

IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO: CAV 0032 and CAV 0037 of 2015
[On Appeal from the Court of Appeal No. AAU 123 of 2011]

BETWEEN : 1. TEVITA SUGU
2. INOKE LIVANASIGA
Petitioners

AND : THE STATE
Respondent

Coram : The Hon. Mr. Justice Sathya Hettige
Judge of the Supreme Court
The Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court
The Hon. Mr. Justice Almeida Guneratne
Judge of the Supreme Court

Counsel : Mr. J. Savou for the Petitioner
Ms. P. Madanavosa for the Respondent

Date of Hearing : 13 June 2016

Date of Judgment : 4 August 2016

J U D G M E N T

Hettige J

[1] I agree with the reasoning and conclusions of Chandra J.

Chandra J

- [2] The Petitioners are seeking special leave to appeal against the judgment of the Court of Appeal dated 3 December 2015 by which their conviction for
- (i) one count of aggravated robbery contrary to section 311(1)(a)
 - (ii) one count of aggravated robbery contrary to section 311(1) (b)
 - (iii) One count of wrongful confinement contrary to section 286
 - (iv) one count of theft of a motor vehicle contrary to section 291(1)
- all of the Crimes Decree No.44 of 2009, were affirmed.
- [3] The Petitioners were jointly charged with others and were convicted after trial in the High Court on 2 December 2011.
- [4] The Petitioners appealed against their conviction and sentence and were granted leave to appeal against their conviction on the issue of whether the trial Judge erred in law and in fact in failing to give accomplice directions.
- [5] The Court of Appeal by its judgment dated 3 December 2015 dismissed the appeals of both Petitioners and confirmed their convictions.
- [6] The 1st Petitioner seeks special leave to appeal against his conviction on the following grounds:
- “(i) That the Fiji Court of Appeal erred in law and fact to consider that Mr. Seru should be treated as an accomplice.*
 - “(ii) That the Fiji Court of Appeal erred in law and in fact that the evidence of Kavitesh Lal the van driver had nothing to do with the Appellant.*

- (iii) *That the Fiji Court of Appeal erred in law and fact that the evidence of the Accomplice to corroborate Kavitesh Lal.*
- (iv) *That the Fiji Court of Appeal Judge failed to consider an unfair trial.*
- (v) *That the Fiji Court of Appeal failed to overlook that the sentencing was unfair.*
- (vi) *That the sentence was too harsh and excessive and in any event unlawful."*

[7] The 2nd Petitioner seeks special leave to appeal against his conviction on the following grounds:

- "(i) *That the Court of Appeal made an error in not holding that failure of the trial judge in not leaving the question whether (PW8) Tevita Seru was an accomplice by giving full accomplice warning and pointing out to the assessors that the evidence which may corroborate the witness did not result in a miscarriage of justice.*
- (ii) *That the Court of Appeal fell into error in not holding that the failure of the trial judge in not leaving the question of whether (PW1) Kavitesh Lal was an accomplice by giving full accomplice warning and point out to the assessors that the evidence which may corroborate the witness, did not result in a miscarriage of justice.*
- (iii) *Failure of trial judge in not directing the assessors that prosecution witnesses would have falsely implicated me to save themselves.*
- (iv) *Failure to give adequate and full alibi directions and warning, which was a miscarriage of justice.*
- (v) *Failure of the Court of Appeal to consider the comments of the trial judge that PW1 Kavitesh Lal and PW8 Tevita Seru were strong and compelling was a direction constituting a miscarriage of justice.*
- (vi) *The Court of Appeal fell into error in dismissing the appeal without considering ground [5] that I was jointly charged with others in the High Court whose indictment were not signed by a proper court officer, and detective.*

(vii) *The Court of Appeal erred in law in holding that the directions regarding the weakness of Kavitesh Lal and Tevita Seru were proper and adequate and did not result in a miscarriage of justice.*"

Factual Matrix

[8] Prior to 15th February 2010 the two Petitioners with three others planned to rob Dee Cees Bus Company. In order to carry out the robbery they wanted to get a motor vehicle to use in carrying out the robbery and to use it as a get-away vehicle. The first Petitioner had been entrusted with the task of getting a vehicle, for them to carry out the robbery and eventually use as a get-away vehicle. The first petitioner was successful in his endeavour when he took witness Kavitesh Lal's van in the course of which one of the accused tied the hands of the driver Kavitesh Lal, relieved him of his mobile phone and put him in the boot of the van, thereby wrongfully confining him to the boot of the van. Thereafter they all proceeded to Dee Cees Bus Company Head Office and took the money that was in a briefcase which was in a car that was getting ready to go to the bank to bank the takings from the week-end. Having used a can knife and causing injuries to the driver of the car they fled from the bus company premises and proceeded to Tevita Seru's house who was witness number 8, where they shared the proceeds. There was evidence to the effect that they were seen driving Kavitesh Lal's vehicle on the day of the incident.

The Present Appeal

[9] The State took up the objection that the grounds of appeal that were not argued before the Court of Appeal, namely grounds (iii) and (vi) in the grounds of appeal of the 1st Petitioner and grounds (ii), (iv), (v) and (vi) in the grounds of appeal of the 2nd Petitioner should be dismissed.

[10] The Petitioners too did not pursue these grounds at the hearing of the appeal.

[11] In Nabainivalu v State CAV 027 of 2014 it was held that this Court will not usually be inclined to consider on appeal any ground of appeal that was not part of the appeal in the Court of Appeal. In view of the fact that the Petitioners did not pursue those grounds before this Court, they would not be considered in this appeal and therefore would stand dismissed.

The 1st Petitioner's Appeal

[12] The 1st Petitioner's Counsel urged three main grounds in relation to the judgment of the Court of Appeal. They are in relation to (1) Dock Identification, (2) Accomplice warning and (3) Alibi evidence.

[13] At the trial, it was revealed that there was no identification parade held. The identification of the Petitioner was while he was in the dock during the trial. The two witnesses who identified him while he was in the dock were Kavitesh Lal and Tevita Seru.

[14] Kavitesh Lal was the first witness for the prosecution and he, in his evidence had described how the van that he was driving was used by the accused on the day of the incident. He had been in the van from the time that he was engaged by the 1st Petitioner up to the time that they made the get away after getting the bag containing the cash from the Bus Company. The 1st Petitioner had been seated alongside in the front passenger seat up to the time that he was pulled up, tied and put in the boot of the van. It is far fetched to imagine that he had only a fleeting glance of the 1st Petitioner specially after the ordeal he had gone through that day.

[15] The 1st Petitioner's Counsel cited the judgment of the Court of Appeal in Tevita Sugu & Others Criminal Appeal No. AAU 44 of 2012 (27 May 2016) upholding the ground of appeal regarding the weakness in the dock identification, in support of his submission

that the trial Judge permitting dock identification was a miscarriage of justice. In Tevita Sugu & Others case, the witness who identified the accused while he was in the dock had faced a similar situation as in the present case by Kavitesh Lal. There too a van was engaged and the driver was taped and put behind the back seat. However, under cross examination the witness in that case had stated that the description that he had given about the accused did not match the person that he identified in Court. Whereas, in the present case there was no such weakness or doubt regarding the identification of the 1st Petitioner by Kavitesh Lal.

In Vulaca v The State (2011) FJCA 39 AU0038.2008 (29 August 2011) the majority decision was to the effect that the discretion of the learned trial Judge to allow dock identification was not erroneous as the Court was of the view that the identification was not fleeting. In that case there had been eight men in the dock when the particular accused was identified by the witness, in the present case there were 5 men in the dock when the witness identified the 1st Petitioner. As stated above Kavitesh Lal's identification in the dock of the 1st Petitioner in the circumstances of the case cannot be said to be after a fleeting glance of the 1st Petitioner by Kavitesh Lal on the day of the incident.

[16] Although dock identification has generally been considered not to be encouraged there may be instances such as the present case where the circumstances would justify the identity of an accused person by dock identification. The 1st Petitioner was also identified in the dock by the 8th witness Tevita Seru in whose house the accused had shared the loot. Tevita Seru had seen the Petitioner for about 40-50 minutes when the accused were in his house.

[17] In the above circumstances, the Judgment of the Court of Appeal cannot be faulted on the basis that the prosecution had relied on dock identification of the 1st Petitioner as the

Court of Appeal had considered the weaknesses in relation to dock identification but nevertheless was satisfied that the evidence in the case justified the admission of such identification. Therefore this ground of appeal regarding dock identification of the 1st Petitioner fails.

- [18] The second ground of appeal was on the basis that the learned trial Judge had failed to give a full accomplice warning and that the Court of Appeal had failed to consider same.
- [19] It was the position of the Petitioner that Tevita Seru, witness No.8 was an accomplice and that the trial Judge had failed to give an accomplice warning.
- [20] The Court of Appeal specifically considered "Accomplice Evidence" in its judgment from paragraphs 11 to 14 and was of the view that, the failure to give an accomplice warning had not caused a miscarriage of justice.
- [21] The Court of Appeal came to this conclusion on the basis that, even if Tevita Seru was considered as an accomplice, Kavitesh Lal's evidence had corroborated Seru's evidence. As observed by the Court of Appeal Seru's evidence was not considered in isolation by the trial Judge, it was considered along with the evidence of the other witnesses, specially the evidence of Kavitesh Lal who was an eye witness to the incident on that day from the time the accused engaged his van up to the time that they abandoned Kavitesh Lal's van to proceed to Seru's house.
- [22] The other material evidence that was available in the case, specially the recovery of the bag from the precincts of Seru's house also lent support to Seru's evidence which made it possible to accept his evidence even if he had been considered as an accomplice.

[23] In these circumstances the Court of Appeal judgment cannot be faulted in relation to the consideration of the ground regarding absence of accomplice warning by the trial Judge and therefore this ground of appeal relating to failure of accomplice warning also fails.

[24] The third ground was one relating to the defence of Alibi. There was overwhelming evidence before the trial Judge of the involvement of the Petitioner regarding the commission of the crime. The Court of Appeal was of the view that even if the learned trial Judge had only very briefly touched upon the defence of alibi in his summing up to the Assessors, on a consideration of the evidence led at the trial, that there was no miscarriage of justice. This Court is in agreement with the reasoning of the Court of Appeal and therefore this ground regarding alibi too lacks merit.

Second Petitioner's Appeal

[25] The Second Petitioner's first ground of appeal was the same as that of the First Petitioner, being the one relating to the failure of the trial Judge to give an accomplice warning. This ground has been discussed above regarding the First Petitioner and this Court arrives at the same conclusion, that there was no miscarriage of justice.

[26] The other ground of appeal adduced by the Second Petitioner was that the Court of Appeal erred in law and fact in taking the evidence of the Accomplice to corroborate Kavitesh Lal.

[27] The Court of Appeal has not taken the evidence of the Accomplice to corroborate the evidence of Kavitesh Lal. The evidence of Seru, the accomplice and that of Kavitesh Lal related to two different segments of the commission of the crime. Kavitesh Lal's evidence was from the time that his van was engaged by the 1st Petitioner and the others

up to the time that they abandoned the van with the loot. Seru's evidence was in relation to what transpired in his house where the accused person shared the loot.

- [28] What the Court of Appeal said in their judgment is that the accomplice Seru's evidence was of utmost importance regarding the identity in relation to the two Petitioners and that Kavitesh Lal's evidence had helped the prosecution in identifying the 1st Petitioner. It is in that context that the Court of Appeal has stated that the evidence of the Accomplice, Seru has been corroborated by the evidence of Kavitesh Lal which is as regards the 1st Petitioner. Therefore there is no error in the judgment of the Court of Appeal and this ground fails.

Criteria for Special Leave

- [29] The Supreme Court is empowered to hear and determine appeals from the final judgments of the Court of Appeal in terms of Section 98(3) and (4) of the Constitution of the Republic of Fiji.

- [30] Section 7(2) of the Supreme Court Act provides:

"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 administrative justice is involved; or*
- (c) substantial and grave injustice could otherwise occur."*

- [31] The Supreme Court has in several cases examined the threshold criteria enumerated in section 7(2) of the Supreme Court Act and has stated that the criteria set out in section 7(2) are extremely stringent and special leave is not granted as a matter of course. Vide **Bulu v Housing Authority** (2005) FJSC 1 2004S (8 April 2005); **Chand v The State** (2012) FJSC 6; CAV 14/2010 (9th May 2012).

Conclusion


- [32] As discussed above the grounds of appeal relied on by the Petitioners in seeking special leave to appeal to the Supreme Court are without merit and therefore are not grounds which can be considered to meet the threshold **criteria** of Section 7(2) of the Supreme Court Act.
- [33] For the reasons set out herein the appeals of the Petitioners are dismissed.

Almeida Guneratne J


- [34] I agree with the reasoning and conclusions in the judgment of Chandra J.

Orders of Court:

- (1) The application for Special Leave is refused.
- (2) The applications of the Petitioners seeking special leave to appeal is dismissed.
- (3) The Judgment of the Court of Appeal dated 3 December, 2015 is affirmed.



Hon. Justice Sathya Hettige
Judge of the Supreme Court



Hon. Justice Suresh Chandra
Judge of the Supreme Court



Hon. Justice Almeida Guneratne
Judge of the Supreme Court