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

CRIMINAL APPEAL NO. AAU 022 OF 2022
[Lautoka High Court: HAC 112 of 2018]

BETWEEN : **MUNI NADAN**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Mr M. Fesaitu for the Appellant
Ms S. Shameem for the Respondent

Date of Hearing : 17 March, 2025

Date of Ruling : 25 March, 2025

RULING

Background

[1] The appellant was charged with the following offences:

Count 1

Murder: Contrary to section 237 of the Crimes Act 2009.

Muni Nadan on 6th day of June 2018 at Sigatoka in the Western Division murdered **Asbin Nair** by stabbing him with a cane knife.

Count 2

Breach of Suspended Sentence: Contrary to section 28 (1) (2) and section 26 of the Sentencing and Penalties Act 2009.

Muni Nadan on 6th day of June 2018 at Sigatoka in the Western Division breached the suspended sentence of 10 month's imprisonment which was suspended for 2 years dated 29th day of May 2018 vide Sigatoka Criminal Case file Number 418/16 by committing another offence namely Murder.

[2] The Appellant was convicted of both offences following a trial in the High Court. On 25th February 2022 the Appellant was sentenced to a mandatory Life Imprisonment with a minimum term of 18 years and 9 months to be served before he can be considered for pardon.

[3] The Appellant being dissatisfied with the decision, filed a timely application to appeal against conviction and sentence. The Legal Aid Commission on his behalf filed an Amended Notice for Leave to Appeal against conviction on 19 February 2025. The appeal against sentence has been abandoned formally by the Appellant completing Form 3 on 17th March 2025.

The facts

[4] The learned Judge in the Sentencing decision had summarized the facts as follows:

> *"On 6th June 2018 at about 8:41pm the deceased was walking home when the accused who was hiding beside the road with a cane knife struck the deceased from behind multiple times between the neck and the shoulder. The accused had seen the deceased after a car had overtaken the deceased. The injuries on the deceased were so severe that he died instantly. The accused then dragged the deceased body down the slope onto a vacant land. After sometime, the son of the deceased was returning home, with his mobile phone torch light saw blood on the road and his father's flip flops. Upon further search in the area he saw his father's body lying on the slope of the vacant land. The matter was reported to the police. The post mortem examination revealed the cause of death of the deceased to be a complete*

transection or cut of the vertebral artery, internal carotid and cervical spinal cord by the use of a sharp object.

Upon investigation the accused was arrested, caution interviewed and then charged. Furthermore, on the 29th May, 2018 the accused was convicted by the Sigatoka Magistrate's Court for the offence of abduction of young persons. In this case the accused was sentenced to 10 month's imprisonment which was suspended for 2 years. However, during the operational period of the suspended sentence the accused committed the offence of murder."

Grounds of Appeal

[5] The Appellant's timely application for leave to appeal against conviction is based on the following grounds of appeal contained in the Amended Notice for Leave to Appeal Against Conviction filed on the 19th of February, 2025 as follows:

Ground 1

The learned trial Judge had erred in law by admitting the Appellant's caution interview and charge statement into evidence given that;

(a) His Lordship in the Voir Dire ruling had found prosecution to have not proven beyond reasonable doubt that the admissions obtained by the police officers in the caution interview and charge statement were given voluntarily and freely by the Appellant; and

(b) That section 14(2) (k) of the 2013 Constitution is not applicable in such instance given that His Lordship had found that the admissions were obtained involuntarily.

Ground 2

The learned trial Judge had erred in law and in facts by relying on the admissions in the caution interview and charge statement to convict the Appellant which has caused a substantial miscarriage of justice to the Appellant in light of the issues of voluntariness.

Ground 3

The learned trial Judge had erred in law by admitting the Appellant's confessions made to the Justice of Peace without considering that the Justice of Peace is a person of authority.

The Test

[6] Under section 21 (1)(a) of the Court of Appeal Act ("the Act") , a person convicted on a trial held before the High Court may appeal to this Court against his or her conviction on any ground of appeal which involves a question of law alone.

[7] Under section 21(1) (b) of the Act, a person convicted on a trial held before the High Court may appeal to this Court, with leave of the Court against conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact on any ground which appears to the Court to be a sufficient ground of appeal.

[8] For a timely appeal, the test for leave to appeal against conviction and sentence is *"reasonable prospect of success";* **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018); **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018), and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019]FJCA 87;AAU0057 of 2015 (06 June 2019) and **Waqasaqa v State [2019]** FJCA 144;AAU83 of 2015 (12 July 2015) ,that will distinguish arguable grounds (see **Chand v State** 2008] FJCA 53 ; AAU0035 of 2007 (19 September 2008), **Chaudry v State [2014]** FJCA106;AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14;CAV10 of 2013 (20 November 2013)) from non-arguable ground (see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019).

Appellant's Submissions

[9] **Ground 1-** The Appellant had challenged the admissibility of his record of interview and charge statement during the High Court trial. It is submitted that the trial Judge was erroneous to have admitted into evidence the caution statement and charge statement as raised in this ground of appeal. He submits that admissibility of evidence is a question of

law, and the ground should be left for the Full Court to consider. In **Hakik v State** [2017] FJCA 184; AAU0047.2015 (17 October 2017), Justice Grounder stated the following:

> *"Admissibility of evidence involves a question of law alone. Leave is not required to appeal on a ground that involves a question of law alone….."*

[10] The Appellant had in the Voir Dire challenged and objected to the admissibility of the two documents. He contended that he was subjected to assault, harassment and threats by the police during the time of arrest and at the police station. The Appellant submits that he did not give his caution interview and charge statement voluntarily. That he was fearful for his life.

[11] The Appellant submits that at the Voir Dire the trial Judge had accepted that:

(i) The Appellant was assaulted by the police and for the reason he was scared during the interview (see paragraph 120 of Voir Dire ruling).

(ii) The Appellant had told the medical doctor who examined him that he was assaulted by police (see paragraph 119 of Voir Dire ruling).

(iii) The trial Judge had given credence to the Appellant's contention of the assaults as supported by the medical doctor's finding (paragraph 118 of Voir Dire ruling).

(iv) In considering the totality of the evidences adduced in the Voir Dire inquiry, the trial Judge held that the prosecution had failed to prove beyond reasonable doubt that the Appellant had voluntarily given the statements in the caution interview and charge statement.

[12] In **Ganga Ram and Shiu Charan,** Criminal Appeal No. 46 of 1983 (13 July 1984) (unreported) had outlined the two grounds for the Court's consideration when determining the admissibility of a confessional statement:

> *"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 or 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*** *[1914] AC 599;* ***DPP v Ping Lin*** [1976] AC 574, Secondly *even if such voluntariness is established there is also a 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 will, by trickery or by unfair treatment:* ***Regina v Sang*** *[1979]UKHL 3;(1980) AC 402.This is a matter of over overriding discretion and one cannot specifically categorize the matters which might be taken into account."*

[13] It is the Appellant's view that since the first consideration in **Ganga Ram and Shiu Charan v State** (supra) has been established, it is not required for the trial Judge to turn to the second consideration of having to exercise his discretion whether to exclude the caution interview and charge statement. The Appellant submits that had the trial Judge found that the statements were given voluntarily by the Appellant, only then was it necessary for the trial Judge to consider exercising his discretion whether to exclude the confession on the ground of unfairness.

[14] The Appellant submits that despite a determination been made by the trial Judge on the issue of voluntariness, the trial Judge had proceeded to admit the caution interview and charge statements into evidence at the High Court trial , relying on section 14(2)(k) of the Constitution. The section reads as follows:

"Every person charged with an offence has the right- not to have unlawfully obtained evidence against him or her unless the interest of justice required it to be admitted;"

[15] The Appellant submits that section 14(2) (k) of the Constitution is not applicable in the context of this case. That, had the caution interview and charge statements been given voluntarily, the issue of discretion would have been alive to the trial Judge .In such circumstance , section 14(2)(k) of the Constitution would have been applicable if the trial Judge was to determine whether there was unfairness in the manner the confessions were obtained by police.

[16] The Appellant referred to **State v Rokobulou** [2020] FJHC 1038; HAC063.2018 (5 November 2020), which discussed section 14(2) (k) of the Constitution and the discretion of the court to exclude on unfairness. Excepts are:

*"When the admissibility of a particular piece of evidence is challenged on the basis of unfairness, a finding that the relevant evidence in question was obtained in an unfair or an unlawful manner would not ipso facto render that evidence inadmissible. The court is required to exercise discretion in deciding whether or not to exclude the relevant (unfairly/unlawfully obtained) evidence as explained in the case of **Ganga Ram and Shiu Charan v R** (Criminal Appeal 46 of 1983 delivered on 13th July 1984) when the Court of Appeal was dealing with the issue of determining the admissibility of a confession on the ground of unfairness.*

***Secondly,** even if such voluntariness is established there is also a need to consider whether the more **general ground of unfairness** exists in the way in which police behaved, perhaps by breach of the Judges' rules falling short of overbearing will, by trickery or by unfair treatment **R v Sang** [1979] UKHL 3;[1980] AC 402, 436 at C-E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account. [Emphasis added}*

*As Shameem J pointed out in the case of **State v Kumar** [2002] FJHC HAC0003D.2002S (11 July 2002), the discretion to exclude must be exercised after balancing the accused's rights and the public interest rights. In the said case of **Kumar** (supra) Shameem J observed thus;*

*The effects of non-compliance with section 27(1) (c) of the Constitution, or of a finding an ill-informed waiver, may be the exclusion of any statements obtained thereby (**State v Mool Chand Lal** Crim. Case 3/99 Labasa High Court).The discretion must be exercised after balancing the accused's rights, and public interest rights to the efficient investigation of crime. [Emphasis added]*

Thus, a court exercising the discretion in deciding whether or not to exclude evidence on the basis of unfairness should consider whether the probative value of such evidence is outweighed by the prejudice caused to the relevant accused.

Admittedly, the provisions of section 14(2) (k) of the Constitution of the Republic of Fiji ("the Constitution") also confirms the position that there is no general principle in Fiji that unlawfully obtained evidence is inadmissible. The said section 14(2) (k) of the Constitution provides thus; "Every person charged with an offence has the right…. Not to have unlawfully obtained evidence adduced against him or her ***unless the interest of justice require it to be admitted;"*** *[Emphasis added]*

Thus, according to the clear provision of the Constitution alluded to above, it is necessary for the court to consider the interests of justice even if the court finds that a Secretary of State for the Home Department (no.2 deciding whether such unlawfully obtained evidence should not be admitted or ruled inadmissible. I would reiterate that, in Fiji there is no general principle that unlawfully obtained evidence is inadmissible."

[17] According to the Voir Dire ruling the allegations raised by the Appellant in the Voir Dire inquiry against the police was the use of assault, threats and intimidation in obtaining his confessions. In other words, the confessions attributed to him by police was extracted by ill-treatment. Under the common law there is a general boarder principle that evidence obtained by torture is inadmissible (**A v Secretary of State for the Home Department (No.2**) [2006] 3 AC 221.

[18] Appellant submits that Fiji is a State party to the UN Convention Against Torture and Other Cruel Inhuman, or Degrading Treatment or Punishment (UNCAT) Article 15 of the convention provides that;

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

Section 13(1) (d) of the Constitution provides that;

> *"Every person who is arrested or detained has the right- not to be compelled to make any confession or admission that could be used in evidence against that person."*

[19] **Ground 2-** The Appellant submits that, in the Voir Dire inquiry, the trial Judge had already determined that the Appellant had not given his caution interview and charge statement voluntarily. The confessions were admitted into evidence not because it was voluntarily given but reliance on section 14(2) (k) of the Constitution. The Appellant had continued to raise his objections to the admission of the caution interview and charge statement at the trial. Since the two confessions were admitted in evidence, it has to be determined whether the confessions are true, and are sufficient for the conviction and the weight to be placed on them. In **Chand v State** [2016] FJCA 61; AAU0015.2012 (27 May 2016) at [50] stated;

> *"In **Chan Wei Keung v The Queen** [1967] 2 WLR 552 the Privy Council held that the voluntariness of a confession is a test of admissibility and that it is a matter for the judge to decide on the voir dire, but failing in the matter of the voir dire,* ***the defence was entitled to canvass again the question of voluntariness and to call again the evidence relating to that issue but such evidence goes to the weight that the jury would attach to the confession."*** (Highlight is for emphasis)

[20] That in the present case, the trial Judge had at paragraph 118 of the Judgment directed himself on the weight of the issues as follows:

> *"Before this Court accepts the answers, this Court must be satisfied that the answers were given by the accused and they are truth. It is entirely a matter for me to accept or reject the answers given in both the documents…"*

[21] The trial Judge in the judgement did not make any assessment on the issue of voluntariness had not changed his mind as to the issue of voluntariness. The trial Judge had only considered the making of confession and its truth in paragraph 153 of the judgement, and no reference is made on the voluntariness aspect. The trial Judge had not

revisited the issue of voluntariness at and during the trial and it can be gathered that he had not changed his mind on the issue of voluntariness, from after the Voir Dire. He found support in the case **Vakarusaqoli v State** [2020] FJCA 57; AAU 032.2017 (20 May 2020), per Prematilaka, at paragraph [24] stated;

> *"It is an important question of law as to whether the same principles would apply mutatis mutandis to a trial by a Judge (without assessors) who has admitted a confessional statement at the voir dire as having been made voluntarily but the accused has continued to agitate the issue of voluntariness and kept that alive at the trial. Going by the existing decisions including Maya the learned Magistrate need not have gone into the question of voluntariness in his judgment unless he had changed his mind during the trial. What about the issue as to whether the accused made the confession, is it true and sufficient for the conviction (that is the weight or probative value)?"*

[22] The Appellant referred also to **Maya v State** [2015] FJSC 30; CAV009.2015 (23 October 2015), where the Supreme Court made the following observations:

> *"....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 would 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.*
>
> *The problem does not arise in this case. Although the judge did not give reasons why he agreed with the assessors, he would unquestionably have said something if he had changed his mind about the voluntariness of the confession in the course of*

the trial. So the correctness or otherwise of the direction to the assessors in para 16 of his summing - up could have no impact on the final 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] The Appellant submits that, there is a serious misdirection for the trial Judge to have directed himself at paragraph 118 of the Judgment about the making of the admission and its truthfulness. He submits that, it is a material irregularity for the trial Judge to have made findings that the Appellant had made admissions in the caution interview and charge statement and the admissions being true as stated in paragraph 153 of the judgment. With the voluntariness issue not alive to the trial Judge, no weight should have been placed at all in relying on the admission in the caution interview and charge statement.

[24] The Appellant submits that although the trial Judge had stated (paragraph 155 of Judgment) on not giving any weight to the caution interview and charge statement completely, to the contrary, the trial Judge had relied (paragraph 161) on the admissions in the caution interview and charge statement. This is because in paragraph 161 of the judgment the trial Judge had considered all the evidences having been satisfied as to the guilt of the Appellant. The trial Judge had relied on the admissions in the caution interview and charge statement to find the Appellant guilty. There is no direct evidence as to who had witnessed the events that had taken place on the evening of the day in question. The admissions in the caution interview and the charge statement would have placed the Appellant at the scene and his conduct in carrying out the unlawful acts that led to the deceased's death. Therefore, there is a substantial miscarriage of justice as a consequence.

[25] **Ground 3-** The evidences of the Justice of Peace at paragraphs 44 to 48 of the judgment is that the police had called him to talk to the Appellant and at the police station. The Appellant had told him that he was having an affair with the deceased's wife and he (Appellant) had struck the deceased with a knife. The trial Judge had accepted the

evidences of the Justice of Peace to be reliable and that the Appellant had confessed the murder to the JP and is the truth (paragraph 155-156 of judgment).

[26] In **State v Panapasa** [2011] FJHC 694; HAC034.2009 (5 April2011) the Court had stated;

> *"As a matter of general rule, a confession made by an accused to a person in authority out of court is admissible only if the confession was made voluntarily."*

The Appellant relied on **R v Grandinetti** as discussed in **State v Panapasa** (supra) and Fiji Police Force Standing Orders on the meaning of "*person of authority"*.

[27] In conclusion the Appellant submits that the appeal grounds against conviction are meritorious and to be mooted before the Full Court of Appeal for its determination.

Respondents Case

[28] In its written submissions the Respondent dealt with the three grounds of appeal collectively as the arguments on the grounds will overlap. It agreed that in Ground 1, the Appellant has raised a question of law which is to be determined by the Full Court. However, the Respondent submits that the learned trial Judge was not wrong to admit the confessions into evidence after concluding that it was in the interest of justice to do so. It states that there is no law in Fiji that dictates that inadmissible evidence must outright be excluded. It is simply a balancing act between the probative value of the evidence and the prejudicial effect to the Appellant. **(**Relied on several cases including **State v Kumar; Ganga Ram & Shiu Charan v State).**

[29] On Ground 2 concerning the issue of voluntariness, the Respondent submits that, the learned trial Judge had expressly stated that he had found that the answers in the caution interview and charge sheet were not obtained freely or voluntarily, hence this argument is moot. In relation to Ground 3 on the involvement of the Justice of the Peace the Respondent submits that the Appellant did not raise the issue at the Voir Dire therefore, the Appellant cannot argue the matter as a ground of appeal. The Respondent submits that the grounds raised are not meritorious and therefore, do not have any prospect of success.

Analysis

[30] In this analysis I have considered the grounds of appeal and the written and oral submissions and the respective cases of the parties, including the authorities cited and the applicable law. The Appellant was convicted of two offences following a trial in the High Court at Lautoka. He is appealing against his conviction on 3 grounds which are closely connected. The grounds may be restated as follows:

A. The trial Judge had erred in law because, having determined that the prosecution had not proven beyond reasonable doubt that the Appellant's confessions were given voluntarily and freely, he should not have applied section 14(2)(k) of the Constitution into admitting the said confession on the basis that ***"the interests of justice require it to be admitted".***

B. The trial Judge had erred in law and in facts by relying on the confessions/admissions in the caution interview and charge statement to convict the Appellant, which has caused a substantial miscarriage of justice given that the admission/confession was not voluntarily given by the Appellant.

C. The trial Judge erred in law by admitting the Appellant's confession made to the Justice of the Peace who is ***"a person of authority".***

[31] **Ground 1** is presented as a question of law. I agree with both the Appellant and the Respondents that the issue be left for the Full Court to consider and make a determination on: see **Hakik v State** (supra), although, the Respondent argues that the learned trial Judge was not mistaken .

[32] The Appellant contends that it was not open to the trial Judge to resort to section 14(2) (k) as he had decided that the confessions was not obtained voluntarily. Further, that, section 14(2) (k) could only be used when there is a determination that the confessions were voluntary, but there were issues of unfairness in the method used in obtaining it.

[33] In concluding the Voir Dire Ruling, the learned trial Judge stated:

"128. Upon considering the evidence adduced by the prosecution and the line of defence put forward by the accused, this court is not satisfied beyond reasonable doubt that the admissions obtained by the police officers in the caution interview and charge statement were given by the accused freely and voluntarily. I do not prefer the evidence given by the police officers who were involved in the investigation, interview and charge of the accused.

129. However, before coming to any conclusion about the admissibility of the caution interview and the charge statement I have considered section 14(2)(k) of the Constitution which states that any unlawfully obtained evidence against an accused is generally inadmissible unless the interests of justice require it to be admitted. I have once again looked at the evidence holistically particularly the admissions contained in the caution interview and charge statement.

130. The admissions are coherent, gives a clear account of the facts in issue by linking the different pieces and most of all are admissions that would only have been known to the accused. In this regard, the interests of justice weigh in favour of the prosecution, therefore after much consideration I have come to the conclusion that the probative value of the admissions contained in the caution interview and the charge outweigh any prejudice caused to the accused.(Underlining is for emphasis)

[34] It is clear from the above paragraphs that the learned trial Judge (Court), after consideration of the submissions obtained from the prosecution and the defence, is not satisfied beyond reasonable doubt that the admissions in the caution interview and charge statement were not freely or voluntarily given by the accused. Further, that the learned trial Judge had considered the requirement of ***the interests of justice*** as weighing in favour of the prosecution, and had concluded that the probative value of the admissions contained in the caution interview and the charge statement outweigh any prejudice caused to the accused. He then ruled that the prosecution may tender in evidence at the trial the caution interview of the accused from 9th June till 11th June, 2018 and the charge statement dated 11th June 2018.

[35] The law on admissibility of a confession was discussed in this Court in the case **Ganga Ram v Shiu Charan** (supra) where the grounds for the Court's determination of the admissibility of a confessional statement was outlined.

(a) Firstly, it must be established affirmatively (by the prosecution) beyond reasonable doubt, that the statement were voluntary in the sense that they were not procured by improper practices such as the use of force, threat or inducement by offer of some advantage : **Ibrahim v R** [1914] AC 599*;* **DPP v Ping Lin**(1976) AC 574.

(b) Secondly, even if such voluntariness is established there is also a 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 will, by trickery or by unfair treatment: **Regina v Sang**[1979]UKHL 3; (1980) AC 402. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account.

[36] The Respondent argues that the learned trial Judge was not wrong to admit the confessions into evidence after concluding that it was in the interests of justice to do so: **State v Kumar; Ganga Ram and Shiu Charan v R; State v Isoof; Sate v Rokobulou.** Further, there is no law in Fiji that dictates that inadmissible evidence must outright be excluded. It is simply a balancing act between the probative value of the evidence and the prejudicial effect to the Appellant. The interests of justice (section 14(2) (k) needs to be considered also from the effect of its application. In paragraphs 9 and 10 of **State v Rokobulou** (supra) Justice Perera stated:

"Thus, a court exercising the discretion in deciding whether or not to exclude evidence on the basis of unfairness should consider whether the probative value of such evidence is outweighed by the prejudice caused to the relevant accused. Admittedly, the provisions of section 14(2) (k) of the Constitution of the Republic of Fiji 2013 ("the Constitution") also confirms the position that there is no general principle in Fiji that unlawfully obtained evidence is inadmissible, The said section 14(2)(k) of the Constitution provides thus;

"Every person charged with an offence has the right……. Not to have unlawfully obtained evidence used adduced against him or her ***unless the interest of justice require it to be admitted.****"*

"10. Thus according to clear provisions of the Constitution alluded to determine., it is necessary for the court to consider the interests of justice even if the court finds that a particular piece of evidence in the relevant case was obtained unlawfully (or unfairly), in deciding whether such unlawfully obtained evidence should not be admitted or ruled inadmissible. I would reiterate that, in Fiji there is no general principle that unlawfully obtained evidence is inadmissible."

In line with section 21 (1) of the Court of Appeal Act, this ground is properly for the Full Court to consider and make a determination on.

[37] **Ground 2 -**The Appellant submits that the learned trial Judge had seriously misdirected himself on two accounts, firstly, it appears that he had not changed his mind as to the issue of ***voluntariness.*** The Respondent submits that, the learned trial Judge had expressly stated that he had found that the answers in the caution interview and charge statement were not obtained freely, hence the Appellant's argument on this aspect is moot. This ground is closely linked to Ground 1.It is arguable whether the trial Judge changed his mind on the issue of voluntariness at the trial in view of his comments in paragraphs 118,121 and 153 of the judgment after the trial, and despite the Appellant's submissions –see paragraphs 119 and 120 of the judgment.

[38] The allegations of serious misdirection were anchored on what the learned trial Judge stated in paragraphs 118 and 153 of the Judgment. To place the allegation in its proper perspective, paragraphs 117 to 121 (Caution Interview and Charge Statement) of the Judgment, and also paragraph 153 (Analysis), are reproduced below, as follows:

"117. The caution interview and charge statement of the accused is before this court, the answers in these documents are for consideration in evidence and not the

questions asked. This means counsel was putting to these witnesses that the admissions

118. Before the court accepts the answers, this court must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for me to accept or reject the answers given in both the documents. If the caution interview or the charge statement the name of another person is mentioned that is not evidence against the other person which has been disregarded completely.

119. The counsel for the accused during the cross examination of the interviewing and charging officers had put the allegations that the admissions in both these documents were obtained due to assault, aggression, trick, pressure, intimidation, without opportunity to read, lack of fairness, force, fabrication and against the will of the accused.

120. This means counsel was putting to these witnesses that the admissions made by the accused in his caution interview and charge statement was not voluntarily given by him and therefore this court should disregard those admissions. Furthermore, the defence also contended that the admissions in the charge statement are to be disregarded completely since the admissions were matched with the caution interview to make the admissions look authentic.

121. It is for this court to decide whether the accused made those admissions in the caution interview and the charge statement and whether those admissions were the truth. If I am not sure whether the accused made those admissions in those documents then I will disregard them. If I am sure that those admissions were made by the accused, then I should consider whether those admissions are the truth. What weight I choose to give to those admissions is a matter entirely for me."
(Underlining for emphasis)

……

"153. Both these officers were cross examined at length and they were not discredited. This court is satisfied beyond reasonable doubt that it was the accused

who had made the admissions in the caution interview and the charge statement and which was the truth. This court cannot ignore the fact that the narration contained in the caution interview and the charge statement would have be only known to the accused and not to the police….." (The two officers are the interviewing officer and the charging officer).

[39] The Appellant submits that with the voluntariness issue not alive to the trial Judge, no weight should have been placed at all in relying on the admissions in the caution interview and charge statement. The application of **Chand v State** (supra), and **Chan Wei Keung v The Queen** (supra) to this case has to be viewed from the differing factual situations and the application of section 14(2) (k) of the constitution in this case. **In Chand** the trial was with the assessors, which is not the case here. There are other differences.

[40] The Appellant appears to be mistaken in his submissions on the learned trial Judge's treatment of the evidences in sections 155 and 160 of the Judgment. The Appellant submits that, although the trial Judge in paragraph 155 of the Judgement had stated not giving any weight to the caution interview and charge statement completely, however, to the contrary it seems in paragraph 161 of the Judgment, the trial Judge relied on the admissions in the caution interview and charge statement. That in paragraph 161 of the Judgment the trial Judge had considered all the evidences having being satisfied as to the guilt of the Appellant, which means that the learned trial Judge relied on the admissions in the caution interview and charge statements to find the Appellant guilty. With respect, in paragraph 155 of the Judgment, the learned trial Judge had said, ***Arguably****, if I do not give any weight to the caution interview and the charge statement……."* which is quite different from saying he did not give any weight to the caution interview and charge statement. This ground is arguable.

[41] **Ground 3-** It appears the Appellant is arguing that the admissions/confessions made before the Justice of the Peace ought to have been disregarded by the learned trial Judge as a Justice of the Peace*" is a person of authority".* In **State v Panapasa** (supra) the Court had stated:

"As a matter of general rule, a confession made by an accused to a person in authority out of court is admissible only if the confession was made voluntarily."

[42] In **R v Grandinetti** [2005] a SCR 27, 2005 SCC5 (cited in **Panapasa v State)** the Supreme Court of Canada held:

"To ensure fairness and guard against improper coercion by the state, statements made out of court by an accused to a person in authority are admissible only if the statements were voluntary. The question of voluntariness is not relevant unless there is a threshold determination that the confession was made to "a person in authority". A "person in authority" is generally someone engaged in the arrest, detention, interrogation or prosecution of an accused."

[43] Did the Appellant complain that the Justice of the Peace at the time of his interview with him was a person of authority, meaning, a person who is generally involved with the detention, interrogation and prosecution of an accused or a person who is likely to act against his interests as an accused/suspect? There is no evidence adduced to that effect. There is also no evidence that there was an inducement on the giving of confession to the Justice of the Peace. The FSO refers to "the inducement". In paragraph 31 of the Appellant's written submissions reference is made to ;

"... more serious offences, and in particular all offences which are normally expected to be tried by the Supreme Court, an accused person who has confessed will be taken before a justice of the Peace of the same race as the accused (if practicable), or a magistrate as soon as possible to be asked whether he/she has any complaints against the police...."

[44] It would appear from above discussion that the FSO does not assist the Appellant .There is no complaint made during the interview nor at the Voir Dire that the Justice of the Peace is a person of authority. The purpose of reference to a Justice of the Peace is confined to giving an accused/suspect an opportunity to raise any complaint against the police regarding his situation at that stage. The Respondent contends that the issue was not raised at the trial, and cannot be raised now. The Court is not informed of when the FSO was

last updated – it still refers to trial in the Supreme Court. In any event, in considering the passage cited from the Canadian authority and, the operational guidelines in the FSO, I am of the view that *"person of authority"* does not include a Justice of the Peace. This ground is not arguable. It has no merit.

Conclusion

[45] In consideration of the foregoing, Ground 1, is properly for the Full Court to consider. Ground 2 in the application for leave to appeal against conviction has reasonable prospect of success. It is arguable. Ground 3 has no merit. It is not arguable.

Order of Court

1. *Ground 2 of Application for Leave to Appeal Against conviction is allowed.*
2. *Ground 3 of Application for Leave to Appeal against Conviction is refused.*

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL