IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. CAV 0013 of 2016
[On Appeal from the Court of Appeal No. AAU 0064 of 2011]

BETWEEN	:	**LEPANI VARANI**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Mr. Justice Suresh Chandra** **Judge of the Supreme Court** **The Hon. Mr. Justice Priyasath Dep** **Judge of the Supreme Court** **The Hon. Madam Justice Anjala Wati** **Judge of the Supreme Court**
Counsel	:	**Mr. S. Waqainabete for the Petitioner** **Mr. S. Vodokisolomone for the Respondent**
Date of Hearing	:	**12 August 2016**
Date of Judgment	:	**26 August 2016**

J U D G M E N T

Chandra J

[1] The Petitioner was charged with one count of Aggravated Robbery contrary to section 311(1)(b) of the Crimes Decree No.44 of 2009. He was tried before the High Court in Suva and convicted after trial. The High Court sentenced him to nine years and ten months imprisonment with a non-parole period of seven years.

[2] The Petitioner appealed against his conviction and sentence to the Court of Appeal and the single judge of the Court of Appeal refused his application for leave to appeal.

[3] The Petitioner renewed his appeal against conviction and sentence to the Full Court of the Court of Appeal and the Court of Appeal by judgment delivered on 2 October 2015 dismissed the appeal.

[4] The Petitioner sought leave to appeal from the Supreme Court by filing his petition of appeal on 4 March 2016 setting out three grounds against conviction and one ground against sentence.

[5] The Petitioner retained the services of the Legal Aid Commission and the Legal Aid Commission filed amended grounds of appeal on 26th July 2016 setting out 8 grounds against conviction and one ground against sentence.

[6] However, when filing written submissions Counsel for the Appellant stated that only Ground Three of the amended grounds of appeal was being pursued and filed submissions on that ground.

[7] Ground three of the amended grounds of appeal is in essence the same as Ground 2 in his original petition of appeal filed on 4 March 2016. The said ground is :

> "The learned Appellate Court erred by stating at page 9, paragraph 15, line 5 to 7 of the Record of the Supreme Court that, the argument that the learned Judge did not direct the assessors on the weight and value of the confession (Ground No.3 of the appeal) does not hold good ground" The Court further erred by failing to clearly state, whether it accepted or rejected ground No.3 of the appeal."

[8] This ground envisages the question of the nature of the directions that a trial Judge should give the Assessors regarding a confession.

[9] The trial Judge held a voir dire inquiry and held that the confession made by the Petitioner in his caution interview statement was admissible. At the voir dire inquiry the Petitioner also gave evidence and sought to make out that the he had been threatened when his caution interview statement was being recorded and therefore it was not given voluntarily. The threat he had stated was not regarding any physical violence to him but a threat to harass his family members.

[10] The learned trial Judge in his summing up directed the Assessors as follows:

> "As a matter of law, I must direct you that, a confession, if accepted by trier of fact, in this case, you as assessors and judges of fact – is strong evidence against its maker. However, before you can accept a confession, you must be satisfied beyond reasonable doubt that it was given voluntarily by its maker. The prosecution must satisfy you beyond reasonable doubt that the accused gave his statements voluntarily, that is, he gave his statements out of his own free will. Evidence that the accused had been assaulted, threatened or unfairly induced into giving those statements, will negate a free will, and as judges of fact, you are entitled to disregard them. However, if your are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of fact, you are entitled to rely on them against the accused."

[11] Counsel for the Petitioner argued that this direction by the learned trial Judge was a misdirection and cited the decision of the Court of Appeal in **Vakacereivalue v State** [2015] AAU 116 of 2011 where it was stated that:

> "It is settled law that the admissibility of a confession has to be decided by a trial judge having satisfied himself on its voluntariness. Thereafter it is for the assessors to consider whether

such confession was in fact made by the accused and whether they are true."

[12] Counsel further cited the Supreme Court decision in **Noa Maya v The State** Criminal Petition No.CAV 009 of 2015 in support of his argument and cited the following paragraph:

> "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 juro4rs 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] 2AC 160."

[13] Counsel stated that the above was the majority view in **Noa Maya's** case and that he was relying on that view in stating that the learned trial judge had misdirected the Assessors when he directed them that they should consider voluntariness of the confession but failed to say anything about the truth and weight that that should be attached to such confession.

[14] This view expressed by Keith J has to be viewed in the light of the paragraphs that followed paragraph 16 quoted above where his Lordship stated:

> "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 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 in 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
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> 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 take the possibility that it may have been made voluntarily into account in the context of the case as a whole."

[15] According to what is stated in paragraph 21, as to which view to be followed is not decisive. On the other hand Gates CJ in **Noa Maya's** case positively stated:

> "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."

[16] Although Counsel for the Petitioner relied on the decision in **Noa Maya** for his submission regarding the failure of the trial judge to direct the Assessors on the weight to be attached to the confessionary statement, **Noa Maya's** decision dealt with the position regarding voluntariness of a confession and not with the weight to be attached to the confession. In that sense the decision in **Noa Maya** works against the Petitioner as voluntariness of the confession can be put to the Assessors as well.

[17] The complaint of the Petitioner is that the Court of Appeal failed to consider the failure of the trial Judge to direct on the weight to be attached to the confession as a misdirection and thereby erred in law. The Court of Appeal dealt with this ground in detail and considered whether there was any miscarriage of justice as a result of the direction when considering the evidence that was available at the trial. The Court of Appeal looked to the evidence of the Petitioner and other relevant evidence in deciding on this issue. It will be relevant to quote the passages in the Court of Appeal judgment on that aspect:

"[12] The appellant in evidence has admitted to the making of the statement to the police (pgs 165/6 RHC). He admitted to the arrest as related by the police. The appellant was at that

time found in a vacant house. He said that he cooperated with the police. He admitted that no force or threats were made during the arrest or while being brought to the police station. However he said that Sgt Aminiasi threatened him to confess to the allegations. Due to the unfair treatment the appellant submitted that he admitted to the crime. On perusal of the record of the High Court (pg.148) it is evident that no questions were asked by the appellant from this witness on this basis. Moreover it appears that the caution interview was done by Sergeant Vinendra Deo (pgs. 95 to 98RHC).

[13] The appellant admitted to the answers given at the caution interview. He also admitted to the caution that was offered by the interviewer. He admitted that the answers given at the interview connect him to the crime. However, he said in evidence that those answers are not true. The appellant strongly submitted that it is for the assessors to believe the truth or the falsity of the caution interview once they determine that it was made voluntarily. It is true that it is the trial judge who decides on the admissibility of the confession. Once it is admitted, the same evidence that was led at the voir dire is led before the assessors, for the assessors to determine not only the truth of it, but of the voluntariness as well.

[14] I am of the view that the learned judge had explained well how to believe and under what circumstances to reject the confession. In paragraph 21 of the summing up the learned judge gave a synopsis of what the appellant had said at the caution interview; how the appellant with others did break into "Rups Big Bear" shop. The two security guards described as to how they were tied up by masked men armed with weapons (pg.157). The appellant gave an account (pg.97) in his caution interview how they tied up the security guards and damaged a light in order to darken the place. This was confirmed by Chand, (pg.158) an employee, in evidence.

[15] The appellant also in the caution interview identified the ropes and the clothes used to silence the security guards. These items were produced in court at the trial. This evidence helped the assessors in ascertaining the truth of the caution interview. If the confession is believed it will nail the accused to the crime charged. Once the voluntariness was proved, there was ample material to give

> weight to the truth of the confession. Therefore the argument that the learned judge did not direct the assessors on the weight and value of the confession does not hold good ground. (emphasis added)."

[18] The Court of Appeal according to the above passages dealt with the argument regarding the absence of a direction by the trial judge regarding the weight and truth of the confession comprehensively. The Court was of the view that there was sufficient evidence at the trial which gave weight to the truth of the confession once the voluntariness was accepted by the Assessors.

[19] There was a voir dire inquiry at which the Petitioner gave evidence and he cross examined the prosecution witnesses regarding threats and inducements, which were denied by the prosecution witnesses. The learned trial Judge ruled that the caution interview statement was admissible.

[20] At the trial also the Petitioner gave evidence and he cross examined the witnesses regarding his caution interview statement on the basis of threats and inducements given to him. However, the Assessors found him guilty and the learned trial Judge agreed with that decision and convicted the Petitioner.

[21] Either at the voir dire inquiry or at the trial the Petitioner did not state that he was physically assaulted at any stage, while being arrested or before being caution interviewed. The production of the ropes and clothes at the trial, which were identified by the prosecution witnesses who were the security guards who had been tied up before the robbery was committed, were material in determining the voluntariness of the confession. The Assessors would have considered these items of evidence in determining the voluntariness of the confession and finding him guilty. This Court sees no merit in this

ground as no prejudice has been caused as a result of the learned trial Judge failing to give a direction on the weight and truthfulness of confession.

[22] Jurisdiction of the Supreme Court

Section 98(3)(b) of the Constitution of the Republic of Fiji states:

> "The Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the court of Appeal."

Section 98(4) of the Constitution provides:

> "An appeal may not be brought to the Supreme Court from a final Judgment of the Court of Appeal unless the Supreme Court grants leave to appeal."

Section 7(2) of the Supreme Act (Cap.13) provides:

> "In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless:
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> a. A question of general legal importance is involved;
> b. A substantial question of principle affecting the administration of criminal justice is involved; or
> c. Substantial and grave injustice may otherwise occur."

[23] As has been stated in several decisions of the Supreme Court, the threshold for the granting of leave to appeal to the Supreme Court is very high and it has to be shown that the appeal gives rise to resolving points of law of great and general importance or that a substantial and grave injustice has occurred.

[24] The ground of appeal canvassed before this Court as discussed above has no merit and therefore fails to meet the threshold for special leave to appeal to the Supreme Court and is refused.

Conclusion

[25] The application for special leave to appeal to the Supreme Court is refused and the application is dismissed.

Dep J

[26] I agree with the reasons and conclusion reached by Chandra, J.

Wati J

[27] I agree that the Petition for Special Leave must be dismissed on the reasons outlined by his Lordship Chandra, J.

Hon. Mr. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT

Hon. Mr. Justice Priyasath Dep
JUDGE OF THE SUPREME COURT

Hon. Madam Justice Anjala Wati
JUDGE OF THE SUPREME COURT