IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0114 of 2014
(High Court HAC 152of 2010)

BETWEEN	:	**NAVEEN SINGH**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Gamalath, JA** **Prematilaka, JA** **Bandara, JA**
Counsel	:	**Mr M Fesaitu for the Appellant** **Mr S Babitu for the Respondent**
Date of Hearing	:	**12 November, 2018**
Date of Judgment	:	**29 November, 2018**

JUDGMENT

Gamalath, JA

The Preliminary Issues

[1] The appellant was out of time by 11 months when he had sought to invoke the appellate jurisdiction against his conviction and the sentence of imprisonment, the details of which I would be discussing later in the judgment, and the single judge Hon. President Calanchini

J. having delved in to the issues raised in the application for the enlargement of time determined that the application was devoid of any merits and hence the decision to "dismiss the application for an enlargement of time to file an application for leave to appeal against conviction and sentence" and "the refusal to grant leave to appeal". That ruling was on 28 October 2016.

[2] Having been dissatisfied by the said ruling the appellant has presently made a renewal application to this Court, which contained three grounds of appeal against the conviction and against the sentence of imprisonment, one ground of appeal. The three grounds of appeal against the conviction were as follows;

> *"(a) The learned trial Judge erred in law and in fact when he failed to direct the assessors on how to approach the unsworn evidence of a child witness and the weight to be attached to such evidence.*
>
> *(b) The learned trial Judge erred in law and in fact by allowing a dock identification where there had not been any police identification parade and failed to direct the assessors correctly on the dangers of identification evidence.*
>
> *(c) The learned trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the evidence contained on the caution interview and the weight to be attached to the disputed confession.*
>
> *(d) The learned trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence resulting in much more severe punishment."*

[3] However, at the very outset of the hearing of this application the counsel for the appellant informed this Court that the only ground the appellant is pursuing presently is the ground above namely, that "*the learned trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the evidence contained in the caution interview and the weight to be attached to the disputed confession*" .Accordingly, the present task of this Court is to consider the sustainability of the sole ground, particularly in the light of the dicta in **Sinu and Kumar v. The State** ([2012] FJSC 17; CAV I of 2009; 21 August 2012) and as re-iterated in **Livai Nawalu v. The State** ([2013] FUSC 11; CAV

0012.12, 28 August 2013). The principles enunciated in the said judgments are known too well and they are setting out the grounds upon which an application could be made successfully, in seeking the indulgence of the appellate court for the grant of enlargement of time. As regards the present application, despite the delay of 11 months to invoke the jurisdiction of this court, I wish to consider in particular whether the ground upon which the appellant is relying has any merit, so that that may succeed in appeal.

The facts in brief

[4] The appellant was charged with the following offences in the High Court at Lautoka;

a) Count 1 – Rape contrary to section 207(1) (2) (b) and (3) of the Crimes Decree, 2009.

b) Count 2 – Indecent Assault contrary to section 212(1) of the Crimes Decree, 2009.

c) Count 3 – Rape contrary to section 207 (1) (2) and (3) of the Crimes Decree, 2009.

d) Count 4 – Rape contrary to section 207 (1) (2) (a) and (3) of the Crimes Decree, 2009.

e) Count 5 – Indecent Assault contrary to section 212 (1) of the Crimes Decree, 2009.

f) Count 6 – Indecent Assault contrary to section 212 (1) of the Crimes Decree, 2009.

g) Count 7 – Rape contrary to section 207 (1) (2) (a) and (3) of the Crimes Decree, 2009.

h) Count 8 – Indecently Insulting or Annoying the Modesty of a Person contrary to section 213 (1) (b) of the Crimes Decree, 2009.

He was convicted on all counts and sentenced to a total period of 13 years imprisonment. The facts as emerged from the evidence at the trial show that the appellant had sexually abused the 7 years old child KW (the name suppressed), who is the daughter of his neighbour, living next to the appellant's parents' house. The alleged incidents of sexual

abuse had happened when the victim visited the appellant's parent's house to watch Hindi films. The victim testified at the trial and her mother's evidence corroborates her evidence to a great extent on material points. In essence, according to the victim, the appellant having invited her into a bed room of his parents' house, first raped her digitally, followed by having penile rape in the bathroom. At the trial prosecution had relied on two streams of evidence to prove the charges against the appellant. While one stream came from the evidence of the victim and the other witnesses whose evidence had shed much light on the incident relating to the crime, the other stream of evidence came from the caution statement of the appellant, which was self- incriminating. The defense challenged it at the trial for its voluntariness and having held a voir-dire inquiry, the learned trial Judge ruled that that had been made voluntarily.

[5] The appellant's evidence at the trial which was a denial of the incident, had not been treated with favour either by the learned trial Judge or by the assessors, whose unanimous opinion was that the appellant was guilty as charged.

The ground of appeal

[6] I have already made reference earlier to the ground of appeal verbatim. It is all to do with the manner in which the learned trial Judge had fashioned his directions as regards the caution statement. Citing it for clarity, it reads as follows;

> *"42. The next witness for the prosecution was WPC Irene. She had recorded the caution interview of the accused on 22.11.2010. The interview was conducted in English language. The accused was given his rights. The accused had answered the questions put to him voluntarily. She read over the entire interview and produced the interview notes marked as P2. Accused had not made any complaint to her. The witness was 8 months pregnant at this time.*
>
> *43. When cross examined, she denied assaulting the accused with a ruler three times on the head. She further denied two Fijian Police officers assaulting the accused during interview or same officers pulling down the accused's pants and burning the penis of the accused with a lighter and putting a stick in to accused's back.*

44. *It is up to you to decide whether the accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of each charge are proved by this statement.*

45. *Sgt. Mohamed Harif was the next witness for the prosecution. On 23.11.2010 he had recorded the charge statement of the accused. It was done in English. The accused had not made any complaint. He identified the original notes of the charge statement and the accused. In cross examination he denied fabricating the statement or threatening the accused that he will be beaten if it is not signed."*

[7] Having regard to the directions above, as I understood from his submissions before us, it was the contention of the counsel for the appellant that the learned trial Judge had misdirected the assessors by inviting them to examine, not only the admissibility of the caution statement in the backdrop of the weight to be attached to its probative value, but also whether it has been made voluntarily, a matter that should always remain in the exclusive judicial domain alone. In other words the question is, "whether a Judge who has ruled that a caution statement has not been obtained by oppression, or in consequence of anything said or done which is likely to render unreliable such confession, is required to direct the assessors, if they conclude that the alleged confession may have been so obtained, they must disregard it?" What I further gathered from the submissions of the counsel for the appellant before us is, that by directing the assessors to examine the voluntariness of the caution statement, the learned trial Judge has placed an unnecessary burden upon the shoulders of the assessors, whose role at the trial should be confined only to examine the weight to be attached to the caution statement and not to examine its voluntariness.

[8] The law on this issue is well settled both in Fiji and in the sphere of the common law. In the case of **Regina v. Mushtaq**, [2005] UKHL 25, (2 Crim. App. R.32 HL) the House of Lords delved into the issue and decided as follows;

> *"3. The law is clear that where a judge has ruled on a voir dire that a confession is admissible the jury is fully entitled to consider all the circumstances surrounding the making of the confession to decide whether they should place any weight on it, and it is the duty of the trial judge to make this plain to them. In R v Murray [1951] 1KB 391 the trial judge ruled on a voir dire that the confession was admissible and later in the trial refused to allow counsel for the prisoner to cross-examine the police witnesses again in the presence of the jury as to the manner in which the confession had been obtained, and in his summing up he told the jury that they must accept from him that the confession was a voluntary one obtained from the prisoner without duress, bribe or threat. On appeal the Court of Criminal Appeal quashed the conviction and Lord Goddard CJ stated at page 392:*
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> > *"The recorder was wrong in the course which he took. It was quite right for him to hear evidence in the absence of the jury and to decide on the admissibility of the confession; and, since he could find nothing in the evidence to cause him to think that the confession had been improperly obtained, to admit it. But its weight and value were matters for the jury, and in considering such matters they were entitled to take into account the opinion which they had formed on the way in which it had been obtained. [Counsel for the defence] was perfectly entitled to cross-examine the police again in the presence of the jury as to the circumstances in which the confession was obtained, and to try again to show that it had been obtained by means of a promise or favour. If he could have persuaded the jury of that, he was entitled to say to them: 'You ought to disregard the confession because its weight is a matter for you' ...*
> > *It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury; for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury."*
>
> Per Lord Hulton

The position in Fiji

[9] The issue that is almost identical to this ground of appeal came up for an incisive analysis in the case of **Maya v. State** [2015] FJSC 30; CAV009.2015 (23 October 2015), in the Supreme Court of Fiji. In dealing with the Ground 4; "The judge's directions to the assessors about the confession", His Lordship Hon. Brian Keith J, had dealt with the issue in the following manner;

> ***"Ground 4: The Judge's directions to the assessors about the confession***
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> *The directions which the judge gave to the assessors about the confession were as follows:*
>
> *"[14] I direct you as a matter of law that if you believe that the Police did fabricate this interview and that none of the answers are his then you are to discard it and then find him not guilty. If you are not sure you will still find him not guilty.*
>
> *[15] If, on the other hand, you find that he did give the answers contained in the record of interview and that he gave those answers willingly then the interview is evidence for you to consider in the normal way.*
>
> *[16] If you find that they are his answers, but that they were given as a result of assaults or fear of further assaults then you will consider the interview but it is up to you how much weight you put on it according to the degree of assaults. It is all a matter for you."*
>
> *There is nothing objectionable about what the judge said in paras 14 and 15. The problem relates to para 16. What is the appropriate direction to give to the assessors about how they should treat a confession which they are not sure was made voluntarily?"*
> (emphasis added)
>
> *"19. There have been two schools of thought in the common law world about this topic in the context of trial by jury. One is that jurors should be told that they should disregard the confession altogether if they are not sure that it was made voluntarily. After all, what weight can be placed at all on a confession which may have been made as a result of ill-treatment or oppression, or which may have been induced by a promise of some kind, and which made the suspect confess when he might otherwise not have done so? He may have been confessing his guilt, not because he was guilty, but, for example, because he*

wanted the ill-treatment to stop. The other school of thought takes as its starting point the fact that questions of admissibility of evidence are for the judge to decide, whereas the evaluation of such evidence as has been ruled admissible is for the jurors to make. If the judge is required to direct the jurors to disregard the confession if they are not sure that it was made voluntarily, that would be tantamount to the judge usurping the jurors' function of evaluating the evidence for themselves. On this school of thought, the appropriate direction is to tell the jurors that the weight which they should give to the confession is for them to decide. That is the school of thought which the Privy Council adopted in ***Chan Wei Keung v The Queen*** *[1967] 2 AC 160.*

20. A different view has been taken relatively recently in England by the House of Lords. In R v Mushtaq [2005] UKHL 25, a majority of the House of Lords held that jurors should be directed to disregard a confession if they think that the confession may have been made involuntarily. However, two things informed their view. One was the terms of section 76(2) of the Police and Criminal Evidence Act 1984. The other was the right against self-incrimination implied in the right to a fair trial embodied in Art 6(1) of the European Convention on Human Rights. The right against self-incrimination is enshrined in section 14(2)(j) of the Constitution of Fiji, but there is no statutory provision in Fiji equivalent to section 76(2) of the Police and Criminal Evidence Act 1984. To that extent, the reasoning of the majority in ***Mushtaq*** *does not apply to Fiji.*
(emphasis added)

21. Which of these two schools of thought is to be preferred is less important in Fiji where the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not. By then, of course, the judge will have ruled the confession to have been admissible. He will therefore have already found beyond reasonable doubt that it had been made voluntarily. If he remains of that view by the end of the case, the terms of the direction he gave to the assessors if they thought that the confession may have been made involuntarily is irrelevant. The problem will only arise if, in the course of the trial, the judge himself changes his original view about the voluntariness of the confession. Should he direct himself to disregard the confession altogether? Or should he direct himself merely to take the possibility that it may have been made voluntarily into account in the context of the case as a whole?
(emphasis added)

22. That problem does not arise in this case. Although the judge did not give reasons why he agreed with the opinion of the assessors, he would unquestionably have said something if had had changed his mind about the voluntariness of the confession in the course of the trial. So the correctness or otherwise of his direction to the assessors in para 16 of his summing-up could have had no impact on the eventual outcome of the case. Since it is unnecessary to decide in this particular case which of the two schools of thought should be adopted in Fiji, I would prefer not to do so, leaving it to be decided in a case in which it needs to be addressed, ie a case in which the judge changes his mind about the voluntariness of the confession in the course of the trial.

23. That does not give much help to judges about how to direct the assessors in the meantime. They are entitled to look to the Supreme Court for guidance. If that guidance can only be given by the Court expressing its provisional view on which school of thought should be adopted in Fiji, it seems to me that the Court should not shrink from expressing its provisional view on the topic. In my opinion, the school of thought adopted in ***Chan Wei Keung*** *puts too much emphasis on the need to maintain clear demarcation lines between the respective functions of judge and jury, and we should adopt the position which says that a confession should be treated as valueless if it may be been made involuntarily. Judges should for the time being, therefore, 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 that it may have been made involuntarily. I am not unmindful of the irony here. The judge will have to direct himself on these lines if he changes his mind about the voluntariness of the confession in the course of the trial. If he does that, there will never be case in which the issue which we have identified will come up for final determination. But that is sometimes the way things go."*
(emphasis added)

[10] His Lordship the Chief Justice Gates P. agreed with the reasons above of His Lordship Keith J and further elaborating on the matter has stated as follows:

"1. I have had the advantage of reading in draft the judgment of Keith J. I agree with his lordship's judgment, its reasons and conclusions.

2. For my part, I reach the view that the assessors should be directed by the judge in his summing up that if they are not satisfied that the

confession was given voluntarily, in the sense that it was obtained without oppression, ill-treatment or inducements, or conclude that it may not have been given voluntarily, they should disregard it altogether.

3. In Fiji the judge may admit the confession into evidence after the voir dire, and yet subsequently at the conclusion of the trial proper he or she may arrive at a different opinion. The defence may pursue in cross-examination in the trial proper the same issues of involuntariness in order to persuade the judge as well as the assessors of the rightfulness of such an allegation. The prosecution however bears the burden in the trial proper, as in the voir dire of proving that the confession was voluntary, and must do so to the standard beyond reasonable doubt, as with all other elements of proof required to prove the charge. The position in ***Mushtaq*** *[2005] UKHC 25 is to be preferred to that of* ***Chan Wei Keung v The Queen*** *[1967] 2 AC 160."*

[11] The sole ground of appeal raised in the current appeal has to be determined in the light of the decision in **Maya** and in that context the learned trial judge's directions to the assessors are devoid of any illegality or misdirection. I must emphasise that in so far as Fiji is concerned the dynamics involved in deciding on where the truth lies in a criminal case is completely distinguishable from other common law jurisdictions where the trials are conducted by the Judge along with the jurors, who are the triers of facts. In Fiji the trial judge should express his own opinion on all matters in his own judgment, which is a stand-alone exercise and unique in its own nature. I have carefully examined the learned trial Judge's ruling on the voire dire, his summing up and his judgment and I find that the learned trial Judge has assiduously followed the correct procedure in dealing with the evidence of the confession by the appellant. Even if the evidence of the confession of the appellant should be disregarded, there is ample evidence upon which a court of law can place reliance in this case to arrive at the conclusion of guilt of the appellant.

[12] In the circumstances I hold that the appellant's sole ground is devoid of any merit. Hence his renewal application shall fail.

Prematilaka, JA

[13] I have read in draft the judgment of Gamalath JA and agree that the Appellant's Application for extension of time to file an application for leave to appeal should be refused.

Bandara, JA

[14] I have read in draft the judgment of Gamalath JA and agree with the reasons and conclusions.

Order of the Court:

1. *The renewal application for enlargement of time is refused.*
2. *The appeal dismissed.*

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL