IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO. CAV 2 OF 2013
(Court of Appeal AAU 2 of 2010)

BETWEEN	**:**	**SHEIK MOHAMMED**
		Petitioner
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**The Honourable Mr Justice Suresh Chandra** **Justice of the Supreme Court** **The Honourable Mr Justice William Calanchini** **Justice of the Supreme Court** **The Honourable Mr Justice Sudharshana De Silva** **Justice of the Supreme Court**
Counsel	**:**	**Petitioner in person.** **Ms A Fong for the Respondent**
Date of Hearing	**:**	**6 and 13 November 2013**
Date of Judgment	**:**	**27 February 2014**

JUDGMENT

Chandra JA

[1] I have read the judgment of Calanchini JA and agree with his reasons and conclusions.

Calanchini JA

[2] This is a petition for special leave to appeal from a judgment of the Court of Appeal delivered on 15 February 2013. The petitioner was convicted on one count of unlawful possession of an illicit drug being 4833.7 grams of cannabis by the High Court at Labasa on 15 October 2009 and was sentenced to a term of 10 years imprisonment.

[3] The present application by the petitioner was filed in February 2013 shortly after his appeal and was as a result filed within the time limit prescribed by Rule 6 of the Supreme Court Rules. By way of notice dated 8 May 2013 the petitioner amended his application for special leave by adding a further fresh ground of appeal.

[4] The immediate background to the appeal proceedings is set out in paragraph 4 of the judgment of the Court of Appeal:

> *"The main evidence against the appellant was his confession made to the police under caution. The trial judge admitted the confession in evidence after holding a voir dire. At the trial it was not in dispute that 4833.7 grams of Cannabis Sativa was found concealed in a vehicle registered under the name of Masha Bi. Masha Bi was the appellant's sister. In his caution interview, the appellant admitted that he had bought the vehicle from his sister but had not filed for transfer of ownership at the Land Transport Authority. The appellant gave a detailed account of how he organised the concealment and transportation of the charged illicit drug from Viti Levu to Labasa, Vanua Levu. He intended to sell the drugs in Labasa."*

[5] The petitioner filed a notice of appeal against conviction and sentence in the Court of Appeal relying on six grounds of appeal. At the leave hearing the petitioner's Counsel relied on only one ground and as a result the single judge of that Court, acting under section 35(1) of the Court of Appeal Act Cap 12, granted leave to appeal on ground 5 only which stated:

> *"That the Learned Judge erred in law in that:*

(a) He allowed the prosecutor to make an application to declare Masha Bi as a hostile witness in front of the assessors.

(b) That the Learned Judge declared Masha Bi as a hostile witness without allowing the defence the right to make a submission.

(c) Erred in law regarding the procedure in declaring a witness hostile."

[6] The facts that gave rise to ground 5 of the petitioner's grounds of appeal in the Court of Appeal may be stated briefly. Masha Bi gave a signed statement to the police that she was the registered owner of the vehicle which was used to transport the alleged illicit drug from Viti Levu to Labasa. In her statement she told the police that she had sold the same vehicle to her brother, the petitioner before the alleged offence. On the basis of the statement that Masha Bi gave to the police, the prosecution subpoenaed her as a State witness.

[7] On 13 October 2009 Masha Bi took the stand as a State witness. She said that the petitioner was her biological brother. She was shown vehicle registration records from the Land Transport Authority. She accepted that she was the owner of the said vehicle. She said that she never sold the vehicle to the petitioner. At this point Counsel for the Respondent asked her whether she had given a statement to the police. She agreed she had given a statement to the police but she could not recall the date. The witness was then permitted to see her statement. After further questioning of the witness Counsel for the Respondent sought to tender the statement dated 17 June 2008. Counsel for the petitioner objected to the statement being admitted into evidence. After further questioning of the witness the learned trial Judge granted the application for an order that the witness be declared hostile. After the application had been allowed Counsel for the Respondent cross-examined Masha Bi on the statement she had given to the police. Under cross-examination Masha Bi maintained that she had not sold the vehicle to the petitioner.

[8] The Court of Appeal noted that the inconsistency between Masha Bi's evidence and her statement to the police was on a material issue, namely, effective control of the vehicle in which the illicit drugs were found. Furthermore, the Court of Appeal

considered that the disappearance of Masha Bi before the commencement of the trial, her relationship with the petitioner and her retraction of evidence on a material issue were all relevant to the learned trial Judge's decision to declare her a hostile witness. The Court of Appeal indicated that no criticism could be made of the learned trial Judge's decision on that point since it was clear that she had *"switched sides*" so that her evidence was favourable to the petitioner, her brother. In addition, the Court of Appeal found no fault with the learned trial Judge exercising a discretion to allow Counsel for the Respondent to question Masha Bi regarding her police statement in the presence of the assessors in the circumstances of the case. In reaching this conclusion the Court relied on **R v Khan, Dad and Afsar** [2003] Crim. L.R. 428. The Court of Appeal dismissed the appeal against conviction.

[9] In his petition dated 18 February 2013 the petitioner identified five grounds of appeal against conviction in the event that he was granted special leave. They were:

> *"8:1 That His Lordship erred in law and in fact in admitting the alleged confession of the Appellant in the Voir Dire.*
>
> *8:2 That his Lordship erred in law when he failed to hold that there was no independent evidence to support the confession.*
>
> *8:3 That his Lordship erred in law when he allowed the tender of the accomplice statement Aiyaz Ali in court despite the objection of the Appellant's counsel.*
>
> *8:4 That the court of Appeal erred in finding that the procedures in declaring a witness hostile is according to the established principles.*
>
> *9. That your Petitioner respectfully submits that by reasons of the foregoing, special leave to appeal must be granted as substantial and grave injustice may otherwise occur."*

[10] In his notice of fresh ground of appeal the petitioner added the following ground of appeal:

> *"That the learned trial Judge erred in law when his Lordship did not pronounce a judgment entered against the conviction and thereby I was sentenced for an offence I was not really and lawfully convicted for resulting in an unfair trial amounting to a miscarriage of justice."*

[11] At the commencement of the hearing of the petition for special leave the petitioner informed the Court that he was relying on two grounds only in support of his application for special leave. The first ground is that which is numbered 8.3 above and relates to the admission of the statement made by the accomplice Aiyaz Ali into evidence. The second ground relied upon is the fresh ground of appeal relating to the claim that the petitioner was not properly convicted.

[12] At this point it is appropriate to recall that in order to obtain special leave to appeal against conviction the petitioner must establish that his petition meets the criteria set out in section 7(2) of the Supreme Court Act 1998 which states:

> *"In relation to a criminal matter, the Supreme Court must not grant special 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."*

[13] In understanding the effect of this provision it is necessary to recall that this Court exercises a jurisdiction that was formerly exercised by the Judicial Committee of the Privy Council. The essential issue for the Court is generally to determine whether substantial injustice has been done. It is sufficient to say that the Supreme Court is not a court of criminal appeal and only in the exceptional circumstances specified in section 7(2) will special leave be given to appeal a final decision of the Court of Appeal.

[14] It is convenient to consider first the petitioner's fresh ground of appeal in his notice dated 8 May 2013. The key words used by the petitioner are that *"his Lordship did not pronounce a judgment entered against the conviction."* The petitioner claims that as a result he was sentenced without being formally convicted which he claims resulted in an unfair trial and amounted to a miscarriage of justice. As the petitioner acknowledged, this is a fresh ground which had not been previously raised in the Court of Appeal. However that fact is not necessarily fatal to the outcome of the petitioner's application for special leave. This Court is not precluded, in a case which raises questions of the type necessary to warrant the grant of special leave under

section 7(2) of the Supreme Court Act, from considering an application which, for good cause shown, raises such a question for the first time: **Raitamata –v- The State** (CAV 2 of 2007; 25 February 2008).

[15] The reason for this ground being raised for the first time in the petition before this Court is set out in the petitioner's submissions dated 6 May 2013. He claims that he was represented by incompetent Counsel who did not raise this issue before the Court of Appeal. He further stated in his submission that he only became aware of the issue when he received all the court documents after the Court of Appeal judgment had been published.

[16] In order to determine whether the petitioner should be given special leave, putting to one side his explanation, it is necessary to examine the record of the proceedings in the High Court. In doing so it must be recalled that the record of the trial is a transcription of the learned trial judge's handwritten notes. It is not a verbatim transcription of recorded proceedings. The only record is the handwritten notes of the learned trial Judge which have been reproduced in a typed form. At the top of page 166 the learned trial Judge has recorded in long hand the opinion of each of the three assessors as guilty. He has then recorded by the use of one word, "*Judgment*" that he has then given judgment. The record of the High Court proceedings also included a typed version of the summing up by the learned Judge. The summing up was detailed and in its typed form runs for 15 pages. At page 165 of the High Court Record the handwritten notes (in typed form) indicate that the summing up was read to the assessors. In his sentencing judgment delivered on 15 October 2009, the learned Judge commenced with the words: *"You have been found guilty by the unanimous decision of the three assessors and this Court of one offence of possession of illicit drugs _ _ _."* In paragraph 14 of his sentencing decision the learned Judge passed a sentence of 10 years imprisonment and in paragraph 15 it is stated that *"that is the judgment of the Court."*

[17] In his written submissions dated 29 April 2013 the petitioner places great emphasis on sections 154 and 155 of the Criminal Procedure Code Cap 21 (the Code). These provisions appear in Part IV of the code which has the heading *"Provisions relating*

to all Criminal Investigations." For that reason it is significant that section 156, also in Part IV, provides that:

> *"In the case of trials before the High Court, the provisions of section 154 and 155 shall be subject to the provisions of section 299."*

[18] This is not surprising since section 299 appears in Part IX of the Code with the heading *"Procedure in Trials before the High Court."* Section 299 provides, so far as is relevant, that :

> *"(1) When _ _ _ the case on both sides is closed, the judge shall sum up _ _ _ and shall then require each of the assessors to state his opinions orally, and shall record such opinion.*
>
> *(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors:*
>
> > *Provided that, notwithstanding the provisions of (section 155(1)) where the judge's summing up of the evidence under the provisions of sub section (1) is on record it shall not be necessary for any judgment, other than the decision of the court which shall be written down, to be given, nor for any such judgment, if given, to be written down or to follow any of the procedure laid down in section 154 or to contain or to include any of the matters prescribed by section 155, except that where the judge does not agree with the majority opinion of the assessors _ _ _*
>
> *(3) If the accused person is convicted, the judge shall pass sentence on him according to law.*
>
> *(4) _ _ _."*

[19] In view of the decision of the Privy Council in **Joseph –v- The King** [1948] AC 215 it would appear that the issue raised by the petitioner warrants the granting of special leave. The Privy Council decision involved an appeal by special leave against the conviction of the appellant by the Supreme Court of Fiji (Criminal Jurisdiction) for manslaughter and the sentence of five years penal servitude passed on him. The appellant and two others were found guilty of manslaughter by the assessors. The trial judge passed sentence without himself delivering judgment as was then required by the Criminal Procedure Code. At this stage it need only be noted that the provisions in the Criminal Procedure Code in 1945, being the year of the trial, were

not the same as the provisions in force in 2009 at the time of the trial in the case before this Court. The provisions in force in 1945 were introduced in 1944 and the provisions in force in 2009 were introduced in 1973.

[20] It is apparent from the requirements set out in section 299 that the only question raised by the petitioner's ground of appeal is whether the decision of the court has been written down. In all other respects the requirements of the section have been satisfied. The learned trial judge's summing up was read to the assessors and is on record. The learned Judge called upon each assessor to state his opinion orally and each opinion thus stated was recorded by the learned Judge. His notes in their typed form indicated that he then gave judgment. It is not apparent at that point in the record what was the decision of the learned trial Judge. The section does state that the decision of the court shall be written down. The words *"the decision of the court,"* in the context in which the words appear in the section, in my view should be taken to mean whether the court, meaning the trial Judge, either agrees or disagrees with the opinions of the assessors. Although the decision of the court is required to be written down, this requirement means no more than the decision of the court must appear in writing on the record. To that end the opening words of the sentencing judgment which is on the record are sufficient to satisfy the requirement. The learned Judge stated that the petitioner had *"been found guilty by the unanimous decision of the three assessors and this Court of one offence of possession of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act No. 9 of 2004."* Before passing sentence the learned trial Judge has recorded in writing the decision of the Court that the petitioner has been found guilty by the Court of the offence charged.

[21] In **Lutuakolo –v- R** (1962) 8 FLR 12, the Court of Appeal said at page 14:

> *"The essence of the matter is that there should be a judgment of the Court pronouncing the accused person guilty and when that has been done the accused has properly been convicted, whether or not that precise word is used in the judgment."*

And at page 15:

> *"_ _ _ but the failure to use the word in a judgment which finds the accused guilty of the offence charged is not an incurable defect and does not, in our opinion, vitiate the verdict of the trial Judge and the sentence imposed after that verdict."*

[22] In my view the essential ingredient of the procedure is that the decision of the court must be written down. Implied in that requirement is that it be written down before sentence is passed. Although undesirable it is not fatal that the decision of the Court in this case was written down at the commencement of the sentencing decision.

[23] The decision of the Privy Council in **Joseph –v- The King** (supra) is distinguishable for the very obvious reason that the Criminal Procedure Code has been substantially amended since 1945. It would appear that in 1945 there was no equivalent to section 156 of the Code which provided that section 299 applied to trials before the High Court and had the effect of making the requirements set out in sections 154 and 155 subject to section 299. Section 156 was introduced to the Code in 1973. The Code in force in 1945 contained in section 308(1) a requirement that was similar to section 299 (1) of the Code in force in 2009. However there was no provision in the 1945 Code equivalent to section 299(2) in the Code in 2009. Section 308(2) and (3) in the 1945 Code were replaced by section 299(2) of the 2009 version of the Code. To put it simply, the Privy Council decision was based on the application of Sections 156 and 157 in the 1945 Code which are equivalent to what became section 154 and 155 of the Code after 1973. However because of section 156 of the 2009 Code those two sections have no application to the present case which falls to be considered under section 299 of the Code. In the absence of an equivalent provision to section 156, section 308 of the 1945 Code incorporated the requirements of section 156 and 157. Whereas by virtue of section 156 the proviso to section 299 (2) excludes the requirements of section 154 and 155. This is significant when the trial judge agrees with the opinions of the assessors. The procedure set out in section 299 of the Code was the procedure that a trial Judge was required to follow in order to ensure that an accused person was afforded a fair trial in the High Court. There has in this case been compliance with section 299 in the technical sense that the decision of the Court has been written down, albeit at the commencement of the sentencing judgment. The petitioner was tried and sentenced by the learned Judge and was not deprived of a fair trial. There was no miscarriage of justice.

[24] In his written submissions on this ground the Petitioner referred to the decision of the Court of Appeal in **Devi –v- The State** (unreported AAU 8 of 2009; 30 January 2012) in support of his petition for special leave. In that decision Marshall JA pointed out (para 57) that since the amendments to the Criminal Procedure Code in 1973 there is no longer the requirement of a full judgment in writing with reasons when the Judge agrees with the opinion of the assessors where there has been a written summing up which is on the Record. When that is the case there needs only be a decision of the Court in writing. In that case the Court of Appeal found that there was no written decision on the Record. More specifically, after carefully checking the Record and the files Marshall JA (with whom Goundar and Temo JJA agreed) concluded that there was nothing written about a decision to convict and further that there was no written document which could constitute a decision to convict. Since section 299 of the Decree required some written indication to the effect that the trial judge has decided to convict or not to convict and since that was not done, Devi's appeal was allowed, the conviction quashed and a new trial ordered.

[25] However, in my opinion the present case can be distinguished from the situation in **Devi's** appeal (supra). In this case there is a written indication on the Record that following compliance with the procedural requirements for taking and recording the opinion of the assessors, the learned trial judge then gave judgment. At the commencement of the sentencing decision the trial judge confirms that the Petitioner has been found guilty, not only by the assessors, but also by *"this Court."* In my view those words are sufficient to indicate that the trial judge has performed his function and decided to convict the Petitioner.

[26] It must be noted that the statutory requirement is that the decision of the Court must be written down. Before proceeding to impose the sentence, the learned Judge has indicated the decision of the Court by confirming that the Court has found the Petitioner guilty of an offence under the Illicit Drugs Control Act. As the Court of Appeal noted in **Luluakalo v Reginam** (supra) the failure to use the word *"convict"* in a judgment where the accused has been found guilty is not an incurable defect and does not vitiate the verdict of the trial Judge. The Court of Appeal took the view that the essence of the matter is that there should be a pronouncement that the accused

person is guilty and when that has been done the accused person has properly been convicted. Although that decision pre-dates the 1973 amendments to the then statutory requirements relating to criminal procedure, the observations of the Court of Appeal are relevant to the present case and I am of the view that they continue to state the law in Fiji today.

[27] In **Faruk Ali –v- Reginam** (1974) 20 FLR the Court of Appeal considered the effect of the 1973 amendments to the Criminal Procedure Code observed at page 37:

> *"If the trial Judge agrees with the majority of the assessors he need now give no judgment (in the former sense at least) but must write down the decision of the Court. That presumably means whether (and of what) the accused is convicted or acquitted."*

[28] I have no doubt that statement is the correct position under section 299 of the Code. I am also satisfied that the Record indicates that by the time the learned Judge had read the opening paragraph of his sentencing judgment the accused had been properly convicted by the Court and that the decision was in writing.

[29] However it is necessary that I stress the importance of the observations of the Court of Appeal in **Edward Sheik Faruk Ali v R** (supra) at page 38:

> *"We would express the view, however, that it would be regrettable if in practice it came to be regarded as a matter of course that a trial judge who agreed with the majority opinion of the assessors should not write a judgment. In the interests of justice, we venture to hope that in many such cases the trial judge will elect to assist us with the benefit of a reasoned judgment."*

[30] A similar view was expressed by Gates J (as he then was) in **The State v Simione Kaitani and 3 others** (unreported HAC 44 of 2004; 15 August 2005) in paragraph 3:

> *"If the judge agrees with the opinions rendered it is not necessary for a judgment to be delivered which conforms with the requirements of sections 154 and 155 of the CPC. The Court of Appeal has expressed the view however that it would prefer a short judgment to be written in that event."*

[31] In **State v Miller** (unreported CAV 8 of 2009; 15 April 2011) this Court cited with approval the observations of the Court of Appeal in **Edward Sheik Faruk Ali –v- The State** (supra) noting in paragraph 30 that *"a short written judgment, even where conforming with the assessors' opinions is a sound practice."*

[32] An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court.

[33] The second ground relied upon by the petitioner in this Court was that the learned trial Judge erred in law when he allowed the statement of the accomplice Aiyaz Ali to be tendered into evidence despite the objections of the petitioner's Counsel.

[34] This ground was addressed by the petitioner in his submissions dated 8 April 2013. In handwritten submissions handed to the Court in the course of the hearing the petitioner's complaint appeared to be that the assessors retained possession of two statements made to the police by the witness for 34 days. The basis of this complaint was the comment by the learned trial judge recorded at the end of paragraph 36 of his summing that he *"directed that those statements be removed from your papers because you are not to consider in your deliberations what he has said in those earlier statements."* Although this point does not meet the criteria set out in section 7(2) of the Supreme Court Act for special leave to be granted, it is appropriate to indicate to the petitioner that the assessors do not take possession of the exhibits until they retire to consider their opinions. The exhibits are retained by the Court in a bundle and handed to the assessors when the time comes for them to consider the evidence and their opinions as to the guilt of the accused. It must also be recalled that leave to appeal to the Court of Appeal on this ground was not argued before the single judge of the Court under section 35(1) of the Court of Appeal Act Cap 14.

[35] Whatever may be the explanation for the petitioner raising this ground as a basis for seeking special leave, having not pursued it as a ground in his application for leave to appeal to the Court of Appeal, the learned trial Judge has properly directed the assessors and himself on the issue in paragraphs 35 and 36 of his summing up. Having outlined the evidence given by Abdul Aiyaz (also referred to as Aiyaz Ali and

Aiyaz Abdul on various pages in the record and the submissions) the learned trial Judge reminded the assessors (and himself) that the witness Aiyaz admitted to making two prior statements to the police about the matter, both statements being inconsistent in some respects with his evidence in Court. The learned Judge then in paragraph 36 directs the assessors that:

> *"36. You might find that the evidence of this witness was very unsatisfactory and as a matter of law I must direct you to examine his evidence with the utmost care. In the absence of any acceptable logical or compelling explanation where a witness has on a previous occasion made a statement which contradicts his evidence, the only safe rule to apply normally is to disregard his evidence entirely as being too unreliable to place any weight on it at all. If however you think that the witness has given an explanation or if you are of the opinion that there is a satisfactory or understandable reason for the previous contradictory statement, then while you must obviously treat his evidence with considerable reserve and give it the most careful scrutiny, you are entitled to accept it and act upon it if you really feel convinced that it is the truth* ***HOWEVER*** *one thing you must not do is to substitute for his evidence the contents or substance of the two statements made by him previously. I have directed that those statements be removed from your papers because you are not to consider in your deliberations what he has said in those earlier statements."*

[36] This was a proper direction to be given in such circumstances. The assessors never had in their possession copies of these two statements. The learned Judge simply indicated that the statements would not be included in the documents that they were to consider as evidence.

[37] There is no basis for concluding that this ground satisfies the criteria set out in section 7(2) of the Supreme Court Act and leave to appeal in this ground is refused.

[38] Although not addressed by the Appellant I have concluded that the remaining grounds set out in the petition do not satisfy the requirements for granting special leave.

[39] As a result I would dismiss the petitioner's appeal on his first ground and his application for special leave on the second ground.

De Sliva JA

[40] I agree with the reasons and the conclusions in the judgment of Calanchini JA.

Orders:

The Petitioner's appeal on ground one is dismissed and his application for special leave on ground two is also dismissed.

HON. MR JUSTICE CHANDRA
JUSTICE OF THE SUPREME COURT

HON. MR JUSTICE CALANCHINI
JUSTICE OF THE SUPREME COURT

HON. MR JUSTICE DE SILVA
JUSTICE OF THE SUPREME COURT