IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 33 OF 2017
(High Court HAC 15 of 2013 at Lautoka)

BETWEEN : **SUDESH MANI NAIDU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Waqainabete for the Appellant**
Ms S Kiran for the Respondent

Date of Hearing : **29 October 2019**

Date of Ruling : **27 November 2019**

RULING

[1] Following a trial in the High Court the appellant was convicted on one count of murder and one count of robbery. The three assessors had returned unanimous opinions of not guilty on both counts. However the learned trial Judge disagreed with the assessors' opinions and, as he was entitled to do under section 237 of the Criminal Procedure Act

2009 found the charges proved and convicted the appellant. On 27 February 2017 the appellant was sentenced to the mandatory sentence of life imprisonment for murder under section 237 of the Crimes Act 2009 with a minimum term of 17 years before a pardon may be considered.

[2] This is his timely application for leave to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal: **Naisua – v- The State** [2013] FJSC 14; CAV 10 of 2013, 30 November 2013.

[3] The appellant filed an amended notice of appeal on 18 March 2019 relying on the following grounds:

> *"1. That the trial judge erred in law and in fact when he failed to consider at all in his voire dire Judgement and also in his written reasons for judgment and sentence the evidence of Dr Kelera Tabuaniqili when the medical report shows the injuries on the Appellant's left ankle which was consistent with his alleged police brutality.*
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> *2. The trial judge erred in law and in fact when he failed to consider the serious prejudice caused to the appellant when the interview was conducted and recorded in Hindustani language when expressed stated in his record of interview that he cannot read nor write in Hindustani language which should made the interviewing officer to ask for any other language options which the interview could be conducted and recorded in for verification purposes.*
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> *3. That the trial judge erred in law and in fact when he overturned the unanimous find of not guilty by the 3 assessors without considered the overwhelming doubts and inconsistencies in the evidence of Ms Savitri on the issue of identity of the person who was seen coming and going from the deceased's residence around the material time and high possibility that she was mistaken.*
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> *4. That the learned trial judge erred in law and fact when he disagreed with the opinions of the assessors of Not Guilty for the two counts of Murder and Robbery especially when he found that the assessors*

opinions were not perverse and that it was open to them to reach such conclusion on the evidence."

[4] The first ground relates to the medical evidence called by the appellant during the voir dire hearing and again at the trial. The learned Judge has made no reference to the medical evidence in his written voir dire ruling dated 9 March 2017 that was delivered ex tempore on 17 February 2017. The issue for the judge at the voir dire was to determine whether the prosecution has established beyond reasonable doubt that the confession was made voluntarily. That process obviously requires an analysis of all the evidence. Admissibility of evidence is regarded as a question of law. On the basis of the decision of this Court in **Nacagi –v- the State** [2015] FJCA 156; AAU 49 of 2010, 3 December 2015. The appellant may proceed as of right under section 21(1) (a) of the Act.

[5] The appellant also claims that the Judge has failed to analyse and assess the medical evidence given at the trial in his judgment dated 27 February 2017. Certainly in the summing up to the assessors delivered on 24 February 2017 the Judge makes no reference to the medical evidence. In his reasoning the learned Judge has touched upon the evidence in paragraph 10. In my judgment the issue of voluntariness was a live issue at the trial and it is arguable that the reasoning is not sufficiently cogent to support the trial Judge's decision to disagree with the unanimous opinions of the assessors. Leave to appeal is granted on this aspect of ground one.

[6] Ground 2 is concerned with the use of the Hindustani language for conducting and recording the caution interview. The relevant questions and answers are reproduced in the respondent's submissions at paragraph 18. It was not suggested by Counsel for the appellant that the questions and answers were in dispute. It is apparent that the appellant stated that he wanted to be interviewed in Hindustani because he speaks and understands Hindustani. He admitted that he cannot read nor write Hindustani. The appellant did not object to being questioned in Hindustani and nor did he object to the interview being written in Hindustani. At the conclusion the interview was read back to the appellant in Hindustani. In my judgment this ground is not arguable and leave is refused.

[7] Ground 3 relates to the issue of the identification of the appellant as the person who committed the offences. The learned Judge has summarized the evidence in relation to identification in detail in paragraphs 37 to 48 of the summing up. In his judgment he has concluded that the evidence is credible. The appellant has not submitted any sound reason why that conclusion should be challenged. This ground is not arguable and leave is refused.

[8] Ground 4 relates to the inconsistency of the observations of the trial Judge in disagreeing with the opinions of the assessors while at the same time accepting that those opinions were not perverse and that their opinions were open to them on the evidence. Accepting the observations of Goundar JA in **Bavesi –v- The State** [2017] FJCA 68; AAU 44 of 2015, 19 June 2017 leave is granted on this ground.

Orders:

1. *Leave to appeal is granted on grounds 1 and 4.*
2. *Leave to appeal is refused on grounds 2 and 3.*

W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL