IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0038.2016
(On Appeal From Court of Appeal No: AAU 0118.2011)

BETWEEN : **PETERO BAI**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court**
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court

Counsel : **Ms. M. Tarai for the Petitioner**
Ms. P. Madanavosa for the Respondent

Date of Hearing: **5 April 2017**

Date of Judgment: **20 April 2017**

JUDGMENT

Chandra, J

1. I agree with the reasoning and conclusions of Jayawardena J.

Aluwihare, J

2. I have read in draft the judgment of Jayawardena J and I agree with his reasoning and conclusion.

Jayawardena, J

3. This is an application seeking leave to appeal to the Supreme Court in terms of section 7(2) of the Supreme Court Act, from the judgement of the Court of Appeal dated 29th of November, 2016.

The Trial

4. The Petitioner was charged in the High Court for Attempted Murder contrary to section 44(1)(2) and section 237, and Rape contrary to Section 207(1)(2) of the Crimes Decree of 2009.
Prior to the commencement of leading evidence at the trial the parties recorded the agreed facts. Agreed fact number 21 is as follows;
"The accused was arrested on 26 March 2010 and interviewed under caution."
However, at the trial, suggestions were put to the witnesses that the confession was not made by the Accused.

5. At the trial the prosecution produced a confession of the Petitioner which was admitted in evidence after a voir dire.
The victim too gave evidence at the trial and stated that she did not see the perpetrator. Her evidence was confined to the incident in the toilet where the crime was committed. However, two students who were studying at the adjacent school gave evidence at the trial and stated that around eight thirty in the morning on the day of the incident they saw the Petitioner loitering around the area, where the crime was committed. In addition to the evidence given by the said two students, the prosecution produced other evidence including medical evidence of the doctors who examined the victim and the Petitioner to support its case.

6. After the conclusion of the evidence the Assessors returned a unanimous opinion of guilty of the Petitioner for the offence of Rape and Doing an Act Intending to Cause Grievous Bodily Harm. Thereafter, the Petitioner was convicted of those charges. The conviction of the Petitioner was based on a confession made by him and other evidence led at the trial.

7. The Learned Trial Judge imposed a 15 year sentence for committing the offence of Rape and 10 years for the offence of violence and the sentences were to run concurrently with a non-parole period of 12 years.

The Application for Enlargement of Time

8. The Petitioner did not file an appeal within the stipulated time. However, after a delay of eleven months he filed an application seeking for an extension of time to file an appeal.

9. A single judge of the Court of Appeal dismissed the application lodged by the Petitioner for an enlargement of time to file a notice of appeal on the basis of long delay and the grounds of appeal do not meet the required standard.

10. In the said judgement it was held;

> *"It is apparent that the learned Judge has directed the Assessors to consider, on the evidence whether they were satisfied that the Petitioner made the admissions and whether those admissions were true. That was a proper direction to the Assessors in the form of a recommendation that they consider the admissions together with all the other evidence in the case."*

11. It was further held;

> *"Although the learned Judge did not use the word "weight" in the Summing Up on this matter, he did however impress upon the Assessors that their task was to determine whether or not they accepted the admissions as being the truth. He also directed the Assessors that they were to disregard the admissions if they considered that the admissions were not true."*

Being aggrieved by the said decision of the learned judge of the Court of Appeal, the Petitioner appealed to the full Court of Appeal.

Appeal before the Court of Appeal

12. The Petitioner filed an Appeal in the Court of Appeal and pleaded;

(i) that the learned trial Judge erred in law and in fact when he did not properly direct the Assessors about the petitioner's disputed confession including the issue of weight to be given.

(ii) that the learned trial Judge erred in law and in fact when he did not direct the Assessors about circumstantial evidence.

(iii) that the learned trial Judge erred in law when he did not clearly put all the elements of the offences to the assessors hence causing a substantial miscarriage of Justice.

(iv) that the Learned Trial Judge erred in law and in fact to accept the assessors'verdict of guilty for the offence of Rape when there was no material evidence of penetration to the vagina.

(v) that the learned Trial Judge erred in law and in fact when he failed to warn the assessors on he danger of convicting the Petitioner on uncorroborated evidence of child witness.

13. The Court of Appeal having considered the appeal filed by the Petitioner dismissed the appeal of the Petitioner for want of merit and due to the long delay.
The Court of Appeal held;

> *"(i) it is the issue of the testimonial trustworthiness upon which the Assessors had been invited to make a determination and the learned trial Judge in clear and simple terms had explained the task to the Assessors, quite accurately. In the case of* ***Mohammed Haroon Khan v The State (unreported CAV 9 of 2013; 17 April 2014)*** *held that the required guidance need not be formulaic."*
> *"Though the Learned Trial Judge in the lower court did not mention of the term "weight" when he was directing the Assessors the Learned Trial Judge had directed them about their task of determining where or not they accepted the admission as being the truth.*
> *"(ii) Clearly, the Petitioner was out of time and it was by eleven long months after the statutory period to lodge the Appeal, meaning thirty days after the*

conviction. In order to be clear in my mind I inquired from the Learned Counsel for the Petitioner the reason for the inordinate delay. According to the Petitioner the delay was due to the non-availability of legal advice. This, in my view is not plausible explanation. Going through the proceedings in the trial in the High Court, one can observe clearly the level of industry with which he was defended at the trial. There was ample opportunity for him to obtain advice on the need to invoke the jurisdiction of this Court well in time. If he so wished he could have obtained the services of the Legal Aid Commission which is at the disposal of many in this country, whenever the need arises to obtain the legal counselling freely. There is nothing on the record to demonstrate that he availed himself of that facility. The well-known Legal maxim states that "vigilanti bus et non doremientibus jura subveniunt" – meaning law aids the vigilant and not the indolent."

Being aggrieved by the said judgement of the Court of Appeal the Petitioner sought special leave to appeal to the Supreme Court.

Grounds of Appeal in the Supreme Court

14. Though the Petitioner urged five grounds before the Court of Appeal, he confined himself only to two grounds in his Application for special leave to appeal. i.e;

> *"(i) that the learned trial judge erred in law and in fact when he did not properly direct the Assessors about the petitioner's disputed confession including the issue of weight to be given.*
>
> *(ii) that the learned trial judge erred in law and in fact when he did not direct the Assessors about circumstantial evidence."*

Consideration of Granting of Special Leave

15. Jurisdiction of the Supreme Court with respect to special leave to appeal is set out in section 7(2) of the Supreme Court Act which states;

> *7(2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-*

(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."

16. In view of the fact that the legislature has set out a criteria that needs to be satisfied to obtain special leave to appeal, it is necessary to consider whether the Petitioner has met the threshold set out in section 7(2) of the Supreme Court Act. Thus, the court has to consider whether the instant appeal contains a question of general legal importance or a substantial question of principle affecting the administration of criminal justice or a substantial and grave injustice may otherwise occur, if leave is not granted.

17. As stated above, there was a 11 month delay for the lodging of the appeal in the Court of Appeal.

18. In **Julien Miller v. State** ***Criminal Appeal No: AAU0076 of 2007***, the Court of Appeal rejecting an application for leave to appeal out of time emphasised the need for Petitioners to obey the rules and time line provided for appeal. In this case it was held that;

> *"[T] The Courts have said time and again that the rules and time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would be Petitioners to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislations.*

19. In the case of ***Kumar v State; Sinu v State [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012)*** the Supreme Court has laid down the criteria of granting extension of time to lodge an appeal. Those grounds are;

> *"Appellate courts examine five factors by way of a principled approach to such applications. These factors are:*
>
> *(i) The reason for the failure to file within time.*
>
> *(ii) The length of the delay.*

(iii) *Whether there is a ground of merit justifying the appellate courts consideration.*

(iv) *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*

(v) *If the time is enlarged, will the respondent be unfairly prejudiced?"*

(a) The reason for the failure to file within time.

20. The reason given by the Petitioner for delay was that after the trial in the lower Court he could not find a lawyer who could advise him on his appeal. Further, he was unable to get the assistance of the legal aid.

21. The Petitioner has been defended by a lawyer throughout the trial. The Petitioner failed to give an acceptable reason for the delay in his appeal filed in the Court of Appeal. However, for the first time he came out with an explanation for the delay to file an appeal in time in responding to a question put to him by the Court of Appeal during the hearing of the Appeal. Further, other than the verbal explanation given in court the Petitioner has failed to substantiate his explanation for delay with cogent evidence.

(b) ***The length of the delay***

22. In the said case the Supreme Court held that an application for appeal out of time may be granted for a short delay if a reasonable explanation is provided and the delay is about a week or two. The Supreme Court adopted the approach in ***The Queen v Brown (1963) SASR 190 at 191*** which says:

> *"The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that there is a question which justifies serious consideration."*

23. In the case of **R v Sunderand** (1927) 28 S.R. (NSW) 26 the Full Court of New South Wales held;

> "very exceptional circumstances would have to be established before the court would be justified in in granting an extension."

24. Taking into consideration of the relevant law and the explanation given by the Petitioner for the delay, I hold that the Petitioner has failed to justify the delay.

25. I am inclined to agree with the finding of the Court of Appeal that the appeal filed in the Court of Appeal is out of time and the eleven months delay after the statutory period of thirty days to lodge the Appeal was not justified by the Petitioner.

26. It is pertinent to note that this appeal is based on an application filed in the Court of Appeal for enlargement of time which was refused by a single judge of the Court of Appeal.

27. Special Leave to Appeal is not granted as matter of course. A Petitioner has to meet the threshold stipulated in section 7 (2) of the Supreme Court Act to obtain Special Leave to Appeal. When granting special leave the Supreme Court has to use its desecration in order satisfy itself whether the Petitioner has met the threshold stipulated in the said Act.

28. When a court has to use its desecration it is imperative for the party who seeks to invoke the jurisdiction of court to make a full disclosure of the facts in order for a court to make a considered decision. However, in this appeal the Petitioner has failed to disclose the fact that the instant appeal emanates from an application filed in the Court of Appeal for enlargement of time and his application was not successful.

(c) Whether there grounds of merits the consideration of the Supreme Court.

29. The first ground of appeal pleaded in this appeal is as follows;

(i) that the Learned Trial Judge erred in law and in fact when he did not properly direct the Assessors about the petitioner's disputed confession including the issue of weight to be given.

In this regard the Counsel for the Petitioner inter-alia submitted;

(ii) that the Learned Trial Judge erred in law and in fact when he did not properly direct the Assessors about the Petitioner's disputed confession;

(iii) that the direction given to the Assessors were incomplete and the learned trial Judge ought to have warned the Assessors that they could use the confession against the Petitioner only if they were satisfied that:

1. *It was the Petitioner who made the confession to the Police Officer; and*
2. *It was truthful and accurate.*

(iv) that though the Learned Trial Judge correctly directed the Assessors to consider the truthfulness of the disputed confession, he failed to direct the Assessors to consider whether the confession was made by the Petitioner.

30. In reply to the submissions made by the Counsel for the Petitioner, State Counsel submitted that the directions given by the trial judge to the Assessors are sufficient. The State relied on the case of **Burns v The Queen** [1975] 132 CLR 258 at 261 where the Court held that;

> "It is clear and elementary law that once a confessional statement has been admitted into evidence, its weight and probative value are matters for the jury. It is for the jury to determine whether the alleged confession was made and whether it was true in whole or in part. Unless the jury are satisfied that so much of a confession as tends to show the guilt of the Accused they cannot treat it as proof of guilt" [emphasis added].

31. State Counsel further submitted that in the summing up of the learned trial Judge in the High Court has stated;

> "The State relies upon the fact that the Accused confessed to the police that he had violently and sexually attacked Ulamila. It is suggested on behalf of the Accused that the confession was not true and it was invented by the police. Your task is to consider all the evidence relating to the

circumstances in which the confession **was made** and to ask yourselves whether you can be sure that the confession was true; that is the only question relevant to your deliberations. If you are not sure it was then you will disregard it in coming to your conclusions as to whether you are sure that the Accused was responsible for the attack upon Ulamila. On the other hand, if you are sure that the confession was true then you take it into account as evidence of the Accused's guilt. You may think that there could be no better evidence of guilt than a reliable and truthful confession."
[emphasis added]

(i) It was also submitted that the learned trial Judge has clearly and accurately explained the law and the duty of assessors in simple words. The state relied on the case of **Mohammed Haroon Khan v The State (unreported CAV 9 of 2013; 17 April 2014)** where it was held that the required guidance need not be formulaic. It was further submitted that the learned trial Judge has directed the assessors about their task of determining whether or not they should accept the admissions as being the truth, and

(iii) In the circumstances, the State Counsel submitted that aforementioned ground of appeal does not meet the requirements of section 7 (2) of the Supreme Court Act, 1998.

32. I will now consider apart from the directions referred to in the submissions of State Counsel one other important aspect of evidence led at the trial which was put to the Assessors by the learned trial Judge.

33. Dr. Singh was the visiting doctor to the prison where the Petitioner had been kept on remand. On the 31st of March, 2010 he has carried out a full medical examination of the Petitioner and has not noticed any injuries. He has described the Petitioner as fully fit. In his evidence he has stated that there was no clinical evidence of any injury or assault. Therefore, he has not prescribed any treatment.

34. The doctor has seen the Petitioner once again on the 29th of September, 2010 and the Petitioner has reported a shoulder injury which he has said sustained three months ago in the Police custody. However, no complaint of this nature had been made in March.

The learned trial judge in her Summing Up has stated "....Dr. Singh said that the Accused did not tell him that he was assaulted at the police station; if he had told him then Dr. Singhe would have recorded it" [para 49] " You will no doubt want to compare the evidence of Dr. Singhe with suggestions made to the police officers that over the course of more than 2 days the Accused was repeatedly assaulted; it will be for you to decide whether **to accept** the evidence of Dr. Singhe, if you accept it, helps you in deciding that issue." [para 50]

35. I am of the view that if the Petitioner was assaulted at the Police Station, he would have most certainly informed the said doctor when he was examined at the Prison on the 31st of March, 2010. Further, the subsequent statement made to the doctor almost after six months of delay that he was assaulted by the Police could well be an afterthought.

36. I am also of the view that in addition to the extracts of the Summing Up produced by the State Counsel, the direction given to the Assessors on the evidence given by the doctor who examined the Petitioner plays a vital role in ascertaining whether it was the Petitioner who made the confession to the Police Officer. In fact in my view the said evidence cuts across the version of the Petitioner that he was forced to make the confession by assaulting him by the Police and it was not a confession made by the Petitioner.

37. The Petitioner had elected to remain silent and had called three witnesses to give evidence on his behalf.

38. Taking into consideration the totality of the directions in the summing up, I am of the view that the learned trial Judge has properly directed the Assessors about the disputed confession and the said direction is quite adequate in the light of the evidence produced at the trial.

39. In the circumstances, I am of the view that the aforementioned ground of appeal cannot be sustained.

40. The second ground of appeal is that the learned trial judge erred in law and in fact when he did not direct the Assessors about circumstantial evidence.

The Counsel for the Petitioner submitted;

(i) that in the Summing Up the learned trial judge did not address the Assessors about circumstantial evidence,

(ii) the learned trial judge ought to have directed the Assessors that they must be satisfied beyond reasonable doubt,

(iii) that apart from the disputed confession, the prosecution case was entirely based on circumstantial evidence. The fact that the Petitioner was seen near the crime scene including the finding of a chain on the floor of the toilet does not prove that he was the perpetrator. Therefore, a proper direction on how to approach circumstantial evidence, what inference could be drawn should have been given to the Assessors, and

(iv) that the Learned Judge should have directed the Assessors that if there are other reasonable inferences consistent with the Accused's innocence or if they had a reasonable doubt, then they should find the Accused persons not guilty.

41. In responding the learned State Counsel submitted;

(i) that in the case of **Mohammed Haroon Khan v The State** (unreported CAV 9 of 2013; 17 April 2014) where a petition involving a conviction for murder and an allegation that the trial judge had failed to directed on circumstantial evidence, observed;

> *"This ground is misconceived. The main evidence is direct not circumstantial. If the Assessors accepted the confession as reliable, an admission of murder with its account of the disposal of the body and the reasons for killing, such evidence has always been acceptable for a conviction for murder."*

(ii) that the learned trial Judge has dealt in the Summing Up on the burden and standard of proof. In this regard the State Counsel drew the attention of court to the following parts of the Summing Up.

> "The Accused is put on trial by the State and it is for the State to prove that he is guilty of the allegations that have been brought against him. It is not for the Accused to prove anything let alone his innocence, the burden of proof rests upon the State. How does the State prove the guilt of the Accused? To what standard must guilt be proved? The standard of proof is best expressed in this way: you will not find the Accused guilty unless you are sure of guilt; if you have a reasonable doubt as to his guilt then you will find him not guilty. ***The first and most important question that you are going to have to decide is whether you are sure that the Accused was the person who carried out this violent and sexual assault. If you are not sure about that you will find him not guilty of both charges. If on the other hand you are sure that he was the person responsible, you must look at each charge in turn***."

Trial in the High Court - The Evidence

42. Apart from the circumstantial evidence the identification of the Petitioner came mainly from the two pupils who were studying in the adjacent Primary School. Giving evidence they stated that on the day of the incident in the morning at around eight thirty, they saw the Petitioner loitering around the area, where the toilets of Annesley Primary School was located.

43. Both of them have stated in their evidence that they had known the Petitioner well and it was not their first acquaintance. In fact they knew the name of the Petitioner for a long time prior to the incident. They had known not only the Petitioner but also his wife. Their evidence provided important circumstantial evidence in relation to the previous conduct of the Petitioner in the morning of the day of the incident and to identify the Petitioner as the perpetrator of the crime. They have stated in evidence that they also noticed the Petitioner was wearing a necklace which was later found at the scene of the crime.

44. The evidence of the two pupils were supportive of each other's evidence with regard to the presence of the Petitioner at the scene of the crime around that time.
The wife of the Petitioner was called by the prosecution and in her evidence she had stated that at the Police Station she identified the chain found at the scene of crime as the one that belonged to the Petitioner. She has further stated that she observed on the day of the incident the chain was missing from the neck of the Petitioner. However, later she changed her position and stated that she found the said neckless in their house.

45. Apart from the confession made by the Petitioner, the prosecution has led the evidence of several witnesses who have given circumstantial evidence to prove that the crime was committed by the Petitioner. Some of the evidence led at the trial including the evidence of the doctors who examined the victim have proved the incriminating portions of the caution statement of the Petitioner.

46. The identification of the perpetrator of the crime (in this case the Petitioner) was based on the circumstantial evidence apart from the confession that the Petitioner made. In respect to the identification of perpetrator of the crime the learned trial Judge has directed the Assessors as follows;

> *"The case against the Accused depends to some extent on the correctness of 3 identifications of him which the Accused alleges to be mistaken; .... You must approach the evidence of identification with care and I must warn you of the special need for caution before convicting the Accused in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes. An apparently convincing witness can be mistaken. So can a number of apparently convincing witnesses.*
> *Examine carefully the circumstances in which the identification by each witness was made. How long did he have the person he says was the Accused under observation? At what distance? In what light? Did anything interfere with that observation? Had the witness ever seen the person he observed before? If so, how often? If only occasionally, had he any special reason for remembering him? "*

47. I am also of the view that in a case where circumstantial evidence is the basis for the prosecution case, the direction to the Assessors need not be in no special form. What is

needed is to direct the Assessors in such a way that they will understand not to convict an accused unless they are satisfied beyond reasonable doubt that the accused committed the offence.

48. In the case of **Senijieli Boila v The State**, *Criminal Appeal No. CAV 005 of 2006 (25 February 2008)*, it was observed that no special directions are required of a trial judge in directing on the use of circumstantial evidence, however, the adequacy of a particular direction will necessarily depend on the circumstances of the case.

49. I am also of the view that the directions given to the Assessors are adequate and they contained the necessary directions that are required to meet the ends of justice. In the case of ***Netani Nute & Iliasa Sousou Cava*** *(supra)* it was held;

> *"how a summing up is structured is a matter of style for different judges but it must have the basic directions which is highlighted above."*

50. Circumstantial evidence is the evidence which implicates an accused on the basis of several indirect sources. In the instant case the Petitioner was seen loitering near the school children's toilet at or about the time that the crime took place. The Petitioner had no reason what so ever to be there at that time. At that time he was recognized by the two pupils who gave evidence at the trial. Further, The chain that the Petitioner was wearing in the morning of the incident was found inside the toilet the offence was committed. The only male who had access to the toilet at the time of the incident was the Petitioner. Importantly, his chain was found inside the toilet where the crime was committed. In such circumstances, one can accept the guilt of the Petitioner beyond reasonable doubt because it is the only reasonable inference that can be drawn from the circumstances of this case.

51. Further, in this case the witnesses who gave evidence of the circumstances that the crime had taken place and the events that took place prior to the commission of the offence and during the commission of the offence (finding the chain inside the toilet) led to a sufficiently certain conclusion of the commission of the offence by the Petitioner.

52. I am inclined to agree with the submissions made by the learned State Counsel. I hold that the Petitioner was unsuccessful in this ground of appeal too.

(d) ***Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?***

53. As discussed previously, I am of the view that the grounds urged in this appeal cannot be sustained. Further, there are no arguable grounds too. Therefore, I hold that the Petitioner is not entitled to have special leave to appeal as contemplated by section 7 (2) of the Supreme Court Act.

(e) ***If the time is enlarged, will the respondent be unfairly prejudiced?***

54. The offences relating to this appeal has been committed on the 25th March, 2010. The Petitioner has not exercised his statutory right of appeal by invoking the jurisdiction of the Court of Appeal within the stipulated time. As stated above the explanation given by the Petitioner for the delay is unacceptable. The State has been pursuing the case against the Petitioner in order to protect the society as a whole. In such circumstances, if the application for enlargement of time is entertained that will inevitably unfairly prejudice the State, the Respondent in this appeal.

Conclusion

55. In concluding, I hold that the conviction was supported by the evidence led at the trial. The assessors had been given proper directions and they accepted the evidence led by the prosecution and rejected the evidence led by the defence. The Court of Appeal did not err in law when it refused to enlarge the time to appeal. Further, the Petitioner failed to meet the threshold set out in section 7(2) of the Supreme Court Act, 1998 and therefore special leave should be refused and appeal is dismissed.

The Orders of the Court are:

1. *Special Leave to appeal is refused.*
2. *The judgment of the Court of Appeal dated 29th November 2016 is affirmed.*
3. *Appeal is dismissed.*

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Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

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Hon. Mr. Justice Buwaneka Aluwihare
Judge of the Supreme Court

.....
Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Solicitors:

Office of the Legal Aid Commission for the Petitioner
Office of the Director of Public Prosecutions for the Respondent.