

IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO: CAV0023 OF 2022
[Court of Appeal No. AAU 136 of 2016]

BETWEEN : **LLOYD RICHARD SENIKAUCAVA** *Petitioner*

AND : **THE STATE** *Respondent*

Coram : The Hon. Justice Brian Keith, Judge of the Supreme Court
The Hon. Justice Terence Arnold, Judge of the Supreme Court
The Hon. Justice Lowell Goddard, Judge of the Supreme Court

Counsel: Petitioner in Person
Mrs U. Ratukalou for the Respondent

Date of Hearing: 8th April, 2024

Date of Judgment: 25th April, 2024

JUDGMENT

Keith, J

1. I have had an opportunity to read a draft of the judgment of Goddard J. I agree with it. There is nothing I can usefully add.

Arnold, J

2. I have read Goddard J's judgment in draft. I agree with it, and with the orders proposed.

Goddard, J

3. The petitioner pleaded not guilty to one count of murder and was tried before a judge and a panel of assessors. The trial concluded on 16 August 2016. The assessors returned a unanimous verdict of guilty and the trial judge convicted the petitioner.
4. The particulars of the crime were that on 7 November 2014 at Sigatoka he murdered Tracey Ann O'Brien Maw (known as Tracey O'Brien). Following his conviction he was sentenced to life imprisonment with a minimum term of 16 years.
5. The petitioner applied for leave to appeal his conviction on two grounds. First, that the learned trial judge had failed to direct and guide the assessors on how to approach the evidence in his caution interview and on the weight to be attached to his confession, which he disputed. Second, that the learned trial judge had erred in law and in fact by not putting his case to the assessors in a fair, balanced and objective manner.
6. His leave application was heard by a single Appeal Court judge and was refused. The matter then came before a full Court of Appeal. The petitioner represented himself and although the appeal judges were not entirely clear about the exact nature of the grounds upon which he was relying, they took great care to examine his grievances closely to ensure they fully understood the basis of his appeal and to accord him a fair and thorough hearing.
7. Following the dismissal of his appeal by the Full Court, the petitioner filed a petition for special leave to appeal to this Court on three grounds, articulated as follows:

a) **GROUND 1:**

Did the petitioner had fair trial in court when his trial was held in absentia without being fully satisfied to complete, and fulfil the mandate require in section 14[2] [h] [i] of the constitution in grasping the petitioner's right to health.

b) **GROUND 2:**

Did the petitioner had a fair trial in court when this defence was not being fully facilitated at the trial regarding the withdrawal of one vital document i.e. the cell diary after it has been numerously requested in court before the trial.

c) **GROUND 3:**

Did the petitioner had a fair trial in court when the learned respondent did not produce any proof in court on the exact positions held by the deceased's mouth and petitioner's right fist at the time of the impact which broke that right interior auxiliary bone of the deceased [Point (19) of the FCA judgment]."

The chronology of facts

8. The following are the facts as adduced in evidence at trial:
9. Tracey O'Brien was last seen alive in the very early hours of 7 November 2014. The last sighting of her was in company with the petitioner near the short cut to Vunavutu Village in Sigatoka, sometime after 1.30am. Both had been dropped off there by a taxi driver.
10. During the previous evening of 6 November, the two of them were seen drinking together and with other friends at the Deep Sea and River View Nightclubs in Sigatoka. The deceased was upset about an argument with her partner earlier that day and said he had assaulted her. During the course of the evening she was seen to become extremely intoxicated, to the extent that one of the witnesses endeavoured to persuade her to stay over at the Deep Sea Nightclub to sleep it off. However, the petitioner intervened and took the deceased away with him. This was at around 1am on 7 November.
11. The security guard at the nightclub spoke to the petitioner as he was closing the club at 1am. He spoke with him again while he was waiting at the Total Service Taxi Station

- with the European lady he had been drinking with. The security guard asked the petitioner how they were getting back and he said they were waiting for transport.
12. At around 1.30 am the petitioner and deceased were seen by a friend, Iliesa Hanimo, boarding a taxi together to go back to their villages.
 13. According to the taxi driver, the woman passenger asked him to drop her off at Vunavutu but the petitioner was saying that he wanted them to get out at Nasama Village to stay at his house. The driver said the two of them were arguing about this continuously during the journey. When they reached the short cut to Vunavutu they told him to stop the car.
 14. When the vehicle stopped, the petitioner wanted to get out with the woman but she was resisting and said her residence was further ahead. The driver said she was forced to get out of the car despite her reluctance because the petitioner had her black coloured handbag hanging from his shoulder and he was pulling her by the hand. The taxi driver later identified the handbag he had seen hanging from the petitioner's shoulder as the bag recovered from the scene where the deceased's body was found.
 15. Another taxi driver, Sireli Kunasina, had also observed the petitioner and the deceased near the Total Service Taxi Station at Sigatoka at around 1am on 7 November. He said, at the time, the deceased appeared to be pushing the petitioner away and both looked drunk. Later Sireli saw them both again as they were getting out of a taxi near the short cut to Vunavutu Village. Sireli is unlikely to be mistaken about his identification, as both the deceased and the petitioner were known to him. Later, at around 5am, Sireli drove back to the same short cut where he had arranged to pick up two of his friends, Ilikena Vudogo and Lorima Bola. As his friends were getting into the taxi the petitioner appeared and also got into the taxi. All of them were drinking. Sireli inquired of the petitioner about the woman he had seen him with earlier but the petitioner did not reply and continued to drink without speaking. Sireli noticed the petitioner had an injury to his hand which was wrapped with a cloth. The passenger Ilikena Vudogo gave similar evidence. He said when they arrived at their destination they continued drinking and the petitioner started to cry. He noticed a bloody injury on the petitioner's knuckles.

16. On 10 November Tracey O'Brien's body was found by a farmer in bushes on his farm near Vunavutu Village. The police were notified, the scene examined and the body photographed in situ together with a white skirt found hidden nearby. A handbag identified by a number of witnesses as belonging to the deceased was also later recovered from the area. A postmortem examination was carried out and the body identified as that of Tracey O'Brien by her partner Josia Cokaibusa. Mr Cokaibusa also identified items found near the body as belonging to her.
17. When the petitioner heard on 10 November that Tracey O'Brien's body had been found, he left the area and fled to a remote village in the interior of Navosa. He was located there by police on 14 November and brought down to Sigatoka Police Station. He complained that he was assaulted by police officers on the journey down to the Station.
18. The arresting party arrived at the Station at 1250 hours. The petitioner was processed, which included documentation of any visible injuries. Photographs of his right hand were taken to record injuries that were evident on that. He was then escorted to Sigatoka Hospital where his hands were examined by a medical practitioner, Dr Zibrán. The history related to the doctor was of an assault on a lady two weeks earlier. Dr Zibrán said the petitioner did not complain of anything other than the pain in his right knuckles and appeared calm. The medical findings were that a scar on the right joint of the ring finger was painful to touch and there was swelling of the middle and ring finger knuckle. In the Doctor's opinion the injury to the petitioner's knuckles was not an acute injury and was the result of a blunt force trauma. An x-ray of the petitioner's hand revealed no fractures. This visit to the hospital was documented in the Station diary.
19. The petitioner was interviewed over a period of three days, from 14 to 16 November 2014.
20. On 16 November police carried out a scene reconstruction with the assistance of the petitioner. At the scene he pointed out where the assault had taken place, where the

deceased's blouse was and where he had thrown her handbag after he had removed the money from the wallet inside it.

21. On 17 November, at his request, the petitioner was taken back to Sigatoka Hospital where he was examined by Dr Neelam Pillay for injuries consistent with assaults by police. The doctor was unable to find any injuries to the petitioner's stomach and chest and none were evident on x-ray or abdominal scan. Dr Pillay found the petitioner to be well oriented and not in obvious distress. He did not complain of any pain.

The cause of death

22. The postmortem examination was carried out on the deceased's body on 11 November by a doctor attached to the forensic science services of Fiji Police. According to the findings of this medical examiner, by the time the body was found it was already in an advanced state of putrefaction and degradation. For those reasons the exact cause of death could not be ascertained. The medical evidence established however that the deceased had suffered a facial fracture prior to her death. The opinion of a forensic dental pathologist had been sought on that aspect. The medical examiner's evidence was as follows:

"..... I've mentioned about the examination of the right upper front or facial bone which is I mentioned here the right interior[sic] auxiliary[sic] bones, which is basically here, there was a fracture noted and there was perimortem missing that is teeth of the front upper goes missing accordingly and I mentioned here perimortem, meaning it was near or around the time of death and also because of us noted by the Forensic Pathologist the degree of how the teeth was moving that is also with that and the missing teeth and the fracture I mention that this were consistent with the possibility of considerable blunt force trauma and therefore looking at the cause of death, the direct cause of death we couldn't ascertain because of the extreme stages of putrefaction noted however, I highlighted the presence of that fracture of the right interior of the auxiliary bone, that is all sir."

The petitioner's confession during his caution interview

23. During his caution interview at Sigatoka Police Station, the petitioner gave a detailed and graphic account of events immediately prior to the deceased's death, including his motivation and the anger he felt towards her and of events immediately subsequent. This included the moving of her body and the disposition of various

personal items belonging to her. The description he gave was in such singular detail that it is unlikely to have been within the knowledge of anyone other than the perpetrator. Of the fatal episode he said:

"A: ... I walked out from her then she pulled me and cried and say not to leave her and she really means the relationship. And I pushed her again very hard and I did not like her. She fell to the ground. I was standing there watching her on the ground and my mind flash to what Joe told me that this woman is a liar. She is a liar. She is a user. She is a sweet talker. Everything bad about her. She was the one who have been backslapping Joe in the business we about to establish. She was a greedy woman. And she wants everything. I also remember that Joe told me we need to get rid of her and also revenge. Only to Joe however she also lied to me for me wages, that she never pay me all the bad things that she have done to me.

Q: What happened after that?

A: She was still lying on the ground and all those words were on my mind. She stood up and tried to say something to me, but I then told her to shut up because she is a liar. I was really pissed off with her that night. She stood up again and said that she wanted to have sex with me. But I refused to have sex and I punched her on the mouth. She threw her left leg and hand towards me and I look around to see if anyone was there but I never saw anyone. I was worried because the road which was, where she was lying down, were normally used by the villages by shortcut.

Q: What happened after that?

A: I carry her up, put her on my shoulder and took her to another place about 30 to 35 metres from the shortcut where I put her down on the ground. By that time she was unconscious but she was still breathing. I thought of what Joe told me, for me to kill her, then I can get back into business again and shareholder with him. That motivates me to press her throat very hard using my both arm until there was no other movement but she was still breathing. And I used my outer sight of my right feet to her neck to suffocate her. After a while I move my feet and at times she was not moving. I tried to carry her again but I could smell the shit. I then took her skirt and wipe her shit off and carried her to another place where I dump her about 15 metres.

Q: What clothes she was wearing? Was she wearing a pantie?

A: When I took off her skirt she was not wearing any panty, she was just wearing a skirt.

Q: Where did you place her skirt after you wipe her shit?

A: I dumped it near the gate.

Q: What happened after that?

A: Later I realised I was carrying her black bag. I opened it and showedI took out money and throw the bag with her purse in the bush where she was lying down. And I followed the shortcut towards the main road to buy some more beers from the shop. The shop was closed then I came around the Highway where I met Bill Hicks. Lorima where we got off with Tracey."

The Petitioner's charge statement

24. In his charge statement, made to a Justice of the Peace and Paralegal Officer known to the petitioner, he verified the admissions he had made to the police in his caution interview, including his explanation of events on the fatal night and his physical attack on the deceased in the early hours of the following morning. He confirmed what he had already said, that the attack began with him punching her in the mouth and was followed by the infliction of further violent means by which he intended to bring about her death. He also spoke about the concealing of her body afterwards. While making this confession to the Justice of the Peace, the petitioner is said to have broken down in tears.

The Petitioner's case before the Court of Appeal

25. Following the refusal of leave to appeal by the single judge in 2019, the petitioner filed four grounds of appeal for hearing by the full Court of Appeal. These grounds significantly overlapped and were essentially directed to a response the petitioner gave to a question during his caution interview. This was question and answer 126 in the interview, which is recorded as follows:

"Q126.

Q. Do you wish to make any complaint before we resume with our interview?

A. Yes".

26. On 27 July 2022, the petitioner filed an amended application to enhance his appeal by pursuing only two of his grounds, which he articulated as:

"Ground 1

That the learned trial judge had erred in Law and in fact when he misdirected himself and the assessors that the interview statement was recorded under a lawful and fair manner without considering the appellant's interest in Justice under question 126 of the interview statement before the appellant could even make any other self-incriminating confession in that particular interview statement.

Ground 2

That the learned trial judge had erred in Law and in fact to negate and obstruct the specific infinitive content of question 126 of the caution interview evidence without enquiring its possible significance in a fair, objective, and balance manner.”

27. In support, the petitioner cited the decision of this Court in Maya v State [2015] FJSC 30; CAV009.2015 (23 October 2015), referring in particular to the opinion of Gates P in paragraph 2:
- “2. *For my part, I reach the view that the assessors should be directed by the judge in his summing up that if they are not satisfied that the confession was given voluntarily, in the sense that it was obtained without oppression, ill-treatment or inducements, or conclude that it may not have been given voluntarily, they should disregard it altogether.*”
28. The Court of Appeal took great care in examining the petitioner’s new grounds of appeal, which they found not entirely clear as to their exact nature. However, the Court felt able to discern during the hearing that the petitioner’s essential grievance was his belief that the only evidence against him at trial and on which he had been convicted, was his caution interview and confession at Sigatoka Police Station. The petitioner believed the trial judge had erred in allowing these into evidence.
29. The gravamen of the petitioner’s complaint was his belief that his answer to question 126 in the caution statement was evidence that his confession had been obtained under duress. He alleged he had been subjected to degrading and cruel treatment during this interview, including being assaulted by police officers on his chest and abdomen.
30. He also alleged that the interviewer had not informed him of his right to remain silent, thereby causing a miscarriage of justice. Contrary to this assertion however, the Court of Appeal found the transcript of the caution interview contained frequent warnings and reminders by the interviewing officer about his right to remain silent. As the transcript records, the full form of caution was appropriately administered to the petitioner at the outset and was repeated throughout the interview on numerous occasions. Indeed, the Court of Appeal referred to the number of times the caution appeared in the transcript as “like a chorus...appearing intermittently throughout the caution interview”.

31. In relation to the question and answer recorded as 126 above, the Court of Appeal noted the unequivocal nature of the appellant's answers to questions 131 and 132, which were put to him immediately afterwards. In addition, the questions put when the interview recommenced after a short welfare break were instructive. The relevant part of the record is as follows:

Q125: I would like to advise you that you still under caution, you are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence. Do you understand that?

A: Yes.

Q126: Do you wish to make any complaint before we resume with our interview?

A: Yes.

Q127: Are you physically and mentally fit to continue with the interview?

A: Yes.

Q128: As you stated in Q111 after you heard all the complaint made by Tracey. What was our intention?

A: From that I know that he wishes to settle down with me as her partner.

Q129: When did you go home?

A: After our conversation and we were also tired as we both drunk then we stood up looking for transport to drop us at Vanavatu village.

1705hrs Interview suspended for Lloyd Richard Senikaucava to have rest and requested to see his brother name Wilisoni Victor.

1805hrs Interview resumed without any complaint.

Q130: I would like to advise you that you still under caution, you are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence. Do you understand that?

A: Yes.

Q131: Do you wish to make any complaint before we resume with our interview?

A: No, everything is fine.

Q132: Are you physically and mentally fit to continue with the interview?

A: Yes."

32. Ultimately, the Court of Appeal found no violation of the petitioner's rights in his caution interview and was satisfied the trial judge had carefully probed the issue of voluntariness. However, the Court made no reference to any misdirection in terms of **Maya**. Dismissing the appeal, the Court concluded that *"...it is not only the confession of the appellant that had been the foundation upon which the prosecution had built up its case; the available circumstantial evidence coupled with the conduct evidence of the appellant, prior to the commission of the crime and afterwards, the medical evidence and the other strings of evidence and their concomitance would evolve a strong case against the appellant which is unassailable having regard to the grounds he raised."*

Discussion

33. There is no doubt that the direction given by the trial judge on the issue of voluntariness of the petitioner's caution statement did not conform with the decision of the Supreme Court in **Maya**. In directing the assessors on the issue of voluntariness, the trial Judge had said:

"18. It is for you to assess what weight should be given to his caution interview, charge statement and the statement given to the JP. You may compare the evidence led in this trial and the caution interview of the accused to see if the accused had made a truthful statement of police. What weight you choose to give the interview made by the accused is a matter entirely for you. If you consider it to be unreliable either because the police assaulted and ill-treated the accused, or because the accused himself told lies to police, then you may think that you cannot put much weight on them at all. If however you consider them to be reliable records of what the accused said to police, then you may think that they contain important statements of what allegedly occurred that night."

34. The issue of a **Maya** misdirection had been raised by counsel in the petitioner's first application for leave before the single judge. The single judge found however, that although the trial judge had not used the same terminology as stipulated in **Maya**, he had nevertheless *"...drive[n] the same point with the Assessors that if the confession was obtained in an improper manner that they should not give weight to it or that they should disregard it. Therefore I do not think that the learned judge has not followed the principles laid down in **Maya v State**."*

35. Clearly that is not a correct analysis. The full Court did not question the reasoning of the single judge or directly address the misdirection of the trial judge or make any reference to the decision in Maya. The Court did however incorporate into the judgment the paragraphs in the summing up that immediately preceded the impugned direction, describing them as a dispassionate and objective handling of the issue of voluntariness:

16. You have before you the caution interview and the charge statement of the accused in which he made those admissions. You heard accused giving evidence in Court. You also heard other evidence including that of two doctors who had examined him immediately after the arrest and after the interview and charging.

17. Mr. Kunaika, the JP had also recorded a statement in which the accused has made some admissions. That statement had been recorded at a Police Station on a request by police officers. The JP Mr. Kunaika said that accused gave his statement on his own free will. Accused on the other hand says that he made those admissions under duress.

18. It is for you to assess what weight should be given to his caution interview, charge statement and the statement given to the JP. You may compare the evidence led in this trial and the caution interview of the accused to see if the accused had made a truthful statement to police. What weight you choose to give the interview made by the accused is a matter entirely for you. If you consider it to be unreliable either because the police assaulted and ill-treated the accused, or because the accused himself told lies to police, then you may think that you cannot put much weight on them at all. If however you consider them to be reliable records of what the accused said to police, then you may think that they contain important statements of what allegedly occurred that night.

36. The petitioner has not sought the special leave of this Court to relitigate any prejudicial effect from the impugned direction, so it is not a live issue. In any event, it is highly unlikely that the misdirection alone would have affected the verdict at trial or the outcome of the appeal, as it is clear the trial judge did not resile from his voir dire findings that the petitioner's admissions were made voluntarily. It is further clear, from both the summing up and the reasons for verdict, that the judge had taken considerable care in considering the totality of the evidence, of which the petitioner's admissions were only a part.

Jurisdiction for granting special leave to appeal to the Supreme Court

37. 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.
38. 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.
39. The only provision of possible relevance in this case is section 7(2)(c).
40. 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.*"

The petitioner's application for special leave to appeal

First ground

41. Under the first ground of appeal the petitioner argued that his rights under section 14 (2) (b) (1) of the Constitution were violated by the trial judge in conducting the voir dire hearing in his absence without "*grasping [his] rights to health*". In this regard the petitioner contended he was unable to attend the first day of trial because he was bedridden with a perianal abscess and was undergoing medical treatment. He denied he was evading the hearing and pleads sections 14 (2) (b) (1) and 38 (1) (2) of the Constitution:

42. Rights of accused persons

"Section 14 - (2) Every person charged with an offence has the right - (b) to be present when being tried, unless - (i) the court is satisfied that the person

has been served with a summons or similar process requiring his or her attendance at the trial and has chosen not to attend."

43. **Right to health**

"Section 38 – (1) The State must take reasonable measures within its available resources to achieve the progressive realisation of the right of every person to health, and to the conditions and facilities necessary to good health, and to health care services, including reproductive health care. (2) A person must not be denied emergency medical treatment."

44. There is no merit in this ground of appeal. As is clear from the High Court record, the petitioner had absconded on 25 July 2016 while on bail, the date his trial was due to commence. He was well aware of that date, having been present in Court with his legal aid counsel on 18 July when the trial date was confirmed and when it was also confirmed that the trial would commence with a voir dire hearing into the admissibility of the confessions in his caution statement.

45. In an affidavit sworn for the Court, his legal aid counsel said he had met with her the day before the trial was to begin (Sunday 24 July), to finalise his instructions for the voir dire hearing the next day. This meeting apparently took place at the Sigatoka Police Station where the petitioner was being held on a breach of bail charge. At the meeting he made no reference to any health or other issue that might prevent his appearance the following day.

46. On the petitioner's failure to appear on 25 July for the commencement of trial, the Court was advised that he had been arrested earlier that day and would be brought before the Sigatoka Magistrate's Court that same day. The Judge then made an order for the voir dire hearing to be "*re-fixed*" for the following day, 26 July. Defence counsel, in her affidavit, said the petitioner came into her office that afternoon, 25 July having been granted bail that morning to uplift a copy of a judgment he had requested. There is no evidence that he made mention of any health issue during that visit either. The next morning, 26 July, the petitioner again failed to appear, having apparently absconded while on the fresh bail granted to him by the Magistrate's Court. The Judge stood the voir dire hearing down until 12.30pm to give him time to appear. When the petitioner had not appeared by that time the State applied for the trial to proceed *in absentia*. After hearing submissions from counsel for both sides the Judge made an

order for the trial to proceed *in absentia* and issued a bench warrant for the petitioner's arrest. In her affidavit, defence counsel set out the train of events as follows:

3. *I last met the Accused Lloyd Senikaucaua on Sunday the 24th of July 2016 where he finalised his instructions for the trial.*
4. *The accused is aware of his trial and is prepared to commence the same having given instructions.*
5. *I confirm seeing the Accused in our Sigatoka Office yesterday afternoon when he came in to uplift a copy of the judgment which he requested.*
6. *I also confirm that the Accused person was granted Bail by the Sigatoka Magistrates Court yesterday on 25th of July 2016.*
7. *I do not have instructions on the non-appearance of the Accused person and I have made every effort possible to contact the accused but unfortunately all the attempts to get hold of the accused are futile.[emphasis added]*
8. *At this stage as counsel in carriage, acting in the best interest of the accused I have instructions on the main matter and the also the voir dire.*
9. *In the interest of justice and that of my client I am able to cross examine the witnesses based on the written instructions."*

47. As is clear from the *in absentia* ruling, the Judge gave very careful consideration to the question of whether the trial should proceed in the petitioner's absence and to its potential effect on due process. His consideration encompassed the history of the proceeding up until that point: the fact the petitioner was legally represented and had met with his counsel only the day before trial was due to begin; and that she had his full instructions for both the voir dire hearing and the conduct of the trial. The Judge also considered the effect of an adjournment on family members of the deceased, who had travelled from overseas to attend the trial. The Judge's reasons for his ruling were:

"[8] According to the affidavit filed by Counsel Ms. Ratu of the Legal Aid Commission, Respondent has instructed the Legal Aid Commission to appear and defend the case, both in voire dire proceedings and trial proper. He had visited the Legal Aid Commission office at Sigatoka to finalise his instructions on the 24th July, 2016.

[9] Respondent does not seem to have a valid excuse to keep away from Court.

[10] *Prosecution is greatly prejudiced if the trial is further delayed. Court has set apart two weeks to give priority to this case even vacating other trials. Vacation of the trial at the last moment and long delay would cause a considerable damage to the Prosecution and to the justice system. The general public will lose confidence in the justice system.*

[11] *Considering Article 14(2) (h) of the Constitution of the Republic of Fiji, I allow the application by the Prosecution for the respondent to be tried in absentia.*

[12] *I am mindful that facts that Respondent's right to a fair trial have to be safeguarded at the trial in absentia even though he is not present at the trial. Assessors shall be clearly warned not to hold the absence of the Respondent against him. I would advise the prosecution to disclose all the evidence against him on relevant material facts and highlight evidence advantageous to the Respondent in my summing up to the assessors. I will also warn the assessors that the absence of the accused is not an admission of guilt and adds nothing to the prosecution case. I will also take steps to expose weaknesses of the prosecution case in the summing up."*

48. The trial proceeded with the State's evidence on the voir dire being called on 27 July. As is clear from the record, defence counsel mounted a vigorous attack on the voluntariness of the admissions made by the petitioner. At the conclusion written submissions were called for and filed for both parties on 28 July.
49. On Friday 29 July 2016, the Judge ruled the petitioner's caution interview had been conducted fairly and would be admitted into evidence at the trial.
50. On Monday 1 August, the assessors were sworn and the trial commenced.
51. On Tuesday 2 August the Judge's Notes record the following:
"Accused has been arrested on bench warrant. He says he was bedridden. There is no medical report produced."
52. On 3 August, the petitioner gave evidence at the trial and was cross-examined and re-examined. In his evidence he said he had walked the deceased to Josai Cokaibusa's house after they got out of the taxi. He said he stopped at the gate and watched her walk into the property and when she reached the house he heard her talking to people sitting on the verandah. He said that was around 2.30am and he had then walked on

to the village where he met up with Iikena Vudogo and Lorima Bola and they had all got into Sireli Kunasina's taxi.

53. He said the reason he had fled from his village after the body was found on 14 November was because other villagers were accusing him of having killed the deceased and were threatening to beat him to death.
54. He alleged brutality at the hands of the arresting officers who located him in the interior of Navosa. He said they beat him up on the journey back to Sigatoka. He challenged the voluntariness of his caution statement made at the Police Station and claimed it was untrue because it was made under duress. He said police had hit the knuckle of his right ring finger and damaged it and it was not he who had told Dr Zibran that his knuckles were damaged when he had punched a woman.
55. He said his confirmation of the caution statement to the Justice of the Peace was also made under duress and that the items found during the scene reconstruction had already been located and the police had made him point them out under duress.
56. No other witnesses were called for the defence. The closing addresses of both counsel were given and the Judge fixed the summing-up for the following day, 4 August 2016.
57. On the morning of Thursday 4 August the petitioner complained of a health issue. The Judge's notes made at 9.30am that day record:

"Accused complains that he is badly in need of medical treatment.

Officer-in-charge, Natabua Correction Centre is ordered to facilitate his medical examination/treatment at Lautoka Hospital.

Summing up is fixed at 9.30 am on 08/08/16.

Remand extended."

58. The petitioner was transported to Lautoka Hospital that day for medical examination and treatment. A report of the attending medical officer dated 8 August records the

petitioner's health assessment as "perianal abscess" and that he was prescribed antibiotics.

Discussion

59. The narrative of events both preceding and during the trial clearly establish that no substantial or grave injustice has occurred in respect of the first ground of his petition, which is dismissed for the following reasons:

1] His absence during the early part of the trial was the result of wilful evasion by him. He absconded twice while on bail during the first two days of trial. First by failing to appear on the first morning of trial; and again by failing to appear on the second day of trial, after having been granted fresh bail only the day before. He was fully aware of the trial date, as both the Court record and the affidavit of his legal aid counsel make clear.

2] At his appearance before this Court the petitioner said he had no intention of evading his trial and he was aware of the trial date. He said the difficulty had been a sudden and acute pain in his groin, which had manifested on the 24th after he was released on bail from Sigatoka Police Station. He had been trying to get medical treatment for this at the time he was arrested on 2 August (5 days after the commencement of trial). At the time of his arrest he was waiting in a line at a medical centre for assistance. There is no evidence however that the petitioner had made any attempt to contact either his defence counsel or the High Court in the intervening period while he was at large. In answer to a question from the Court he said that he and his family had tried to call his counsel to report his infirmity. Contrary to that, his counsel in her affidavit deposed that she had made *"every effort possible to contact the accused but unfortunately all the attempts to get hold of the accused are futile"*. The trial judge accepted the evidence of defence counsel and rejected the petitioner's implausible and belated explanation about the reason for his failure to make contact over a period of some 7 days.

3] There was no medical or other evidence before the trial Judge of any health issue, other than the unsubstantiated claim the petitioner made when brought before the Court on 2 August of having been "bedridden". As a matter of record, no health

issue manifested until 4 August 2016, after all of the evidence at trial had been called.

4] The trial Judge's ruling that the voir dire hearing should proceed in the petitioner's absence was an appropriate exercise of his discretion in the circumstances. Defence counsel had full and very recent instructions in the matter and was able to cross examine effectively and advance the petitioner's interests accordingly. At the conclusion of the voir dire hearing, the Judge gave a careful and detailed ruling in which he traversed all of the evidence given, with a particular focus on whether the petitioner had been accorded his rights in an appropriate manner and whether there was any risk that the admissions he had made were given under duress. The Judge was satisfied the petitioner had been told the reason for his arrest and importantly that he "had been administered Miranda rights in the form of Judges Rules No.2 before his caution interview and charging took place".

5] Although the petitioner did not give evidence at the voir dire hearing he was able to give viva voce evidence before the Judge and assessors after he was arrested and brought before the Court.

6] In reality, the petitioner's confessional evidence was not essential to a verdict of guilty, as the totality of the circumstantial evidence was overwhelming. As the trial Judge noted in his judgment of 10 August 2016, when agreeing with the unanimous opinion of the assessors and finding the petitioner guilty of murder, even his conduct subsequent in fleeing to a remote village was consistent with his guilt. It seems clear therefore, that even if the caution and charge statements had been ruled inadmissible, a verdict of guilty was well open and probably inevitable.

7] It follows from the findings above that there has been no violation of the petitioner's rights under sections 14 (2) (h) (1) and 38 (1) (2) of the Constitution. Thus, there is no merit in this ground of appeal.

Second ground

60. Under this ground the petitioner argues that despite the repeated requests he made for the cell diary of the Sigatoka Police Station to be produced in evidence it was never

produced. In his oral submissions before this Court, he stressed the importance of the cell diary to his case. He said it was vital to the preparation of his defence because it would have recorded the contacts and names of each individual person in the cells at the time he was being held there; and it would have contained vital information, such as a record of any fresh injuries on his body when he was arrested and before he was incarcerated. In particular, he submits that the injury to his right knuckle should have been adequately documented in this cell diary.

61. The petitioner said he had expressed extreme concern about the absence of the cell diary to his defence counsel when she met with him at the Police Station the day before trial. The diary had still not been provided by then and they argued about it. He wanted her to push for it and said to her *"..if you can't do it don't appear for me in Court. That's what I told her but she never answered anything back. The last thing she told me she said I will meet you in Court and I said fine."*

The cell diary

62. Since the hearing, we have been informed that the police had been asked by the prosecution for the cell diary, but it had not been provided.

The Station diary

63. The diary entries for the Sigatoka Police Station for the period 14 November 2014 to 17 November 2014 relating to the petitioner were disclosed to the defence in advance of the voir dire hearing, together with other documentary disclosures, such as photographs and the medical reports from the two doctors who examined the petitioner and also statements from various police officers involved in the case. The diary entries disclosed are a detailed record of all movements in the Station and of meals given to the prisoner. In all, they encompass more than 30 pages.
64. These diary entries were admitted into evidence at the voir dire hearing and defence counsel cross-examined extensively on various entries in them.

Discussion

65. Any evidence that might have been elicited through fellow inmates held at the Sigatoka Police Station while the petitioner was incarcerated there, would have had to

be assessed against the weight of the other evidence adduced at trial. This comprised the evidence of the police officers who arrested and processed the petitioner, as well as the medical evidence and the independent evidence given by the petitioner's friends who saw an injury to his right hand prior to his arrest.

66. As already noted, the injury to the petitioner's knuckles was photographed when he was first brought into the Police Station on 14 November 2014. It was also examined that same afternoon by Dr Zibran at Sigatoka Hospital. In the Doctor's opinion the injury to the petitioner's knuckles was not an acute injury and was the result of blunt force trauma.
67. The evidence of the witnesses Sireli Kunasina and Ilikena Yudogo, of a fresh injury to the petitioner's right hand only hours after the last sighting of the deceased on 7 November, was independent of any police influence. This was significant evidence that would also have had to be weighed in the balance.
68. Further, the medical findings of the doctor at Sigatoka Hospital on 17 November, who examined the petitioner for signs of fresh violence to his body and viewed his x-ray and abdominal scan, would also have had to be weighed in the balance. The doctor found no evidence of any of the injuries complained of by the petitioner.
69. Taken as a whole, any evidence of brutality to the petitioner at the hands of the police given by other cell mates is unlikely to have raised any reasonable doubt. There is nothing in this ground of complaint to cause concern that a substantial and grave injustice may have occurred and it is dismissed.

Third ground

70. This ground has not previously been raised and can be disposed of briefly.
71. The petitioner's complaint in support of this ground is that the State did not prove the exact positions of the deceased's mouth and his right fist at the time of the impact which fractured her right anterior maxillary bone. Proving the exact positions of each at the point of impact was neither necessary nor was it possible, given there were no

eyewitnesses. The injury, which was severe and from which the deceased had not been suffering earlier that evening, spoke for itself. There was no evidence of any third-party intervention and the circumstantial evidence of time, place and opportunity was compelling. Furthermore, the petitioner admitted to police and to the Justice of the Peace that he had punched the deceased in the mouth. The fresh, blooded injury to petitioner's right hand, observed by two of his friends only a few hours after the deceased was last seen alive, was further independent corroboration.

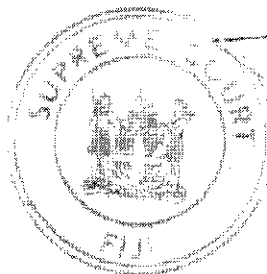
72. There is no merit in this ground of appeal and it is dismissed.

Conclusion

73. There is no merit in any of the grounds put forward by the petitioner and no substantial or grave injustice has occurred in his case. I would therefore refuse special leave to appeal.



The Hon. Justice Brian Keith
JUDGE OF THE SUPREME COURT



The Hon. Justice Terence Arnold
JUDGE OF THE SUPREME COURT



The Hon. Justice Lowell Goddard
JUDGE OF THE SUPREME COURT