IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0008 of 2020
[On Appeal from the Court of Appeal Criminal Appeal No: AAU0069/12; HAC 60 of 2011]

BETWEEN: **LEPANI TEMO**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court**
The Hon. Mr. Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr. Justice Filimone Jitoko, Judge of the Supreme Court

Counsel: **Petitioner in Person**
Dr. A Jack for the Respondent

Date of Hearing: **12th June, 2023**

Date of Judgment: **29th June, 2023**

JUDGMENT

Gates J

[1] This petition seeks to challenge the trial judge's decision to admit the caution interview of the Petitioner and to hold his admissions therein as having been given voluntarily and without oppression. The petitioner was detained in excess of 48 hours, in breach of the protection against over lengthy detention, extended by the Constitution of 1997 [section

13(1)(f)]. There was challenge also to the reliability of the witnesses identification of the petitioner and to the judge's directions. Finally, it was claimed that the judge had paid insufficient heed to the evidence of two doctors who had considered that death would have followed swiftly from the blows of the cane knife, therefore it is argued, not making it possible for the dying victim to have given out the name of the petitioner to two witnesses.

[2] The petitioner had been charged with a single count of murder contrary to section 237 of the Crimes Act. Between the 21st and 30th of May 2012 he was tried in the Labasa High Court before a judge and assessors. He was convicted upon the unanimous opinions of the assessors and the judgment of the trial judge given on the 30th May 2012. He was sentenced to imprisonment for life and ordered to serve a minimum term of 18 years; more accurately that was a minimum term to be served before pardon might be considered [section 237 Crimes Act – Penalty].

[3] He had been represented at the trial by experienced Counsel.

[4] On 15th July 2016 the petitioner's application to the single judge of the Court of Appeal for leave to appeal against conviction and sentence was rejected.

[5] Leave to appeal against sentence was renewed before the Full Court. Witnesses had seen the petitioner pursuing the victim into a neighbour's compound, and after she had fallen to the ground, he had slashed her at least twice with a cane knife. One of these blows had caused a gaping hole wound on the left side of her neck. She died shortly afterwards.

[6] Passing sentence the Judge had said:

> *"8. This was a violent and unnecessary attack on a defenceless woman who was in fear of you despite your earlier loving relationship. To reflect that horrific crime and to protect the community for some time in the future, I order that you serve a minimum term of eighteen years for this offence."*

[7] Unsurprisingly there had been no further appeal against sentence to this court.

The evidence

[8] The petitioner was a cousin of the victim. He was farming at Soqulu on Taveuni Island. He paid money as rent to the victim Susana, who was the caretaker of 2 acres of land for her sister's husband. The sister lived overseas. The exact position with the land was not clear. There was ill feeling between members of the local community and the petitioner, and there had been hostile interference with his farming efforts. He said youths and others were angry with him. They wanted him to move away. He said they used foul language on him. On one occasion he found the camp at Qacavulo, where he stayed, had been destroyed.

[9] At one time Susana had been separated from her husband. During this time the petitioner and Susana had started an affair. It was suggested that when the husband came back, Susana ended the affair.

[10] Maria Pateresia was staying with Susana for 2 months before the 19th of November 2011, the day Susana met her death. In the evening she and Susana left home at around 7pm. It was still daylight. They walked along a gravel road to the main road. Susana ran ahead. Maria realized she had dropped a jacket along the way, and retraced her steps to pick it up.

[11] As she did so, she noticed a man coming out from their house gate. She rejoined Susana. She saw that the man was following her. He had a cane knife in his hand. At that time and distance she did not recognize him. She told Susana to run. He was walking quickly. As he came past her, she recognized it was her first cousin Lepani, the petitioner.

[12] Susana, with the man following, ran into the driveway of an European man called Colin. Maria went up another driveway of the same property. She met one Mereia who lived in Colin's compound. She asked if she had seen Susana. Mereia informed her that Susana

was there. Maria saw Susana lying on the ground. She had a cut on her neck which was open to the bone. Her arms and legs were shaking. Others had gathered around. They were attending a party which was taking place at Colin's property. She asked for a first-aid kit which was brought. She called out Susana's name but there was no answer.

[13] Colin Caines was a retired engineer from England. It was into his compound that Susana was seen to run and to fall over. He saw two persons, a man and a woman, run into his compound. The man pursuing pulled the woman to one side he said, and he saw her being struck with what he thought was a stick. Another witness, Matei, also living in Colin's compound, ran up, at which the man who had struck Susana, ran off down the same driveway.

[14] Dr Asesela Matai was working all day at the hospital. She received a call from a woman seeking an ambulance to go to Soqulo. She made the necessary arrangements, and went to Colin's place with a medical team. They must have arrived half an hour after the call. By then Dr Matai saw a woman known to her, a former patient Susana, lying on the ground. From her examination Dr Matai realised Susana had already died. She noticed the laceration on the nape on her neck which was very deep. She concluded it was probably a wound caused by a chopper or a knife with a great deal of force.

[15] The pathologist Dr Goundar gave evidence of his findings from the post mortem he had conducted on Susana's body on 23rd November 2011. He detailed the injuries and said the cause of death was the deep cut on the left side of the neck measuring 9cm x 4cm. The cut extended to the 4th cervical vertebra which was fractured. The spinal cord was also severed as well as the vertebra artery.

[16] The police questioned the petitioner. They commenced the interview on Monday the 21st November 2011 in the morning. Ms Lemaki, a Legal Aid lawyer, who had been asked by a policeman to see the petitioner, spoke to him. She gave the petitioner certain advice and then left the station.

[17] The petitioner made admissions during the interview, which were recorded in his caution statement. He spoke of the affair he had been having with the victim when the husband was away. He said he had many problems with the land. Some of it amounted to sabotage of his use of the land he rented, and on which he had planted crops. He blamed Susana's relatives for this.

[18] Earlier in the interview the circumstances of his meeting up with Susana and Maria on the road on the 19th November were put to the Petitioner. He denied being there and said he did not know anything about it. He said he was at his farmhouse. Later he was taken by the police to the farmhouse, a search warrant was executed, and clothing was seized. He was then allowed to rest.

[19] The interview resumed on 24th November 2011. He was asked if he wanted to contact a lawyer. He said he would "*look for a lawyer in court*." It was put to him that they had found at his farmhouse, the clothing which he had been identified as wearing by the witnesses. He admitted that he had not been at his farmhouse at that time. The allegation of the identifying witness Maria was put to him. He admitted he had wanted to go and see Susana, and that he had brought with him a knife. He accepted that he had been wearing the seized clothing.

[20] He said he called out to Susana but that she did not stop. She ran into the compound of the European. She was sitting down looking at him. He asked her about his 2 blocks of land on which he had already planted and which now she had cleaned (meaning removed his plantings). She said an order had already been given for him not to plant there. He said "*my mind was blank and I chopped her with the knife I was holding*." He chopped her 3 times. He then ran back to his farm.

[21] He was asked about the knife. He said he hid it underneath a tree. After lunch the petitioner accompanied some of the officers back to the farm and showed them where he had hidden the knife. He showed them where various parts of the story had occurred. He said the knife was the same knife he had used to chop Susana. It was forensically tested,

but analysis came back negative for blood. A police witness, PC Jone Drauna had taken the knife to the laboratory. He said the knife had been cleaned and wrapped in plastic and given to the Forensic Officer Cpl. Leone. It is not clear when and why the knife was cleaned, and whether this was an investigative error.

[22] He was charged on the same day, 24th November 2011. He said *"I didn't mean to kill her. I struck her with the knife to only injure her. That is all."*

[23] Both statements were challenged at the outset of the trial, and after a *voir dire* hearing the judge ruled the statements to have been made voluntarily and were therefore admissible.

[24] The petitioner maintained his challenge in the main trial. He gave sworn evidence and called one witness.

The Court of Appeal

[25] The Full Court considered that the grounds before them in what was meant to be a renewal of his application for leave to appeal before the single judge had "*very little similarity*" to the grounds brought before the single judge. The court nonetheless, because this was a murder conviction, permitted the grounds to be argued. Those grounds were similar to those argued before us. The appeal had been rejected.

Before the Supreme Court

[26] Temo, ACJ requested representation for the petitioner to be provided by the Legal Aid Commission. This was prior to any decision on the merits on his own application having been finalised. That request was attended to and an amended petition was lodged on the 26th of May 2023. The petitioner has been ably assisted by the LAC and its counsel at the hearing.

Ground 1 – Wrongful admission of caution interview

[27] It is argued that there had been a wrongful assessment of the evidence in light of the injuries he had sustained, and that the independent defence witness had not been considered.

[28] The independent witness was the Legal Aid Lawyer Ms Lemaki. Interestingly enough she was attending the Taveuni Court sittings for that week. In cross-examination she admitted it was a police officer who had asked her to see the petitioner. She said "*Yes, I was in the station when PC asked me to go and see him."* She asked for privacy, whereupon the officers left that room in order to permit her to speak to the petitioner in private.

[29] In the interview his constitutional rights were given to him. If they were about to assault him in the way the petitioner said had been done to him on the afternoon of the Monday (21st November 2011) why would they invite Ms Lemaki to come and attend to him. After all she might call back after the interview, and take full instructions. She was to be there in Taveuni for the whole week of the court sittings.

[30] She said the petitioner informed her that the police were pressuring him to admit the allegation. She tendered appropriate advice about his rights, including his right to silence. She was asked why she did not stay for the interview if he was under pressure. She had no answer to this question.

[31] The following exchanges took place in her cross-examination:

"You didn't believe he being pressured.	*He looked alright*
No injuries	*Didn't see any*
Distress	*No*

Back at work Thursday/Friday	*Yes*
Check on him on Thursday?	*No*
Tell Temo he could call on you again?	*No."*

[32] This evidence seemed to indicate that the witness did not consider the petitioner was under any threat or subject to any impropriety.

[33] In its judgment the Court of Appeal summarized the allegations against the police [at para.26]:

> *"a) On 21st November in a Police cell at Taveuni Police Station he was put in to a room and handcuffed.*
>
> *b) then he was tied to a chair.*
>
> *c) he was hit on legs with a stone the size of which was described like a rugby ball.*
>
> *d) he was forced to lie on the ground and gagged with a piece of cloth.*
>
> *e) he was stomped and chilli was rubbed all over his body*
>
> *f) the Police put chillie powder into his eyes*
>
> *g) rubbed the genital with chillie.*
>
> *h) he was kicked and stomped on*
>
> *i) he was trampled by the Police Officer.*
>
> *j) he was assaulted on 22nd November, the whole evening. While the assault continued the appellant became unconscious, incontinent and after he regained consciousness, the Police had stomped on him, hit his back with a stone and while wearing the boots, they walked on his body."*

[34] In the main trial, prosecuting counsel called Dr Sowani. In 2011 he was the Sub-divisional Medical Officer at the Taveuni Hospital. It seems the police asked him to see the petitioner on the Friday, the 25th November 2011. In his evidence the petitioner did

not refer to this. He only said the police took him to the hospital on the Saturday, the 26th of November 2011, when he was admitted.

[35] On the Friday, Dr Sowani saw the petitioner in the police cell. He complained to the doctor of a painful knee. On examination the doctor noticed a swollen knee, with 2 small lesions, partially healed, with redness. He prescribed antibiotics. A scar was forming. The doctor considered this condition was "3 *to 4 days old or more*." There were no other visible injuries on the petitioner.

[36] The Court of Appeal noted that the doctor considered the knee condition was the result of cellulitis and an infected lesion. The medical evidence had revealed no bruises, lacerations or abrasions or any signs of distress on the part of the petitioner.

[37] When I say "*medical evidence*" it is important to distinguish oral evidence and exhibited documents, from a bundle of disclosures not referred to by a witness and which have not been formally made an exhibit at the trial. A bundle of disclosures are not evidence in a trial unless referred to by a witness, without objection which has been accepted by the court, and which have been formally marked as exhibits.

[38] In the *voir dire*, but not in the main trial, Sergeant Baleiwai, who was not part of the investigation team, said he took the petitioner to court on Thursday 24th November. He said the petitioner had no injuries on him and that he made no complaint. He made no complaint to the Magistrate or to Sgt. Baleiwai. He was walking normally. He referred to the petitioner's complaint of knee pain and of Dr Sowani visiting him in the cell on the evening of 25th November, the Friday. On Saturday 26th he said the petitioner was taken to hospital.

[39] The trial judge in his ruling made it clear that the burden was on the prosecution to prove the admissions had been made voluntarily, and proved to the standard beyond reasonable doubt. The Court of Appeal made no error in accepting the judge's reasoning in a passage of the ruling headed "*Discussion.*" It read:

"***Discussion***

15. The evidence of the Police Officers was consistent, honest and credible. They were at pains then to establish the true involvement of the accused in this homicide. I believe them and find their evidence reliable.

16. While the accused in giving evidence does not have to prove anything to me, the State having to prove their case beyond reasonable doubt, I did not believe his evidence. Had he been subject to the physical abuse he claims, he would have suffered far more injuries and displayed marks of abuse and violence than he then presented with. His knee injury could well have been caused by mishap "in the bush" as was an earlier ankle injury that he told the interviewer about. In the round, I prefer the evidence of the Police Officers over that of the accused.

17. The accused tells me that he changed his story on the third day of interview because of the assaults. I find that there were no such assaults and therefore the reason for him changing his stance in the interview remains unexplained by the evidence before me.

18. I find that the answers given by the accused on each of the three days of the interview were given freely and voluntarily as was his response to the formal charge of murder. There is no evidence before me of oppression which would cause me to exercise my discretion to exclude the evidence.

19. The cautioned interview and the charge statement are both admissible and may be led by the State in the trial on the general issue".

[40] Whilst the cause of the knee condition was not established, it was open for the judge to conclude, in view of the prior ankle injury previously mentioned by the petitioner as having occurred in the bush, that that condition could have occurred similarly, and not in the way that he had stated in the trial.

[41] Even his counsel conceded in her submissions that the petitioner may have exaggerated the extent of the officer's threats and assaults against him. However, as was borne out in the Ruling, falsehoods went to the credibility of the petitioner. The reasoning of the trial judge for rejecting the petitioner's allegations was sufficient for his ruling and not obviously wrong. This ground must fail.

Ground 2 – Not brought to court within 48 hours

[42] It is urged that the petitioner had been detained in excess of 48 hours in breach of his rights under the Constitution of 1997, then pertaining [Section 27(1)(b)]. That section reads:

> *"Arrested or detained persons*
>
> *27. – (1) Every person who is arrested or detained has the right:*
> *(3) Every person who is arrested for a suspected offence has the right:*
>
> *(a) .....*
> *(b) to be brought before a court no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter; and"*

[43] Though this ground was argued before the Court of Appeal it was never urged as a litigation issue before the High Court. Goundar J, as the single judge, had commented on this ground:

> *"At trial, the appellant challenged the admissibility of his confession on the ground that he was assaulted by the police during interrogation. The appellant did not expressly raise oppression as a ground to challenge the admissibility of his confession in the court below. The appellant was represented by counsel at trial. Mr. Savou could not explain why the appellant's trial counsel did not raise oppression as a ground to challenge the admissibility of the appellant's confession. If it was raised, the prosecution would have led evidence to rebut the ground alleging oppression. In my judgment, by not raising the issue in the trial court, the appellant has effectively waived the ground and is barred from raising it for the first time on appeal."*

[44] Because this was not raised as part of the challenge to the caution interview and charge statement, the witnesses did not have their mind directed to provide explanation and answer to the specific criticism. This situation was commented on adversely in **Varani v The State** [2015] FJCA 145.

[45] Suffice to say, the 48 hour rule as written is not an absolute rule. Depending on the circumstances and reasons, courts have allowed admissions to be held free of oppression

and therefore voluntary: **Maya v The State** [2015] FJSC 30; CAV 0009 of 2015; 23rd October, 2015.

[46] On the evidence provided to the court the interviewing officer explained that the interview had been commenced on Day 1, the Monday. On the same day the petitioner consulted his lawyer. After her departure, the interview continued in the afternoon. The officer said he allowed the petitioner to rest on the Tuesday and further enquires were made on that day and on the Wednesday. The interview was completed on the Thursday and he was taken to court on Friday morning. Some criticism could rightly be levelled because of this slow pace, though matters arising had to be checked. The decision of the trial judge that there had been no oppression in the broad sense was correct. His conclusions were not a matter demanding the intervention of this court. Ground 2 fails.

Ground 3 – Insufficient directions on identification evidence

[47] So many times such issues are raised in this court in cases where the trial judge has specifically asked both counsel at the end of the summing up whether they seek any re-directions, and where none are sought. In this case the judge asked for re-directions. There were none. Subsequently the matter is raised in the appeal courts both here and below in the Court of Appeal. Identification in this trial, on the evidence, was a live issue.

[48] Petitioner's counsel has referred to identifying "*witnesses*" in her submissions. There was only one identifying witness and that was Maria Pateresia. The judge omitted to state in his summing up to the assessors that Maria and the petitioner were first cousins. That is a close relationship. It was an incidental advantage therefore for the petitioner not to have this important fact referred to in the summing up. The identification here was of a person by recognition. He was not a stranger.

[49] In her evidence Maria said:

"He was coming quickly walking. When I called out to Susana to run, he was also running towards Susana's side. He ran past me. I stepped to the side. I looked at him. Saw his face. He was familiar. It was Lepani. We are related. We are first cousins. He was wearing black army boots, brown ¾ and jackets and a back pack and a hat. Bucket Hat. (Accused Identified)."

[50] In cross-examination she replied as follows:

"When he ran past you stepped aside.	*Yes.*
You saw his face and he looked at you.	*Yes.*
Wearing black army boots, brown ¾ jacket, bucket hat.	*Yes.*
So bucket that goes around head.	*Yes, bucket covering his face.*
Suggest that at time are 7.30 .	*Yes but not yet.*
Getting dark.	*Nearly dark.*
Suggest that the hat would prevent from having. seeing his face.	*No.*
Suggest that it was not Lepani Temo.	*It was him.*
You mistaken about whether it was Lepani Temo.	*Not mistaken."*

[51] On the exact time of the sighting, an issue relevant to the amount of light that was left of the day to permit recognition, she said in re-examination:

"Difference between 7pm and 7.30pm. say it was 6pm?	*When we took off, I had phone and it was 6.30pm.*
How long to walk from house to road.	*10 – 15 minutes.*
Was it before 7pm or after?	*7pm.*
How you sure it was Lepani who ran past.	*Because I saw his face."*

[52] Maria's recognition was of her cousin at very close quarters passing within feet of each other on a rural track.

[53] The judge, in his charge to the assessors [para.13], put the defence case on these issues:

"It was suggested to Maria in cross-examination that she had got her times wrong and that it was getting dark and so she wouldn't not have been able to have seen these events very clearly. Mr Waqainabete also suggested to Maria that the hat the man was wearing would have obscured her view of his face and she therefore could not be sure that it was Lepani. He finally suggested to her that as she did not see any chopping, she could not then be sure that it was Lepani who had wielded the fatal blows. These are all matters for you to consider Ladies and Gentlemen."

[54] The Court of Appeal concluded that the summing up should have been in greater detail with regard to the issue of recognition made by Maria. The Court considered that the case for the prosecution did not depend *"wholly or substantially on the correctness of one or more identifications of the accused which the appellant alleged to be mistaken."* **R v Turnbull** [1977] QB 224 at 228 – 231.

[55] With respect, I must disagree. Identification was a substantial part of the prosecution case, and for that reason the judge should have given more extensive directions to the assessors. Now that they will sit without assessors, judges will need to demonstrate in their findings that they have borne in mind the special need for caution, and to note the **Turnbull** directions relevant to the circumstances of the case. Even in a case where the defence has not raised the issue, the judge should consider the **Turnbull** directions in arriving at his or her decision: **Beckford v R** 97 Cr. App. R 409, PC.

[56] **Archbold** 2010 Ed. at 14 – 17 pp. 1576 – 7 sets out the **Turnbull** requirements which can assist judges in tailoring in their judgments the necessary acknowledgments of those requirements relevant to their particular cases. They are:

"(a) warn the jury of the special need for caution before convicting on that evidence (ante, 14-2);

(b) instruct the jury as to the reason for such need (ante, 14-2);

(c) refer the jury to the fact that a mistaken witness can be a convincing witness, and that a number of witnesses can be mistaken (ante, 14-2);

(d) direct the injury to examine closely the circumstances in which each identification was made (ante, 14-3);

(e) remind the jury of any specific weaknesses in the identification evidence (ante, 14-3);

(f) where appropriate, remind the jury that mistaken recognition can occur even of close relatives and friends (ante, 14-4);

(g) identify to the jury evidence capable of supporting the identification (ante, 14-8); and

(h) identify evidence which might appear to support the identification but which does not in fact have that quality (ante, 14-8)"

[57] But the Court of Appeal was correct in stating that the case rested mainly on the strength of the caution interview statement. Therefore it was proper also to apply the proviso to section 23(1) of the Court of Appeal Act. Ground 3 fails.

Ground 4 – Whether the evidence of two Doctors invalidated the evidence of other witnesses

[58] This ground argues that in view of the medical opinions expressed estimating Susana's life expectancy following the grave knife wound inflicted to her neck, doubt must be cast on the accounts given by the two witnesses who supposedly and separately heard the dying victim uttering the name "*Lepani*." If believed, the two witnesses in this part of their evidence, established the identity of the perpetrator.

[59] The single judge refused leave on this ground. He stated the ground was unarguable, since there was no real contradiction. The Full Court did not rule on this ground and it is not clear whether that was because it was not urged in oral argument. However the court did observe [para.17] that neither party had asked the doctor (the pathologist) about the speaking ability of the deceased in view of her neck injury.

[60] Dr Asesela Matai was a hospital medical officer, not a pathologist. When she arrived at the scene, and upon examination of Susana lying on the ground she found that Susana had no pulse, no cardiac sound, no air entry, fixed and dilated eyes, and concluded that she had already died. Of the deep neck wound, she said *"If wound left untreated, instant death would have destroyed respiratory reactions."* This short opinion was not followed up by any further explanation or more probing questioning. By referring to treatment, it must be understood that she contemplated some treatment might have saved her. If left untreated, death would follow because of the respiratory damage that had been caused. I do not interpret Dr Matai's short statement to mean that death was instantaneous or that for a short time Susana would not have been able to utter a few words.

[61] Similarly in the evidence of the pathologist Dr Goundar, there is no real conflict with the lay witnesses observations. Dr Goundar said of the neck wound "*would cause **almost** instant death.*" That without more, provides a short window, within which the victim may have been able to utter what she was heard to utter moments before she died.

[62] This evidence was capable of being accepted as being without conflict. This ground must also fail.

Result

[63] None of these grounds meet the threshold for intervention by this court. The petition must be declined and leave refused.

Calanchini, J

[64] I have had the advantage of reading the Judgment of Gates J in draft form. I agree with the reasoning and with the orders.

Jitoko, J

[65] I have had the advantage of reading in draft the judgment of Hon. Gates J. I agree that leave should be refused and appeal dismissed for the reasons he had given.

Gates, J

[66] The orders of the court are:

i) *Special leave refused;*

ii) *Petition dismissed;*

iii) *Conviction and sentence affirmed.*

Hon. Mr Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

Hon. Mr Justice William Calanchini
Judge of the Supreme Court

Hon. Mr Justice Filimone Jitoko
Judge of the Supreme Court

SOLICITORS:

Office of the Director of Public Prosecutions for the Respondent