granted** unless the requirement stated therein is satisfied. These are:

> '(1) In exercising its jurisdiction under section 98 of the Constitution of the Republic of Fiji with respect to leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case -
>
> (2) In relation to a criminal matter, the Supreme Court **must not grant** 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.'

[25] It is necessary that I clarify what is expected from a petitioner's grounds of appeal and submissions in support, of an application of special leave to the Supreme Court. A Special Leave Application to the Supreme Court is not a procedure that affords a petitioner, another opportunity for a review of the Court of Appeal judgement.

[26] In **Livia Lila Matalulu and Anor v The Director of Public Prosecution**[1] their Lordships articulated the role of the Supreme Court in applications for special leave to appeal matters in the following way:

> *"The court has considered the application of the criteria for the grant "of special leave in this case with some particularity. Petitioners for special leave should ensure that when they frame their petitions, they do so with care. The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. Such leave will not be granted lightly. Too low a standard for its grant would undermine the authority of the Court of Appeal and distract the Supreme Court from its role as the final appellate body, by burdening it with appeals that do not raise matters of general importance or a principle or, in the criminal jurisdiction, 'substantial and grave injustice'* (see p 731, below)

[1] [2003] FJSC 2 (17 April 2003)

[27] It is for the Supreme Court to consider the grounds of leave to appeal, which may raise an issue of law or procedure which showed a gap in the jurisprudence. Then the court will use that opportunity to bridge the gap in the public interest in support of the efficient administration of the criminal justice system. It is critical to appreciate that the special leave to the Supreme Court is in place for the court to make determination based on grounds and submissions allowed after the special leave procedure have been satisfied.

[28] It is for those policy reasons that the requirements for special leave to the Supreme Court, articulated in the Supreme Court Act 1998, pose a restrictive procedure. It is clear from the language of section 7 (2) of the Supreme Court Act, that there is no ordinary right of appeal from the final judgement of Court of Appeal. First, a petitioner must seek special leave to appeal and if leave is granted then the appeal may take place. If special leave is not granted, there is no appeal. The initial Special leave application must be filed with 45 days from the date of the judgement of the Court of Appeal appealed against: Rule 5 (a) of the Supreme Court Rules.

[29] Governing principles for determining whether leave to appeal is granted, is not 'reasonable prospect of success' like it is in the Court of Appeal. For special leave to the Supreme Court, section 7(2) of the Supreme Court Act 1998 state:

> *"In relation to criminal matters, the Supreme Court* ***must not grant*** *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"*

[30] It will be noted that the Supreme Court must not grant leave unless the petitioner's grounds of appeal raise an issue of general legal importance, and question of principle affecting the administration of criminal justice. The other basis for granting special leave is, if the grounds of appeal and submission establish that if the Supreme Court does not address the issue raised by the ground of appeal, substantial and grave injustice may occur.

Enlargement of time Before Special Leave

[31] Having outlined briefly what is required to support a special leave application to the Supreme Court, and before I consider the special leave, I must address an issue not raised by the special leave petition, which is that, the special leave application is out of time. This means that before the special leave is even considered the court must consider whether enlargement of time to appeal should be granted to the petitioner.

[32] By a letter dated 17 June 2023, the petitioner submitted his application for Special Leave to Appeal from the decision of the Court of appeal. This a delay of 1 year 2 months 29 days. Rule 5 (a) of the Supreme Court Rules require the petition for appeal to be filed within 42 days of a decision appealed against. In this case the judgement of the court of appeal appealed against was delivered 4 March 2022. This means that the last date for timely petition is 16 April 2022. The petitioner's application for Special Leave to appeal was received 4 July 2023, though he wrote a letter dated 17 June 2023. A delay of 1 year 2 months and 29 days; is a substantial delay indeed.

[33] The Supreme Court in **Rokotuiwailevu v State**[2], stated that enlargement of time is an essential pre-requisite for the Court to consider any application for leave to appeal against a final decision of the Court of Appeal filed outside the time period prescribed for the filing of such applications.

[34] While enlargement of time to petition for appeal, has been permitted by courts exceptionally, and only in an endeavour to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court. The Supreme Court in **Kumar v State**; **Sinu v State**[3], enumerated the factors that will be considered by a court in Fiji for granting enlargement of time as follows:

(i) The reason for the failure to file within time.

(ii) The length of the delay.

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[2] [2022] FJSC 21 (CAV 0011 Of 2018) 28 April 2022.

[3] [2012] FJSC 17 (CAV 001 of 2009) 21 August 2012.

(iii) Whether there is a ground of merit justifying the appellate court's consideration.

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[35] In the absence of an application by the petitioner for enlargement of time to seek special leave to appeal, there are no explanation available for the Court, to evaluate the five factors identified in **Kumar v State** and **Sinu v State** (supra) There is no reason submitted by the Petitioner to explain the inordinate delay.

[36] In **Rasaku v State**[4] the Supreme Court observed that a petitioner who is seeking a belated appeal in a criminal case, must be able to meet the threshold criteria in section 7 (2) of the Supreme Court Act 1998, and it is implicit that the criteria for granting enlargement of time are much more stringent than that for grant of leave to appeal in a timely application.

[37] In light of the above, the Petition for Special Leave is misconceived in the absence of an order from the court granting enlargement of time permitting a late petition. The special leave petition is dismissed.

Petitioner's Special Leave Petition

[38] There is one ground submitted by the petitioner by letter dated 17 June 2023 for his appeal against conviction and it is:

> *"That the trial judge erred in law and fact in not analysing deeper each of the prosecution witnesses' statement as it was intended after the allegation, while it was still fresh in their minds."*

[39] The petitioner's sole ground submitted to support his application for special leave does not raise an issue of great legal importance nor does it raise any question of

[4] [2013] FJSC 4 (CAV 009, 0013 of 2009), 24 April 2013

principles of law that needs the attention of the Supreme Court, which if left unattended, will affect the administration of the criminal justice system.

Fresh Grounds of Appeal Not Raised in Courts below

[40] By another letter submitted through the Correction Service dated 6 May 2024, the petitioner submitted 5 additional grounds. None of these grounds were raised as grounds of appeal in the Court of Appeal. Therefore, they were not part of the final judgement of the Court of Appeal in this case and cannot now be considered by the Supreme Court: section 98 (4) of the Constitution.

[41] If these grounds were accepted by the Supreme Court it would means that it had granted special leave to a petition that is 2 years 5 months late. It is a substantial delay.

[42] The Supreme Court in **Dayal v State**[5] stated the following:

> *"[81] Although the Supreme Court has powers to entertain fresh grounds of appeal which were not raised below, it will not be entertained "unless its significance upon the special leave criteria was compelling. **Eroni Vagewa v State** (supra): In considering the issues of whether new issues should be allowed to be argued in the Supreme Court, Justice L'Heureux- Dube in **R v Brown** [1993] 2 SCR 918, 1993 Can. Lii 114 (SCC) in his dissenting opinion, adopted by this Court in **Vagewa,** said:*
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> > *"Courts have long frowned on the practice of raising new arguments on appeal, only in those circumstances were balancing the interests of justice to all parties lead to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on question of law alone are more likely to be received , as ordinarily they do not require further findings of fact.t Three prerequisites must be satisfied in order to permit the raising of a new issue,..., for the first time on appeal; first, there must be sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial, and third, the court must be satisfied that no miscarriage of justice will result....."*
>
> *[82] His Lordship's comments on the need to discourage new issues on appeal is very relevant. In this case, the new grounds of appeal were not supported by the Record of the High Court of Fiji. They were misconceived and not based on the evidence adduced at the trial given the nature of the offences committed by the Petitioner. Further the grounds of appeal substantially relied on the allegations made by the Petitioner on not being properly represented by*

[5] [2023] FJSC 21

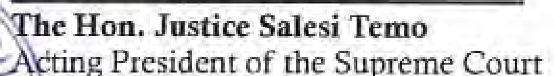
counsels, and alternatively, that the counsels were not competent and did not sufficiently represent and project the defence case to the Petitioner's detriment. The grounds formulated around the counsel's alleged inadequacies were devoid of details and substance being drafted without the knowledge of the counsels. The grounds were drafted without due regard to the interests of the counsels, and without regard to the guidelines for approaching at the trail and at the Court of Appeal stages. In denying all the new grounds, including the additional grounds of the application for leave to appeal, this Court is satisfied that no miscarriage of justice will result".

[43] The careful review and analysis of the evidence in the Court of Appeal of this ground of appeal showed that there is no substantial and grave injustice will occur, because no such issue is raised by the ground of appeal.

[44] I am satisfied that this application for special leave does not satisfy the requirements set out in section 7 (2) of the Supreme Court Act 1998 for the grant of special leave. The application is refused.

ORDER

1. Special Leave application to Supreme Court by the Petitioner is refused.



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