IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 21 OF 2019
(Court of Appeal No. AAU 48 of 2015)
(High Court HAC 109 of 2012)

BETWEEN: **RAVINESH SINGH**

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 Isikeli Mataitoga
Judge of the Supreme Court

Counsel: **Mr S. Waqainabete for the Petitioner**
Ms P. Madanavosa for the Respondent

Date of Hearing: **16 June 2023**

Date of Judgment: **29 June 2023**

JUDGMENT

Gates J

[1] I agree with the succeeding Judgment of Calanchini J, its reasons and orders. It appears there was more than one investigation in progress. The petitioner was questioned in relation to a different matter and made replies that were not relevant to the charge before the trial court. There was therefore no evidence pointing to the petitioner's involvement in the crime charged.

Calanchini J

[2] The Petitioner seeks leave to appeal the decision of the Court of Appeal delivered on 7 March 2019 dismissing the Petitioner's timely appeal against conviction. Although the date stamp indicates that the Petition was lodged in the Registry on 27 August 2019. the typed date on the letter from the Corrections Service is 15 April 2019. Under those circumstances the practice has been to treat the petition as timely on the basis that the cause of the subsequent delay was beyond the control of the Petitioner.

Introduction

[3] The Petitioner along with two others was tried on one count of aggravated robbery the particulars of which stated that the three accused in company with one another on 11 July 2012 in Nadi robbed Kushal Kumar of items of property and cash with a total value of $8,890.00. Following a trial in the High Court before a Judge sitting with three assessors the assessors returned unanimous opinions of not guilty in respect of each of the accused. The learned Judge disagreed with those opinions and convicted each of the accused. The Petitioner was sentenced to 9 years 10 months imprisonment with a non-parole period of 8 years. Being aggrieved by his conviction and sentence the Petitioner filed a timely appeal against conviction and sentence in the Court of Appeal. The application for leave to appeal was heard on 22 June 2017 by a Judge of the Court who refused leave to appeal against both conviction and sentence. The renewed application for leave to appeal conviction only came before the Court of Appeal on 13 February 2019.

[4] The Prosecution alleged at the trial that the first and third accused with others entered the complainant's house in the night stole cash and items with a total value of $8890.00.

They assaulted the complainant during the robbery. The second accused (the Petitioner) had dropped the other accused near the scene and picked them up after the robbery and received a share. It should be noted that the only evidence relied upon by the State against the Petitioner was in the form of his admissions in his caution and charge statements.

Court of Appeal

[5] The grounds of appeal against conviction put forward by the Petitioner at the hearing for leave before a Judge of the Court related to what was claimed to be omissions by the trial Judge in his summing up on the issues of identity of the Petitioner and the number of offenders involved in the home invasion. However the grounds of appeal relied upon by the Petitioner in his renewed application for leave to appeal against conviction before the Court of Appeal were:

> *"1. That the learned trial Judge erred in law and in fact while directing the assessors on the disputed confession, he left open the issue of voluntariness for the assessors to decide, resulting in a miscarriage of justice in the circumstances of the case.*
> *2. That the learned trial Judge erred in law and in fact when he misdirected the assessors on the evidence contained in the caution interview of the appellant in respect of its truth and/or credibility and weight to be given to the confession."*

[6] The Court of Appeal appears to have dealt with the renewed application for leave to appeal against conviction as the hearing of the appeal itself without any reference to the applications for leave in the orders of the Court. In any event so far as the Petitioner is concerned Fernando JA in a brief judgment dismissed the appeal and the Court affirmed the conviction.

[7] The grounds of appeal relied upon by the Petitioner in his Petition dated 15 April 2019 were replaced by four grounds of appeal against conviction in an amended Petition for leave to appeal filed on 29 March 2023.

Supreme Court

The amended Petition for leave to appeal was filed by the Legal Aid Commission. The four grounds stated that:

"(i) *That the Justice of Appeal had erred in law and in fact in recording a conviction as there were no recoveries of stole properties from the Petitioner to invite assertions of recent possession.*

(ii) *The learned trial Judge erred in fact and in law in overturning the unanimous 'not guilty' opinions of the assessors without giving cogent reasons:*

(iii) *The learned trial Judge erred in fact and in law in substantially relying on the confessions in the Petitioner's record of interview when the evidence did not support such reliance; and*

(iv) *The learned trial Judge erred in fact and in law in convicting the Petitioner solely on confessions in the Petitioner's record of interview – the reasons given by the learned trial Judge infer that unfair treatment of the Petitioner during interview was contradicted by the Petitioner's father's evidence whereas all witnesses for the Petitioner (including the Petitioner's father's evidence) account for a display of injuries to the Petitioner."*

[8] Ground (ii) was the one ground previously raised in the initial Petition. Furthermore none of the four grounds were before the Court of Appeal. The Supreme Court has extensive jurisdiction to hear and determine appeals from all final judgments from the Court of Appeal under section 98(3) of the Constitution. It is difficult to understand how the Supreme Court could determine whether the Court of Appeal has erred in such a way as to satisfy section 7(2) of the Supreme Court Act 1998 when the Court of Appeal has not even been called to consider the grounds that are now relied upon in the Petition before this Court. Although the Supreme Court may consider fresh grounds of appeal in the Petition that were not raised in the Court of Appeal either at the leave stage or at the hearing of the appeal, those grounds will not be considered unless the significance of any one of them upon the leave criteria (in section 7(2)) is compelling and clearly warrants adjudication on account of its or their significance. See: **Vaqewa v The State** [2016] FJSC 12, CAV 16 of 2015 (22 April 2016) and **Tuwai v. The State** [2016] FJSC 35; CAV 13 of 2015 (26 August 2016).

[9] The issue that is of significance arises under ground 3 of the proposed new grounds of appeal. The case against the Petitioner was based entirely on the admissions made by the Petitioner in the caution interview and in his charge statement. In this case the trial judge as a matter of law indicated that there was no impediment to proceeding to convict

on the basis of a confession alone, i.e. an uncorroborated confession. See: **Kean v State** [2013] FJCA 117; AAU 95 of 2008 (13 November 2013). Although an issue in relation to voluntariness is raised by ground 4 and the propriety of the decision by the trial judge to record a conviction contrary to the unanimous not guilty opinions of the assessors is raised by other grounds, it is the reliance by the trial judge on the admissions made by the Petitioner in his caution interview and charge statement that became the focus of attention both in the written submissions filed by the parties and in the oral submissions before the Court.

[10] The Petitioner's written submissions filed by the Legal Aid Commission addressed the issue of truthfulness and reliability of the admissions made by the Petitioner. The caution interview dated 9 August 2012 was recorded by long hand and appeared at page 4 of the "Further Supplementary Record of the High Court". The "Charge Statement" was typed and dated 10 August 2012, also appearing in the Supplementary Record.

[11] In the caution interview at question 16 the Petitioner is informed that he is to be questioned in relation to an allegation that on 11 July 2012 at about 3.00am at Richmond Crescent Nadi he with others broke into a dwelling house and stole cash and goods to the total value of $11.000.00 belonging to Kushal Kumar Pillay. He was cautioned in the usual terms in the same question. The Petitioner was then asked a series of questions relating to procedures and formalities without referring to any specific factual allegation. Then at question 30 the following is put:

"30. Can you recall where were you on 1/8/2012 at about 7.00 pm."

In the answers to questions that followed, the Petitioner made a number of admissions after outlining his movements around Nadi from 7.00pm onwards on the night of 1 August 2012. Then followed questions and answers as to what transpired from about 11.00pm on 1 August 2012. Those answers are conveniently summarised in para 4.49 of the Petitioner's written submissions as:

> *"At about 11pm he picked up one Bobo from Qeleloa and Steven from Northern Press Road. Thereafter Ron and Hammer got into his car from near a church. They followed through Sagayan Road, Hospital Road and the Petitioner dropped them off at the junction of Nakunakuna around 12am. The Petitioner drove back to Nadi Town. After some time, the Petitioner picked them up again from Nakunakuna junction and dropped them off again at a free plot near Gujrati Temple. He then drove to Nadi*

Town again. Around 4am the Petitioner returned to the free plot and picked them up."

This summary of movements by the Petitioner clearly relates to the answer given by the Petitioner to question 30 that enquired into the Petitioner's actions on the night of 1 August 2012.

[12] The caution interview was suspended at 1805 hours in order to conduct a reconstruction of events. That reconstruction involved the Petitioner identifying two specific points of the journey outlined in the summary above. At no stage was the Petitioner taken to the complainant's residence as part of the reconstruction.

[13] During the caution interview the Petitioner also provided details of the planning for the offence that can only be related to what transpired on 1 August 2012. He also made admissions as to their customary "modus operandi". At no time during the interview was the Petitioner asked any specific questions in relation to the offence that occurred on 11 July 2012 being the offence for which he was formally charged on 10 August 2012. Furthermore in the Charge Statement in the answers to question 9 the Petitioner admits that he "does the driving for the people who went and do breaking and robbery." However this is a statement made in general terms without making any reference to a specific date let alone 11 July 2012.

[14] The discrepancy between the date of the alleged offence (11 July 2012) for which the Petitioner had been charged and the date to which admissions were made being 1 August 2012 was not the subject of any questions during the *voire dire* nor the trial itself. Given this discrepancy and given that there was no other evidence that connected the Petitioner to the offence committed on 11 July 2012 it was submitted that there was insufficient evidence for the trial judge to be satisfied beyond reasonable doubt as to the guilt of the Petitioner. The reasons given by the learned trial Judge for overturning the unanimous not guilty opinions of the assessors were (1) the admissions in the caution statement and charge statement made voluntarily and (2) the truthfulness of the admissions. It is apparent that taken together those reasons do not constitute cogent reasons that were required pursuant to the now repealed section 237(5) of the Criminal Procedure Act 2009: **Lautabui v The State** [2009] FJSC 7; CAV 24 of 2008 (February 2009). The assessors must have concluded that there was sufficient doubt that the

caution statement admissions were voluntarily made or that the admissions were not truthful or both. The learned Judge has not provided reasons that could be described as cogent for overturning the not guilty opinions of the assessors.

[15] In any event I am not satisfied that the admissions made by the Petitioner in his caution interview can, by themselves, be said to establish beyond reasonable doubt that the Petitioner was guilty of the offence allegedly committed by him with others on 11 July 2012.

[16] Both the Petitioner and the State have submitted that the petition raises issues that satisfy one or other of the requirements in section 7(2) of the Supreme Court Act 1998 for granting leave to appeal. I agree that, if leave to appeal was not granted then a substantial and grave injustice may otherwise occur. As a result I would grant leave to appeal. In accordance with the Supreme Court's usual practice I would treat the hearing of the application for leave to appeal as the hearing of the appeal.

[17] Under section 7(1) of the Supreme Court Act the Court may:

> *"(a) ...*
> *(b) ...*
> *(c) grant ... leave and allow his appeal and make such other orders as the circumstances of the case require."*

In my opinion section 7(1)(c) permits the Court to turn to section 14 of the Supreme Court Act which in turn authorises the Court to exercise such powers and authority as may be exercised by the Court of Appeal with such modifications as are necessary, according to the circumstances of the case. It is also my opinion that the Supreme Court may consider the options that are available to the Court of Appeal upon allowing an appeal against conviction under section 23(2)(a) of the Court of Appeal Act 1949. Section 23(2)(a) provides that if an appeal against conviction is allowed the Court may "either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interest of justice so require, order a new trial." It should be noted that the wording of the section is significant. The Court may either (1) quash the conviction and direct an acquittal order be entered OR (2) if the interests of justice so require order a new trial. In other words it would follow that a new trial cannot be ordered or contemplated if the Court quashes the conviction.

[18] There are a number of matters that are usually considered when this issue arises at the conclusion of a successful appeal against conviction. In my opinion the prosecution should not be given a second chance to prove beyond reasonable doubt that the Petitioner was involved in the offence for which he had been charged when there was no relevant evidence adduced at the trial implicating the Petitioner in that offence. Admissions made by the Petitioner related to a different offence on a different day. If a re-trial was ordered the Prosecution would be relying on the same evidence. The complainant could not identify the Petitioner. It is unlikely that identification evidence would become available in a second trial. The Prosecution is not going to be in a position to tender a second caution interview as evidence in a second trial.

[19] In addition the offence for which the Petitioner was convicted occurred in 2012. It would be at least 11 years later in the event that a new trial were to take place. Finally the Petitioner was sentenced on 31 March 2015 to 9 years 10 months imprisonment with 8 years as non-parole. In accordance with the provisions of sections 27(3), (4) and (5), of the Corrections Service Act 2006, the Petitioner has now served the non-parole component of his sentence (8 years) and since that term is greater than the two thirds of the head sentence calculated at the time of initial classification being approximately years 6 months. the Petitioner was entitled to be considered for release on 31 March 2023. For all of those reasons I have no doubt that it is not in the interests of justice to order a retrial. Therefore I would quash the conviction and direct that a judgment and order for acquittal be entered.

[20] Although the issue of release of the petitioner is not before the Court, the Commissioner of Prisons ought to consider the amendments to section 27 and the retrospective operation of those amendments that came into effect in November 2019. In the absence of any recorded incidents justifying a continued detention the Petitioner has been entitled to be released since 31 March 2023.

Mataitoga J

[21] I support the reasons and the conclusions in this judgment.

Orders

1. Leave to appeal against conviction granted.
2. Appeal against conviction allowed.
3. Conviction quashed and in its place judgment and order for acquittal is to be entered.

Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court