IN THE SUPREME COURT OF FIJI
CRIMINAL APPELLATE JURISDICTION

Criminal Petition No. CAV 008/ 2018
On Appeal From Court of Appeal No. AAU 011/2012 & 046/ 2012

BETWEEN : **TEMO LUTUMAILAGI**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Chief Justice Anthony Gates, President of the Supreme Court**
Hon. Mr. Justice Sathyaa Hettige, Judge of the Supreme Court
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court

Counsel : **Petitioner in Person**
Mr. Mosese D. Korovou for Respondent

Date of Hearing : **15th August 2018**

Date of the Judgment: **30th August 2018**

JUDGMENT

Gates, P

1. I have read in draft the following judgment of Hettige J. I agree with the conclusions reached that this appeal must be refused.

Sathyaa Hettige, J

2. This is an application seeking special leave to appeal against the judgment of the Court of Appeal (Chandra J, Gamalath J, and Fernando J) affirming the conviction of the appellant and the dismissal of the petitioner's appeal against the conviction dated 8th March 2018.

3. The petitioner was jointly charged along with two others in the High Court of Lautoka for robbery with violence contrary to section 293 (1) (b) of the repealed Penal Code Cap. 17; for having robbed Sin Har Sue of F$ 1500 on 1st December 2007 at Nadi and the petitioner was indicted separately on the same information for murder of Sin Har Sue contrary to sections 199 and 200 of the repealed Penal Code, Cap.17 on the same day at Nadi in the Western division.

4. The High Court of Fiji at Lautoka per Thurairaja J , at the conclusion of the prosecution case considered whether or not there was a case to answer in respect of the petitioner and other accused in respect of both the counts and acquitted the petitioner and others following the ' no case to answer ' ruling on the robbery with violence count.

5. However, the trial against the petitioner for the charge of murder proceeded in the High Court as the learned High Court judge found a case to answer in respect of the second count of murder and put the petitioner to his defence.

6. After trial the assessors returned with a unanimous verdict of guilty to the count of murder and accordingly the petitioner was convicted of murder by the High Court and sentenced to life imprisonment . The learned High Court Judge having considered the provisions of section 18 (1) of the Sentencing and Penalties Decree , 2009 ordered the petitioner not be eligible for parole until he had served 12 years imprisonment.

7. The State, being aggrieved by the decision of the learned High Court Judge of acquitting the petitioner and other respondents on the charge of robbery with violence appealed to the Court of Appeal seeking to set aside the acquittal having obtained time extension and leave to appeal from the Court of Appeal (per Gounder J) The State appeal against the acquittal was numbered AAU 0046/12. The petitioner who was the 3rd respondent in the trial court too filed an appeal against his conviction for murder by the High Court. The petitioner's appeal against his conviction was

numbered AAU 0011/12. Both the appeals were consolidated and heard together by the Court of Appeal as both appeals arose from the same case in the High Court.

8. On 8th March 2018 the Court of Appeal[per Chandra J, Gamalath J and Fernando J] set aside the acquittal of the petitioner and other respondents in Appeal No. AAU/12 and the appeal against the conviction made by the petitioner in Appeal No. AAU 0011/12 was dismissed. The conviction of the appellant was affirmed by the Court of Appeal. The ruling acquitting the petitioner and others in respect of robbery with violence count on 'no case to answer' was set aside by the Court of Appeal and no re-trial was ordered due to delay.

9. The petitioner seeks special leave to appeal before this court against the Court of Appeal decision dated 8th March 2018 dismissing his appeal against his conviction for murder. However, before I deal with the grounds of appeal I would outline the facts in this case briefly.

Facts in brief

10. The evidence available before court is that the deceased Ms. Sin Har Sue was 71 years old and she was running a Chinese gift shop by the name of "John Lui" at Nadi town. The deceased was a senior member of the Chinese Community . On the day of the incident being 1st December 2007 the petitioner with two others along with a juvenile against whom the charges had been dropped, had entered the deceased's shop in broad day light to steal from the shop and after ransacking the shop stole money. The petitioner slashed the deceased with a cane knife causing her death after the others had left the shop. The deceased had suffered two deep cut injuries in the face and one blunt force injury on the back of the head. The deceased was a mother of 5 children and was defenseless at the time of her incident. According to the post-mortem report the cut injury was from one ear to the other ear which had been fatal. According to the pathologist, the petitioner had meant to cause the death of the deceased and nothing else of the deceased when causing injuries on the deceased. The

cause of the death according to the pathologist was due to loss of blood from the cut injuries on the face.

Grounds of Appeal in the Petition to the Supreme Court

11. (1) The Court of Appeal erred in not properly addressing the grounds of appeal , particularly the question relating to the petitioner's disputed confession.

(2) That the learned Court of Appeal did not independently assess the circumstances of motive, in light of its own orders reversing the petitioner's acquittal on robbery charges. The findings of the guilt on robbery charges invariably buttress the petitioner's position that element of mens rea for murder has not been made save for robbery.

12. The petitioner however, by his document dated 25 June 2018 which was received in the Registry of the Supreme Court on 18th July 2018 filed amended grounds of appeal as follows.

Amended Grounds of Appeal before the Supreme Court

13. (i) Did the Fiji Court of Appeal err by failing to fairly or properly take into consideration the non-direction regarding the danger of my co-accused caution interview contents since there are prejudicial statements in that could have possible damage to my defence causing a prejudice.

(ii) Did the Fiji Court of Appeal err by failing to take into consideration the learned trial Judge's failure to follow the specific direction to the assessors as stipulated in **Volau vs. The State** Criminal Appeal No. AAU 0011 of 2013 whilst considering ground 1 of the appeal.

(iii) Did the Court of Appeal err by failing to carefully or properly make an independent assessment whether there was a direction to the assessors to prove that the injured ear was possibly inflicted while in police custody and whether there is credible evidence by the police to prove that it was inflicted by playing a game of rugby, thus the lack of assessment has caused prejudice in the trial.

(iv) That the petitioner 's medical report was suggestive of police impropriety whilst in the police custody therefore the petitioner was not fairly directed by the learned High Court Judge and whereas the Fiji Court of Appeal failure to assess these vital piece of evidence giving rise to substantial miscarriage of justice.

(v) That the said conviction is unsafe and unsatisfactory since there was no evidence to prove that the petitioner murdered the deceased.

The amended grounds of appeal filed in the Supreme Court have been dated 18th July 2018 and are late. However, the court allowed the petitioner to support the application at the hearing in fairness to the petitioner. The State too has responded by dealing with the amended grounds of appeal in its written submissions.

Jurisdiction of the Supreme Court

14. The Supreme Court derives exclusive jurisdiction to hear and determine appeals from all judgments of the Court of Appeal under section 98 (3) (b) of the Constitution of the Republic of Fiji. Section 98 (4) of the Republican Constitution of Fiji also provides that an appeal may be brought to the Supreme Court from a final Judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

15. Section 7(2) of the Supreme Court Act No. 14 of 1998 sets out the stringent criteria for grant of special leave which is as follows:

> *"In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-*
> *A question of general legal importance is involved;*
> *A substantial question of principle affecting the administration of criminal justice is involved; or*
> *Substantial and grave injustice may otherwise occur."*

16. It is now settled law that the Supreme Court is not a Court of criminal appeal or general review. This was established in **Aminiasi Katonivualiku v State** (2003) FJSC Crim. App. No.CAV 0001/1999s 17th April 2003 wherein the Supreme Court clarified the jurisdiction of the Supreme Court at page 3 as follows:

> *"It is plain from this provision that the Supreme court is not a Court of criminal appeal or general review nor is there an appeal to the court as a matter of right and whilst we accept in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal which in this instance, was an order for new trial.*

17. In the recent judgment in **Sharma v State** [2017] FJSC 5; CAV0031.2016 the Supreme Court on threshold requirements in section 7 (2) of the Supreme Court Act of 1998 observed as follows:

> *"It is observed that the injustice that is said to have occurred must not only be one that is substantial but also one that is grave. As such, even if the party succeeds in establishing that some injustice had been caused. that by itself may not be sufficient to obtain relief unless the*

party is capable of establishing that the injustice referred to is one that meets the threshold laid down in section 7 (2) paragraph (c) of the Supreme Court Act."

18. In **Dip Chand v State** CAV0014/2012 the Supreme Court observed as follows:

" Given that the criteria set out in section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent and special leave is not granted as a matter of course, the fact that the majority of the grounds relied on by the petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult."

19. Time and again the Supreme Court in Fiji has pronounced in a series of Judgments that it is an extremely difficult task for a petitioner to pass the stringent threshold criteria contained in section 7 (2) of the Supreme Court Act No. 14 of 1998. The petitioner has a greater burden to establish his ground of appeal as a 'question of general legal significance and that there is substantial and grave injustice' that warrants leave from the Supreme Court.

20. The Supreme Court in **Sharma v State** (supra) further said that "*The Supreme Court in 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. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not give rise to matters of general importance or principles or in the criminal jurisdiction ,substantial and grave injustice".*

Grounds One and Two in the Amended Grounds of Appeal

21. These grounds of appeal are dealt with together since they arise from same the complaint of the petitioner on non-direction regarding the danger of co-accused caution interview contents which are prejudicial statements with reference to **Volau v State**; Case No. AAU 0011 of 2013.

22. In paragraph 49 the learned Judge directed the assessors that they must consider all the evidence before court and come to their own decision. The learned Judge clearly informed them that if the assessors are satisfied beyond reasonable doubt of the accused's guilt and if they are sure of it they must find the accused guilty as charged. If they were not satisfied beyond reasonable doubt and not sure of it they must find the accused not guilty as charged.

23. Though the petitioner contends that the trial Judge failed to direct the assessors that any admission made by the co-accused against the petitioner in the caution interview is not admissible against the petitioner, learned State counsel submitted that this ground is a new ground of appeal which was not argued in the Court of Appeal.

24. The charge of murder was only against the petitioner. The other accused were acquitted by the trial Judge on the no case to answer ruling. (subsequently the ruling was set aside by the Court of Appeal.) Learned State counsel argued that the accomplices were not charged with murder as there was nothing in their caution interview statements to justify a charge of murder. There is evidence in the caution interview statements of the 1st and 2nd accused where they have admitted that together with the petitioner in this case, planned to rob the deceased's Chinese shop and 1st 2nd accused and the petitioner (3rd accused) along with a juvenile had entered the Chinese shop to steal. They have admitted that they had taken money from the till. The 2nd accused also saw the petitioner holding the Chinese woman with a knife in his hand. It appears from these caution interview statements of the accomplices the admission of the criminal act only relates to the robbery with violence charge. There

is nothing to establish any incriminating evidence against the petitioner in respect of the murder charge.

25. The petitioner complains that the learned trial Judge failed to direct the assessors on the danger of a co-accused's statement. That the petitioner believes that he has been prejudiced because of the lack of an appropriate warning to be given regarding the co-accused's caution interview statement.

26. In the caution interview of the petitioner made on the 3rd December 2007 at pages 67 and 68 of the Supreme Court record in answering the questions put to him he answered as follows:

" Q 67 : How did you pick up the cane knife?

A: I picked it up with my right hand.

Q 68: What part of the Chinese woman's body did you strike ?

A: I strike her twice, on her head and her face.

Q69: How can you strike her when you were holding her head.

A: No when she struggled, her head got free from my hand and at the same time I picked up the cane knife and strike her.

Q 70: After striking her , what happened ?

A : The Chinese woman yelled and bowed down.

Q 71: Then what did you do ?

A: I then ran outside.

Q 72: How did you go out.

A; From the front door and then I pulled the door.

Q 73: What about Tex, junior Mangal and junior Simi?

A: They ran away earlier.

Q74: Did these people see you when you strike the Chinese woman with the cane kinife?

A: No, they already gone out.

27. In paragraph 43 of the Court of Appeal judgment, the Court referred to Volau v State (supra) case and observed as follows:

"I agree with the submission of the State that it is clear from the directions of the trial Judge that he had left the weight and truthfulness of the cautioned confessional statement for the assessors to consider with all the evidence led in the trial before making a decision. There is no need to mention the words ' weight and truthfulness' in directing the assessors nor is there a specific direction to be given. In Vilikesa Volau v The State Criminal Appeal No. AAU 0011 of 2013 it was held that once confession is ruled as being voluntary by the trial Judge , the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force and if those allegations were thought to be true to decide whether they should place any weight or value on them and what weight or value they should place on them. It is the duty of the trial Judge to make this plan to them."

28. I therefore, conclude that the above mentioned grounds of appeal do not meet the leave criteria in Section 7(2) of Supreme Court Act of 1998 and should be dismissed due to lack of merit.

Appeal Grounds Three and Four are dealt with together

29. The petitioner's complaint on these grounds of appeal is that the Court of Appeal failed to independently assess the injuries caused to him while in police custody and police impropriety.

Though the petitioner gave evidence at the 'voir dire' Inquiry he did not give evidence at the main trial before the assessors. Had he given evidence he had the opportunity to cross examine the police witnesses on police impropriety as alleged by the petitioner. Therefore there was no evidence in the trial court on the alleged police impropriety. The police officers testified in court at the trial within trial when the caution interview of the petitioner was challenged in court . The petitioner failed to rebut the evidence of the police officers in the course of the main trial in court.

30. However, at the hearing of this application in this court the petitioner who was legally unrepresented submitted that he, after the arrest, was punched and assaulted at the police station and taken blindfolded to a different place and he was threatened. I would like to refer to the Ruling given by the learned Judge in the trial court at the Voir Dire inquiry wherein the learned Judge had carefully considered the complaint of the petitioner in the following paragraphs.

31. The prosecution had led the evidence of 16 police witnesses and the medical officer (retired) In the ruling of 'Voir Dire' Inquiry dated 10th November 2011 (per Madigan J) at pages 97, 98, 100, 101, 102 and 103 in paragraphs 2, 6, 8, 18, 23, 24 and 25 learned Judge has considered carefully the allegation of assault of the petitioner. Learned Judge in paragraph 23 of the Ruling observed that the evidence of all prosecution witnesses were consistent , convincing and relevant. After hearing all the evidence the Judge held that he was satisfied beyond reasonable doubt that the caution interview statement of the petitioner was obtained without assault, threat and that being so that it was made voluntarily.

32. Further, the learned Judge in paragraph 24 in the ruling stated as follows:
The following observation made by the learned Judge was in respect of all three accused at the Voir Dire Inquiry.
" *.....In chief in these proceedings all three appeared to have deviated from those initial objections , thereby weakening their evidence in these proceedings . All three " embellished" the nature of the assaults and exaggerated them to a high degree. If all three were assaulted in the manner they attested to, they would have to have been hospitalized rather than taken before a very senior medical officer who found no external injuries on their bodies apart from a bruised ear on the first accused (the petitioner) which is in itself not proof of assault given that he was arrested while playing a game of rugby.*" (emphasis added).

33. It is important to state that the petitioner, however , failed to give evidence in the trial proper even though the police officers gave evidence. There were no evidence in

court to establish any police impropriety as alleged by the petitioner in this application. The petitioner was entitled to canvass his complaint of assault or any kind of police impropriety and voluntariness of his caution interview statement (He would have had a second bite at the cherry) at the main trial as that evidence goes to weight probative value and truthfulness that would have attached to the confession before the assessors.

34. In **R v Murray** 1951 1 KB 391 the Court (CCA) accepted this position and said that the defendant was entitled to cross-examine the police witnesses at the main trial as to the circumstances in which the confession was obtained. However, the petitioner in the instant case failed to cross examine the police witnesses or give evidence at the trial.

In **Prasad v Queen** 1981 1 AER 319 the Privy Council said that there is no rule of law that the question whether a confession was voluntary was to be decided by the Jury. However, in assessing the probative value of a confession a Jury should take into consideration all the circumstances in which it was made. There was no evidence in the trial court in the instant case for the Judge to sum up or even for the Court of Appeal to consider as to whether the trial Judge was in error in his summing up.

> "I therefore, conclude that these grounds of appeal should fail and should be dismissed due to lack merit and failure of the petitioner to satisfy the leave criteria in section 7 (2) of the Supreme Court Act of 1998 ".

Ground of Appeal No. 5.

35. The ground five is in relation to the petitioner's conviction. The petitioner stated that the conviction is unsafe and unsatisfactory since there was no evidence to prove that the petitioner murdered the deceased.

36. The petitioner relied on the **Vilikesa Volau v The State** (supra) and complains that the trial Judge did not consider the observations made in Volau case regarding cautioned confessional statement and charge the assessors accordingly. The trial Judge

had sufficiently and properly charged the assessors of the petitioner's caution interview statement. The incriminating evidence against the petitioner in respect of the murder charge is in his caution interview.

37. It is relevant to consider briefly the questions and answers put to him at caution interview by the police officer (This statement of the petitioner was tested and examined at the trial within trial and was ruled as voluntary and admissible in evidence.) The following questions and answers were recorded at page 68 of the Supplementary Court Record as they were drafted in the same form.

> " *Q 63 : What about you, what did you do ?*
> *Ans. : I then got hold of the Chinese woman and was holding her.*
> *Q 64 : How did you hold her :*
> *Ans.: My left hand was holding her head and she was moving backwards and was trying to get free.*
> *Q 65 : Then what did you do ?*
> *Ans.: The Chinese woman struggled hard , so I picked up a long cane knife and struck the Chinese woman.*
> *Q 66 : Where was this cane knife?*
> *Ans.: two cane kinife were lying on the floor where I was standing. I picked up one.*
> *Q 67: What part of the Chinese woman's body did you strike ?*
> *Ans. : I strike her twice, on the head and then on face.*
> *Q69: How can you strike her when holding her head?*
> *Ans.: No, when she struggled her head got free from my hand at the same time I picked the cane knife and strike her.*
> *Q70: After striking her what happen?*
> *Ans.: The Chinese lady yelled and bowed down.*
> *Q71: Then what did you do ?*
> *Ans.: I ran outside."*

38. Dr. Ponnu Swamy Gounder testified in the trial court on the post-mortem report prepared by Dr. Ms. Litia Tudrau, the Consultant Pathologist and said that the deceased had two deep incised wounds on the face and crushed injury on the back of the deceased's head. Learned Judge in paragraph 36 of his summing up explained the medical evidence as follows:

> "The *Pathologist Dr.Ms. Litia Tudravu who conducted the Post Mortem is presently on maternity leave. Therefore, Dr. Ponnu Swamy Gounder is called as the 15th witness. He is a Consultant Pathologist with long period of service experience . He submitted the Post Mortem report as P3 and explained the nature of the injuries on the deceased. According to the report the deceased Sin Har Sue had 3 injuries , the 1st was on the face just below the eyes measuring 19 cm length and gaping 2cm. This wound had penetrated facial bones to the depth of 6cm.Second injury was with mid forehead measuring 9cm long and gaping 1cm.The 3rd in jury was on the right occipital region (back of head) It was crushed injury. Dr. Gounder says the 1st and 2nd wounds are not accidental wounds, it was caused by a sharp cutting instrument, possibly by a cane knife. Further he submitted that death was very imminent*."

39. It appears from the doctor's evidence and caution interview statements of the petitioner that the evidence elicited in court was supportive of the petitioner's guilt and the learned Judge properly directed the assessors of the admission of the offence and left it to the assessors to decide and come to their own independent conclusion if they were satisfied that the case had been proved beyond reasonable doubt that the petitioner had struck the deceased with the cane knife on the face and head of the deceased. However, there is no reference made by the trial Judge in the summing up directly for the assessors to consider 'weight and truthfulness' to be attached to the confession. Nevertheless, we observe, on a careful perusal of the summing up that the trial Judge properly and sufficiently directed the assessors and no prejudice has been caused to the petitioner.

40. In **Kelsey v R** (1953) 16 C R 119. the Supreme Court of Canada held that a trial Judge was under no legal duty to warn the jury of the danger convicting an accused solely on the basis of his confession.

In **Chandravati v Reginam** 8 FLR 70 the Court of Appeal adopted the following passage from the English case of Rex. V Sykes 8 Cr. App. R.233 at page 236:

> *" I think the Commissioner put it correctly; he said ' a man may be indicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive , and is properly proved , a jury may , if they think fit convict him of any crime upon it.*

41. It is also relevant to refer to the observation made by the Court of Appeal in **Kean v State** [2013] FJCA 117 ; AAU 95.2008 (13 November 2013) wherein the Court said that there is no requirement to look for corroboration when considering a confession nor is there any need for the trial Judge to give any warning to the assessors.

Court further, observed as follows:

> *"In this jurisdiction there is no rule of practice that requires a trial Judge to always include in his directions to the assessors a warning of the danger of acting upon the evidence of an alleged confession even though that confession is uncorroborated."*

42. It is well settled law that an accused can be convicted on a confession alone. However, the learned trial Judge , without considering the caution interview statements as admissible evidence , acquitted the petitioner and others in respect of robbery with violence and ruled that there was a case to answer against the petitioner based on the same caution interview statement of the petitioner in respect of the murder charge.

43. It must be stated that the trial Judge has given a sufficient and sound direction to the assessors on the disputed caution interview of the petitioner. The caution interview statement is not circumstantial evidence. It is a very cogent evidence to prove the petitioner's guilt of committing the offence. The judge asked the assessors to consider it along with other evidence and come to their own independent decision.

44. It can be seen from paragraphs 34 and 49 of the summing up that the trial Judge at pages 85 , 86 and 88 had warned the assessors when considering the caution interview evidence.

In paragraph 34 the learned Judge directed as follows:

> *"...He is also an experienced police officer with 22 years' service. He told Court that he interviewed the 1st accused under caution. Interview was conducted in Fijian language which was the choice of the 1st accused. The record of the caution interview is marked as P1 and the English translation as P1A. I want you to read these documents very carefully. This witness submits that the interview was conducted after due caution and the 1st accused made the statement voluntarily, but the 1st accused says that the statement was taken after use of force. In this case this statement is an important document. You should consider them carefully and compare with the other evidence before the court and take your own independent decision."*

45. This is a case where the prosecution relied on the caution interview statement of the petitioner and the medical evidence of the pathologist. In the caution interview of the petitioner, in answering the question that was put to him he has admitted that there no one saw him striking the deceased with the cane knife or his accomplices did not see when he was striking the deceased.

46. As stated above in paragraphs 34 and 49 of the summing up the trial Judge had directed the assessors on the caution interview statement of the petitioner sufficiently and requested the assessors to carefully consider it as it is an important document. The main incriminating evidence against the petitioner for the charge of murder is contained therein. The learned Judge requested the assessors to compare the caution interview with other evidence elicited in court and reach its own independent decision. It appears that the trial Judge left the truthfulness and weight to be attached to the caution interview evidence with the assessors. We are of the opinion that the charge to the assessors on the caution interview was adequate. This court is satisfied that there was sufficient and cogent evidence in the caution interview of the petitioner which was supported by the pathologist's evidence and the decision of the assessors and trial Judge to convict the petitioner for the charge of murder was correct in law.

47. In Fiji the courts have pronounced in a number of cases that the decision of guilt or innocence is ultimately a matter for the trial Judge to decide whereas the assessors are to render their opinions to assist the Judge but they are not final deciders of fact, law or the verdict.

48. In **Khan v State** CAV 0069 of 2007, (2013) FJCA, March 2013, the Court observed that:

> *" It is well settled law that the accused may be convicted of any crime upon his own confession alone. But as is pointed out by Ridley J in Skyes v R. 8 Crim. App.233 at page 236, the necessity seldom , if ever, arises as the court always examines the surrounding circumstances to ascertain if the confession is consistent with other facts which have been proved."*

In **Khan v State** ; CAV 009 of 2013 : 17 April 2014 [2014] FJSC 6 the Supreme Court in a Leave to appeal application wherein the petitioner contended that that the directions on how to approach the answers in the caution interview were inadequate and there were no adequate directions on weight, observed that " *There is no incantation which must be read here . The required guidance need not be formulaic*".

49. It is clear from the learned Judge's direction to the assessors that the judge left the weight , probative value and truthfulness of the caution interview statement to the assessors to consider. At the trial within trial the truthfulness and voluntariness of the caution interview was tested and examined by the trial court. The caution interview was ruled as voluntary and made admissible in evidence. The assessors have accepted the cautioned confessional statement as an admission of causing grievous bodily harm to the deceased by slashing her face with the cane knife and causing serious crushed injury on the back of the head which killed the deceased due to loss of blood.

50. The prosecution relied on the cautioned confessional statement of the petitioner and the medical evidence of the doctor which was consistent with the serious injuries sustained by the deceased. The assessors and the court accepted the evidence of the prosecution and decided that the case against the petitioner had been proved beyond reasonable doubt. The trial Judge in paragraphs 8-9 of the judgment stated that:

> "8. *The prosecution had produced the caution interview statement and proved the truthfulness of the same through independent evidence.*
> *9. Considering the nature of the evidence before this court I am convinced that the prosecution had proved the case beyond reasonable doubt.*"

51. At this juncture it is also relevant to refer to the decision in **Noa Maya v State** Crim. Petition No. CAV 009of 201523 October (2015 FJSC 30) wherein an observation was made by the court recommending to the Judges in Fiji to tell the assessors that " *even if they are sure that the defendant said what the police attributed to him , they should nevertheless disregard the confession if they think it may have been made involuntarily*".

52. However, we have to be mindful of the fact that Their Lordships took that view requiring that direction to be made only in a situation where the defendants canvass the voluntariness of their caution interview statements at the main trial and testify that his

caution interview statement was obtained involuntarily and the Judge has changed his mind in the course of the trial on the voluntariness of the statement. It can be argued that however, if the defendant does not challenge it at the main trial before the assessors and the Judge is of the same opinion reached at the voir dire Inquiry, the observation made by court in **Noa Maya** case requiring that direction seems to be irrelevant and not required.

53. In this case the petitioner did not give evidence at the main trial and there was no evidence in court canvassing the involuntariness of his caution interview statement which was made admissible in court.

54. It is necessary to mention at this juncture , that this is a case where the deceased , Sin Har Sue was 71 years old and a Chinese senior citizen in Fiji . She was also a senior member of the Chinese Community at the time her death. The deceased was a mother of five children and defenseless at the time of the incident when the petitioner slashed her face with a cane knife causing deep cut injuries on the face and a crushed injury on the back of the head .The evidence reveals that the petitioner, being a young and strong person of 30 years of age caused fatal injuries on the face and the head of the elderly Chinese woman. The pathologist's evidence was that the deceased died of fatal cut injuries and loss of blood and his evidence further revealed that the petitioner meant the death of the deceased. Therefore, I dismiss this ground of appeal due to lack of merit.

55. In view of the legal position set out above , I conclude that the petitioner has failed to satisfy the leave to appeal criteria in section 7 (2) of the Supreme Court Act of 1998. I am satisfied that the Court of Appeal had not fallen into error in dismissing the petitioner's appeal against the conviction.

CONCLUSION

56. In Fiji the society makes endeavour to look after and protect the elderly people and senior citizens and not to cause any physical harm on them. Therefore the petitioner's unlawful act of causing grievous and fatal bodily harm to the deceased who was a senior citizen cannot be dealt with leniently by our courts as the offence of murder has been proved beyond reasonable doubt on evidence and unanimously accepted by the assessors and the trial Judge. We agree with the decision of the Court of Appeal dated 08.03 2018 dismissing the petitioner's appeal against the conviction.

57. We therefore, dismiss all the grounds of appeal as alleged and urged before this court by the petitioner since the petitioner has been unsuccessful in satisfying the leave criteria in section 7 (2) of the Supreme Court Act.

58. I dismiss the petitioner's application for leave.

Jayawardena, J

59. I agree with the reasoning, conclusion and the proposed orders of the judgment of Hettige J.

Orders of the Court:

(1) The application for leave is refused.

(2) Appeal is dismissed.

(3) The Judgment of the Court of Appeal dated 8th March 2018 is affirmed.

.....

Hon. Chief Justice Anthony Gates
President of the Supreme Court

.....

Hon. Mr. Justice Sathyaa Hettige
Judge of the Supreme Court

.....

Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Solicitors:

1. The petitioner in Person.
2. Office of the Director of Public Prosecutions for the Respondent.