IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0008 of 2023
[Court of Appeal No. AAU 111 of 2018]

BETWEEN	:	**ASESELA NIUBASAGA**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice Anthony Gates, Judge of the Supreme Court** **The Hon. Justice William Calanchini, Judge of the Supreme Court** **The Hon. Justice William Young, Judge of the Supreme Court**
Counsel	:	**Petitioner in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**13 August 2024**
Date of Judgment	:	**29 August 2024**

JUDGMENT

Gates, J

Introduction

[1] This case is concerned with whether the petitioner was a participant in an aggravated robbery. The sole evidence against him consisted of admissions he had made in a caution interview conducted by police investigators of his involvement in the offence.

[2] The Court of Appeal had dismissed his appeal on the 27th of July 2023. His appeal to the Supreme Court was lodged within time on the 8th of August 2023.

[3] On the 4th of July 2024 the petitioner lodged a second application for leave, setting out two new grounds against conviction and one against sentence. The grounds against conviction raised similar matters as in the first appeal document arguing the significance of the abrasions noted by the doctor in the second medical report.

[4] The petition against sentence, besides being out of time, is also outside of our jurisdiction. This is because the petitioner abandoned his appeal against sentence before the Court of Appeal.

[5] For the Court, Qetaki J at paragraph [22] said:

> *"[22] At the hearing, the appellant had indicated his intention to abandon his appeal against sentence. He did so on his own free will after it was explained to appellant that that would result in the dismissal of grounds 3 and 4. Further, that once dismissed, the grounds cannot be pursued again. He was adamant that he will pursue the grounds against conviction only."*

[6] After the petitioner had indicated his desire not to proceed with the appeal against sentence, the Court of Appeal followed the correct procedure before accepting his abandonment and before the dismissal of that part of the appeal: ***Masirewa v The State*** [2010] FJSC 5; CAV0014.2008S (17 August 2010).

[7] The trial had been conducted before a High Court Judge and three assessors. The assessors returned unanimous opinions to the Judge that the petitioner was guilty. The Judge accepted those opinions in his judgment delivered on the 12th of October 2018, and convicted the petitioner (and his co-accused) of the single count of aggravated robbery contrary to section 311 (1)(c) of the Crimes Act. He was sentenced to a term of 14 years imprisonment with a non-parole period of 13 years.

The Facts

[8] In the trial, evidence was adduced which related that on the 28th of October 2016 an elderly man and his wife awoke in the early hours of the morning to find five masked men had entered their home. Both victims were badly handled. The male complainant was a heart patient. They were threatened with physical harm. They were tied up by the intruders who were armed with pinch bars, screw drivers, and cane knives. The complainant's home was ransacked, and items totalling $42,200 in value were stolen. The men drove away in the complainant's car, which was later abandoned.

[9] The defence did not seek to contest the events at the residence that night. The petitioner only denied being there or being involved in the robbery. The prosecution relied on inculpatory admissions made by the petitioner in the course of his caution interview. If accepted, those admissions placed the petitioner at the complainant's residence on the night of the robbery. In it he admitted being directly involved in the robbery and in the home invasion. The interview contained a great deal of detail as to the events before, during, and after the robbery.

The Grounds

[10] In the oral hearing before us the petitioner queried how the caution interview had been accepted whilst there had been evidence of some injuries on his body as established by the second medical report. All the other grounds centered on aspects of this one question. The medical evidence emerged in two stages. The first medical report was presented in the voir dire. This report was compiled by Dr. Ashneel Singh who gave evidence. He stated that his examination of the petitioner at the Raiwaqa Health Centre on the 6th of November 2016 revealed no physical injuries. The second report, was exhibited by Dr. Archana Prasad a witness called by the petitioner in the trial proper. It revealed some injuries, two abrasions on the feet and tenderness on the chest. This second medical report had been prepared by Dr. Edwin Kumar on the 8th of November 2016. It was urged, its production should have resulted in the Judge changing his mind on the voluntariness of the confession and a rejection of the caution interview. If that had happened there would have been no evidence

remaining of the petitioner's involvement in the robbery, and it should have resulted in the acquittal of the petitioner.

Voir Dire

[11] After all of the evidence in the voir dire had been heard the Judge ruled the petitioner's caution interview statement as admissible and said it could be tendered in the trial proper as evidence. He said, "It's acceptance or otherwise, will be a matter for the assessors." He said he would give his reasons later. These he gave on the 15th of October 2018. The prosecution called six witnesses including Dr. Ashneel Singh. Both the petitioner and his co-accused gave sworn evidence. The petitioner was the sole witness for his case. The co-accused also called his mother.

[12] The Judge set out the parameters of his role:

> *"4. The law in this area is well settled. On 13th July 1984, the Fiji Court of Appeal in **Ganga Ram & Shiu Charan v Reginam**, Criminal Appeal No. 46 of 1983, said the following, "....it will be remembered that there are two matters each of which requires consideration in this area. First, it must be established affirmatively by the crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage – what has been picturesquely described as the "flattery of hope or the tyranny of fear" **Ibrahim v R** (1941) AC 599, **DPP v Ping Lin** (1976) AC 574. Secondly even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. **Regina v Sang** [1979] UKHL 3; (1980) AC 402, 436 @ C – E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account ...."*
>
> *5. I have carefully listened to and considered the evidence of all the prosecution and defence's witnesses. I have carefully examined their demeanours when they were giving evidence in court. I have carefully considered the parties closing submissions."*

[13] His Lordship referred to the evidence of Dr. Ashneel Singh (PW6) who had testified that he had seen no injuries on the petitioner. The Judge accepted that evidence and admitted the caution interview, repeating that it would be a matter for the assessors in the trial proper.

The evidence at the Voir Dire

[14] Following long established precedent the Judge did not in his ruling condescend to details for finding in favour of the prosecution witnesses and for rejecting the evidence of the petitioner.

[15] The counsel for the petitioner summing up his case at this stage referred to three days of assaults on the petitioner:

> *"1. 3.11.16 between 6.30 – 10am at Rifle Range [body punches in ribs]*
> *2. 4.11.16 at Samabula Police Station [punches to temple, and body kicks, "threats to have baton shoved up his arse."]*
> *3. 5.11.16 at Colo-i-suva [threatened with rope around his neck]"*

[16] In his evidence the petitioner had described various assaults made upon him. On the 3rd of November 2016 he had been punched on both sides of his ribs. At Rifle Range, Vatuwaqa he was punched repeatedly for about 30 minutes. He said he had injuries to his ribs from this. Later taken to Samabula Police Station to the Crime Office during questioning he was punched on the right side of his temple, "a very hard punch, I saw stars, that is many stars." He was also punched on the left side of his back. He had difficulty breathing. The police tried to put a police baton up his backside. They were kicking his knees and stepped on his feet. From this he was injured on his leg and his ribs.

[17] Later during reconstruction and visiting the scene he was taken to Colo-i-Suva swimming pools. During further questioning one of the officers took the petitioner's head and banged it against the side of the vehicle. They threatened to put a rope around his neck and throw him into one of the pools. It was after this that he was frightened and admitted the allegation against him. But when they started to interview him he continued to deny the allegation.

[18] When shown the interview record the petitioner said the answers were not his. But he signed the record. On the 6th of November 2016 he was taken to the Raiwaqa Health Centre where he told the doctor [Dr. Ashneel Singh – the first examination] that he had injuries

and that he was feeling weak. He said he argued with the doctor. He said his feet were swollen and he could not walk.

[19] He was taken in the afternoon of the 7th of November 2016 to the Magistrates Court. The court record confirms that he asked to be medically examined and that the Resident Magistrate ordered the prosecution to see that he was taken to the hospital for medical attention. He ordered that the medical report was to be filed with the Court on the next call over, that is the 18th of November 2016 in the High Court. The Magistrate noted that there had been an allegation of assault on the petitioner.

[20] That medical report of the 8th of November 2016, the second medical report, the petitioner said, was given to his first Legal Aid counsel. This report could have been exhibited, and its author Dr. Edwin Kumar, called to give evidence for the defence in the voir dire. This was not done.

[21] Without the second medical report, and armed with Dr. Ashneel Singh's report [the first medical report], it is not surprising that the prosecution was able to prove beyond reasonable doubt, at the end of the voir dire, that the allegations were not true.

The Trial Proper

[22] The author of the second medical report was a Dr. Edwin Kumar. However, he was ill on the day he was required to come to Court. He attended, but the Judge excused him from giving evidence and released him. Instead, Dr. Archana Prasad stood in for Dr. Kumar and by virtue of Section 133 of the Criminal Procedure Act, she was able to comment on his findings and opinions in relation to the examination of the petitioner on the 8th of November 2016. She was defence counsel's witness and Mr. Shah for the prosecution did not object to her being a witness under this provision.

[23] Dr. Archana Prasad referred to Dr. Kumar's medical report which had noted:

> *"2 x 2 abrasions on the left lateral chest wall."*

[24] Dr. Prasad said the abrasions were over the 9th rib on the posterior axillary line. There was no active bleeding and the wound appeared to be dry and healing. She said the abrasions were a peeling of the skin and "there wasn't any cut." Abrasion was defined in the glossary of terms attached to the medical report form. The petitioner in his grounds [new ground 2] complained that abrasion had not been properly described or defined by Dr. Prasad. He is mistaken in that, for a full explanation had been given by Dr. Prasad to the Court and assessors in readily comprehensible language.

[25] Dr. Prasad referred to small abrasions noted on the right foot, less than 1 centimetre in diameter. They were on the base of the first and second toe.

[26] A second abrasion was noted on the left foot approximately 1 x 1 centimetre on the medial malleolus. She said the middle malleolus was the bony part of the foot, the middle part of the foot.

[27] Dr. Prasad read out Dr. Kumar's opinion which had been noted on the form that, "the injuries appeared to have been caused days ago. Injuries most likely resulted due to frictional force acting along the skin surface." She said a chest x-ray was carried out and showed no rib fractures. The petitioner was prescribed brufen, an anti-inflammatory and pain killer. In the result the doctor had found minor soft tissue injuries to the left chest wall and minor abrasion to each foot.

[28] Dr. Prasad said there were no head injuries found. A punch could cause mild swelling to the head, and a hard punch could have caused internal bleeding. If there were continuous hard punching a patient could suffer vomiting, fainting, swelling or bleeding. None of these injuries or circumstances were recorded in the report.

[29] In his evidence at the trial proper Dr. Ashneel Singh explained how he went about the examination of his patient, the petitioner on the 6th of November 2016. He took a history by asking the petitioner what was wrong. Then he would go on a system by system examination. The basic vitals, the heart and the chest, the abdomen and the extremities were all normal. He marked the form NAD, meaning, "no abnormalities detected." He had

taken the blood pressure 141/75 and the pulse 61. He said there were no complaints and basically this had been a normal examination.

[30] Defence counsel suggested the doctor's examination had been very short and had not been a proper examination. Dr. Singh said he had specifically asked the petitioner if he had been assaulted or injured. He had replied no. Dr. Singh said he did not see the ribs, but on chest examination there was no tenderness and there were no abnormalities that he could feel. If there had have been bruises to the ribs, the area "would be very very sore, very tender."

Basis for Judge's Decision

[31] The Judge gave careful directions to the assessors on the issue in the case and how to approach it. After the assessors tendered their unanimous opinions of guilt, the Judge wrote his own judgment.

[32] At paragraph 6 his Lordship said:

> *"6. The prosecution's case largely depended on the acceptance or otherwise of the two accuseds' alleged confessions. I have heard the prosecution's witnesses' evidence on the same. I have also heard the two accuseds' version of events on the same. The police said, they did not assault or threaten the two accuseds while in their custody. The two accuseds said they were repeatedly punched and kicked by the police officers. At the end of the day, I had to look at what Doctor Singh and Doctor Prasad said. Both doctors said the two accuseds suffered no injuries that is major, while in police custody. Doctor Prasad said, given the two accuseds' complainants of assault by police officers, major injuries should be present on their bodies, not abrasion.*
>
> *7. I have come to accept the doctors' evidence, that both accuseds suffered no major injuries, while in police custody. Doctor Singh said he found no injuries on both accuseds on 6 November 2016. Doctor Kumar only found abrasion on Accused No. 1. According to Doctor Prasad, an abrasion is not a cut. Given the punches they allegedly received from police, I expected major injuries on their bodies. None was found.*
>
> *8. The doctors' views had led me to accept that both accuseds voluntarily confessed to the police when caution interviewed on 3 and 4 November 2016. I accept that they signed their interview notes out of their own free*

will. I accept they gave their confessions voluntarily to the police when caution interviewed, and the same were true."

[33] The Court of Appeal in ***Tuilagi v State*** [2017] FJCA 116; AAU0090.2013 (14 September 2017) provided a compendious summary of the correct approach to be adopted by the trial judges regarding a confession. The Court said:

> *"The correct law and appropriate direction on how the assessors should evaluate a* ***confession*** *could be summarised as follows:*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide* ***Volau v State*** *Criminal Appeal No.AAU0011 of 2013: 26 May 2017* [2017] FJCA 51*).*
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> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the* ***confession*** *(vide* ***Volau****).*
>
> *(iii) Once a* ***confession*** *is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the* ***confession*** *including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide* ***Volau****).*
>
> *(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the* ***confession*** *if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30]).*
>
> *(v) However,* ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the* ***confession*** *is voluntary, Noa Maya*

> *direction is irrelevant and not required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017* [2017] FJSC 19*."*

[34] In ***Rahiman v The State*** (CAV2 of 2011; 24 October 2012) the Supreme Court referred to the observations of Lord Salmon in ***Director of Public Prosecution v Ping Lin*** [1975] 3 WLR 419 at page 445:

> "*The Court of Appeal should not disturb the judge's findings merely because difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases but only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle-always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal*."

[35] The Judge here was no doubt strongly influenced by the medical evidence. In summary the accounts of severe beating in police custody, the kicks to the knees, the punches to both sides of his ribs, the hard punches to his temple, the punch to the left side of his back, the stepping on and stomping on his feet, the banging of his head against the vehicle, none of these found echoing confirmation. The first medical examination recorded no complaint and nil injuries. The second medical examination recorded three minor injuries. His Lordship concluded there was no support for the petitioner's detailed account of serious assaults. The Judge accepted the evidence of the police officers that they had not assaulted the petitioner and he accepted the testimony of both doctors. He rejected the evidence of the petitioner.

[36] The exact cause of the minor injuries noted on the 8th of November 2016 in the second examination observed some days after the incident, remained unresolved and unaccounted for. The Judge's decision was reasoned. Unresolvable matters were spoken of in ***Ping Lin***. The assessment of each of the witnesses was a matter peculiarly within the grasp of the Judge hearing the case. He had the better opportunity of assessment of their testimony. It cannot be said here that the Appellate Court is completely satisfied that the Judge had made a wrong assessment.

[37] None of the grounds on this issue can succeed, nor has the threshold for the grant of leave to appeal been reached.

Calanchini, J

[38] I have had the opportunity of reading, in draft form, the judgment of Gates J and agree with his conclusion that the petition for leave to appeal should be refused.

Young, J

[39] I agree with the result proposed by Gates J and with the reasons he has given.

Orders of the Court:

1. *Leave refused.*
2. *Petition dismissed.*
3. *Conviction affirmed.*

The Hon. Justice Anthony Gates
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Justice William Calanchini
JUDGE OF THE SUPREME COURT

The Hon. Justice William Young
JUDGE OF THE SUPREME COURT

Solicitors:

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