

**BHARAT LAL, JAYANT LAL, MOREEN LATA v STATE
(AAU0044 of 1145 of 2011; 0047 of 2011)**

COURT OF APPEAL — APPELLATE JURISDICTION

5 CHITRASIRI JA

15, 21 March 2012

10 **Criminal law — appeals — murder — leave to appeal against conviction — leave to appeal sentence — alleged bias — voluntariness of confessions — alleged assault — period of time in custody — directions to assessors — Court of Appeal Act s 21(1)(b) — Court of Appeal (Amendment) Decree s 2 — Penal Code ss 199, 200 — Registrar’s Practice Directions r 3.**

15 The appellants were convicted of murder and sentenced to life imprisonment with a non-parole period of 20 years. The second and third appellant sought leave to appeal against conviction. All three appellants sought leave to appeal against sentence. The grounds of appeal related to the voluntariness of the confessions admitted into evidence and alleged bias of the trial judge.

20 **Held —**

(1) When it comes to the voluntariness of confessions made by the accused, the period of time that the accused were detained at the police station is important. The confessions by the accused were made while they were kept in detention for three days. Such a background may create doubt as to the voluntariness of the facts that they related to the police where they were in custody. It is one of the matters that should have been considered by the assessors. It does not appear that any clarification on this point was made by the judge when he directed the assessors in his summing up.

25 Leave to appeal against conviction of first appellant refused. Leave to appeal against conviction of second and third appellants granted. Leave to appeal against sentence granted.

30 **Cases referred to**

Koya v State [1998] FJSC 2, cited.

State v Shanker [2003] FJHC 337, considered.

35 *M. Savou* for the first and second Accused-Appellants.

Iqbal Khan for the third Accused-Appellant.

P. Bulimainaivalu for the Respondent.

40 [1] **Chitrasiri JA.** Three Appellants have filed three separate applications moving for leave of this court to appeal against the conviction and sentence imposed on them by Justice Salesi Temo, High Court Judge sitting at the Suva High Court. Even though three separate applications have been filed, the trial against the three Accused-Appellants was taken up in the same case. They all were convicted for the offence of murder contrary to Section 199 and 200 of the Penal Code [Chapter 17] for committing murder of Shalesh Prakash on the 21st day of June 2005. All of them were found guilty for the same charge and each were sentenced to life imprisonment with a non-parole period of 20 years imprisonment. Grounds of appeal advanced by the three Appellants are also almost similar. Hearing of all the three applications were taken up together in this Court as well. Therefore, this ruling will apply to all the three applications of the
50 respective appellants.

[2] At the commencement of the hearing, learned Counsel for the first and second appellants informed Court that the first accused-appellant is moving to withdraw his appeal against the conviction but wished to proceed with the appeal filed against the sentence imposed on him. Accordingly, I allow the application
5 for the said withdrawal of the appeal against the conviction of the 1st accused-appellant. In the circumstances, the said leave to appeal application of the first accused-appellant filed against the conviction is hereby dismissed. Accordingly the conviction imposed on him for murder, contrary to Section 199 and 200 of the Penal Code should stand unaltered.

10 [3] At the commencement of the submissions of Mr Iqbal Khan who appeared for the 3rd accused-appellant stated that he is unable to present his case without the copies of the documents marked in evidence at the trial, particularly the medical report of his client the third accused-appellant. He also insisted to have the copies of the Judge's notes to support his case. Learned Counsel made this
15 request since he intended to challenge the admissibility of the confession made by his client. He further submitted that the confession was obtained consequent to threat or inducement imposed on her.

[4] He made the request referred to in the preceding paragraph relying upon r 3 of the Registrar's Practice Directions No 1 of 1999 dated 16th December 1999.

20 [5] The said Rule reads thus:

'3. Judges' Notes of Evidence As soon as the notice of appeal is filed and served on the Registrar, arrangements will be made by the Registrar for the notes of evidence to be transcribed. As soon as transcript is ready the Registrar will advise the appellant to collect it upon payment of the appropriate charges.'

25 [6] At this stage the clerk in the Court of Appeal Registry, informed the Court that the transcripts are not yet ready. Then the learned Counsel moved for a date to obtain the transcripts and to argue his case thereafter. The Counsel appearing for the State objecting to this application, submitted that the rule referred to by
30 the learned Counsel for the 3rd accused-appellant applies only to the substantial appeals and not at the stage of arguing the leave to appeal applications. He then said, the practice of this Court is to take up leave to appeal applications even without the transcripts are being available. He then insisted to follow the practice of this Court and to take up this matter today though the transcripts of the record
35 are not available.

[7] Learned Counsel for the accused appellants did not deny the adoption of the said practice in this Court in respect of leave to appeal applications. Rule 3 mentioned above, referred to by the learned Counsel for the third
40 accused-appellant also does not refer specifically as to the applicability of this rule when it comes to leave applications. On the face of the Registrar's directions it is seen that those are applicable to the substantive appeals. The entirety of the contents of the directions is aimed at to have the transcripts ready before the substantive matter is taken up. Therefore, I preferred to follow the practice of this
45 Court and decided to take up the matter without the transcripts are being available. This decision was informed to all the Counsel and they were given the opportunity to make submissions on behalf of their clients on the merits of the respective applications.

[8] I will now turn to examine the applications for leave of this Court filed by
50 Counsel for the Respondent informed Court that he does not object to the application for leave filed against the sentence imposed on all the three

accused-appellants. He conceded that there is an issue of law to be argued as far as the sentence is concerned. I also have referred to the relevant authorities in this regard. In *State v Shanker* [2003 FJHC 337 04th July 2003] seventeen years imprisonment had been imposed on the accused for gruesome activities that
5 involved house breaking in the night, rape and murder. Therefore, I conclude that there is a serious question of law to be looked into by a Full Bench as far as the sentence imposed concerning all the three accused appellants.

[9] I will now examine the issue as to the conviction imposed on the 1st and the 3rd accused-appellants, since the 2nd accused-appellant has already withdrawn
10 his appeal against the conviction. I will now briefly refer to the law applicable, in a situation where leave is sought from this Court to have an appeal heard before a Full Court.

[10] The law governing this application is mentioned in Section 21(1) (b) of the Court of Appeal Act as repealed and replaced by Section 2 of the Court of Appeal
15 (Amendment) Decree 1990. The amended Sections states that any person convicted on a trial held before the High Court, may appeal to the Court of Appeal seeking leave of that Court on any ground of appeal which involves a question of fact alone or a question of mixed law and fact, unless there is a prior certificate from the Trial Judge. Upon a perusal of the grounds of appeal, it is seen
20 that the appellants have advanced issues pertaining to law mixed with facts. If I may look at their grounds of appeal, it is seen that those are basically:

- (a) as to the voluntariness of the confessions that had been admitted in evidence; and
- (b) on the ground of bias alleged to have been committed by the learned Trial Judge.

25 [11] It was alleged that the learned trial Judge was biased since he had hinted with an opinion as to a verdict of guilt by making remarks such as

‘I know that this matter would end up on appeal’.

Learned Counsel for the State referring to the case of *Koya v State* [1998 FJSC
30 2 26th March 1998] submitted that unless an application for recusal had been made in the original court no accused could claim bias on the part of the trial Judge in an appeal. However in reply, learned Counsel for the 3rd appellant submitted that his client has taken up the issue of bias in the High Court. Therefore, consideration of the objection raised by the learned State Counsel
35 does not arise in this instance. However these facts; as to the remarks made by the learned Trial Judge and the applications made in the original Court on those remarks cannot be looked into at this stage, as the notes of the learned Judge are not before this Court now. Therefore the fact remains that an opportunity will have to be afforded to the parties to make submissions on those matters at a later
40 stage probably at the time the substantive appeal is being heard. Such a background also may require this matter to be argued before a Full Court. 12. I will now turn to the most important issue raised in the grounds of appeal namely, the voluntariness of the confessions that were admitted in evidence. Admittedly, the conviction on the accused is basically on the evidence emanated from the
45 confessions made by the three accused-appellants to the Police. Learned Counsel for the 2nd and 3rd accused-appellants submitted that the confessions made by the accused were devoid of voluntariness. In that, they alleged that the accused were assaulted by the Police which may lead to negate the voluntariness of the confessions. In this context, learned Counsel for the 3rd Accused-appellant
50 requested Court to pay attention to the last four lines in paragraph 38 of the summing up of the learned trial Judge.

[13] Having looked at the contents of the said paragraph 38, I see no error on the part of the learned trial Judge when he directed the assessors in the manner referred to therein. In that, he was stressing upon the responsibility of the assessors as to the voluntariness of the accused on whom the injuries were found, when they were produced before a doctor from Police custody after making confessionary statements to the police.

[14] Be that as it may, in the instant case, the 2nd accused had been produced before Dr Danford on 26.06.2009. At that point of time the Doctor had found no injuries on him though the accused had complained that he was stomped on his front thigh by a police officer. However, Dr Danford has then noted: 'tenderness felt over anterior aspect of his thighs'. Thereafter, again on 24.07. 2009 he was produced before Dr Chand and in his report Dr Chand had stated that he found injuries on Jayant Lal, the 2nd accused and those injuries were too recent. (vide para.55 in the summing up)

[15] The second accused was taken to police custody on 23.06.2009 at 5.00 pm and he was produced to the Doctor on the 26th of June, after laps of three days with a complaint of stomping on his thigh. Again, the accused was produced to another Doctor on the 24th of July, nearly one month after he was produced to the Doctor who saw him previously. The Doctor who examined him first, had stated that there were no injuries on the accused whilst the Doctor who saw him subsequently had observed injuries caused recent to 24th of July.

[16] This may have been an important aspect which needed the attention of the assessors for them to arrive at the correct decision particularly when the voluntariness of the confession had been challenged due to assault by the Police. I do not find specific clarification on this point in the summing up. Then the question arises whether the aforesaid circumstances should contain or not in the summing up. Such a position therefore needs intervention of the Full Court in order to determine whether it is necessary or not, to have clear directions in the summing up as to the observations made by the two Doctors, of the injuries caused to the second appellant. This may have a bearing as to the voluntariness of the confession made by the 2nd appellant. Accordingly, I am of the opinion that there is a point of law mixed with facts to be argued before a Full Court.

[17] There is one other matter that I consider as important when it comes to the voluntariness of the confessions made by the accused to the Police. It is the period of time that the accused were detained at the Police Station. Second accused was taken into Police custody on 23.06.2009 whilst the third accused was taken in was on 22.06.2009. Police concluded the recording of their confessions only on the 26th noon. This indicates that both of them were in Police custody for three days or more, in order to come out with the confessions they have made in this regard. In other words they were kept under the detention of the police for three days when recording the confessions which made them liable for murder.

[18] Such a background may lead to create a doubt as to the voluntariness of the facts that they have related to the Police when they were in the custody of Police. However, it is one of the matters that should have been considered by the assessors when they are required to come to a finding as to the guilt of an accused. I do not see any clarification on this point by the learned High Court Judge when he directed the assessors in his summing up.

[19] However, I am of the view that this issue namely, not directing the assessors of the period of detention of the accused at the Police station when determining the voluntariness of the confessions is a matter for the Full Court of the Court of Appeal. Hence, it would become a reason to grant leave of this Court to have this matter argued before a Full Court.

ORDERS

[20] In the light of the above:

- (i) Leave to appeal against the conviction of the first accused-appellant is dismissed.
- (ii) Leave to appeal against the conviction of the second and third accused-appellants is granted.
- (iii) Leave to appeal against the sentence imposed on all three accused is also granted.

Applications granted.