IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

Criminal Petition No. CAV 0009 of 2019
[On Appeal from the Fiji Court of Appeal No. AAU 0053 of 2015]

BETWEEN : **JOJI KACIVAKAWALU**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Madam. Justice Chandra Ekanayake, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Frank Stock, Judge of the Supreme Court

Counsel : **In Person for the Petitioner**
Mr. L. J. Burney and Mr. R. Kumar for the Respondent

Date of Hearing : **21 October, 2019**

Date of Judgment : **31 October, 2019**

JUDGMENT

Ekanayake, J:

Introduction

[1] The Petition Joji Kacivakawalu, by a notice dated 20 December 2018 addressed to the Supreme Court of Fiji (which appears to have been received by the Registry on 5 January 2019) has appealed against the decision of Fiji Court of Appeal dated 29 November 2018 which had affirmed conviction and sentence imposed by the learned High Court Judge. He was convicted for 2 Counts of Robbery with Violence contrary to section 293(1)(b) of the

Penal Code, Cap 17 and Unlawful use of Motor Vehicle contrary to section 292 of the Penal Code, , Cap 17.

[2] The above notice of appeal to this court has been lodged within the time frame of 42 days stipulated in Rule 5(a) of the Supreme Court Rules 2016. Thus it is a timely application.

[3] The Court of Appeal by the impugned judgment had dismissed the appeal and affirmed the conviction.

[4] Petitioner, one Jose Peters with others had been originally charged in the Magistrate's Court at Ba for the aforementioned 3 Counts on 21 August 2008. In pursuance to Section 220 of the Criminal Procedure Code by its order of 12 September 2008 case was transferred to High Court at Lautoka.

[5] After commencement of the trial before the High Court, after the Voir dire inquiry the other accused Jose's interview was ruled inadmissible by the Learned High Court Judge's ruling on Voir dire dated 18 September 2014 and he was discharged following the filing of a nolle prosequi.

[6] Thereafter an Amended Information was filed in the High Court of Suva on 28 January 2015 only against the present Petitioner. He was charged with the following offences:

FIRST COUNT

Statement of Offence (a)

ROBBERY WITH VIOLENCE: Contrary to section 293(1)(b) of the Penal Code, Cap 17.

Particulars of Offence (b)

JOJOI KACIVAKAWALU and others on the 1st day of August 2008 at Nailaga, Ba, in the Western Division, robbed Hassan Ali of cash $20,202, two Alcatel mobile phones values at $258; two 22ct gold chain valued at $1100, 3 piece diamond earrings valued at $300, one gents gold ring valued at $150, two gold car rings valued at $550, two gold bangles valued at $1500 all to a total value of $24,060, the property of Hassan Ali and immediately before the time of such robbery did use personal violence to the said Hassan Ali.

SECOND COUNT

Statement of Offence (a)

ROBBERY WITH VIOLENCE: Contrary to section 293 91)(b) of the Penal Code, Cap 17.

Particulars of Offence (b)

JOJI KACIVAKAWALU and others on the 1st day of August 2008 at Nailaga, Ba, in the Western Division, robbed Khatoon of a gold chain valued at $400, gold bangles valued at $400 all to a total value of $800, the property of Khatoon and immediately before the time of such robbery did use personal violence to the said Khatoon.

THIRD COUNT

Statement of Offence (a)

UNLAWFUL USE OF MOTOR VEHICLE: Contrary to section 292 of the Penal Code, Cap 17.

Particulars of Offence (b)

JOJI KACIVAKAWALU and others on the 1st day of August 2008 at Nailaga, Ba, in the Western Division, unlawfully and without color or right but not to be guilty of stealing for their own use motor vehicle registration number EX 213 the property of Hassan Ali.

[7] Having pleaded not guilty to the above charges trial proper commenced in the High Court before a judge sitting with assessors.

[8] After trial the assessors having returned unanimous opinion of guilty on all 3 Counts the learned High Court Judge had accordingly convicted the Petitioner for the offences charged.

[9] By the sentencing order of the learned High Court Judge dated 17/4/ 2015 the Petitioner was sentenced as follows:-

11 years of imprisonment for each 1st and 2nd Counts of robbery,

6 months imprisonment for the 3rd Count and all to be served concurrently. Not eligible for parole for 9 years.

In the Court of Appeal

[10] Petitioner's 1st application for leave to appeal against conviction and sentence was received by the Court of Appeal on 6 May 2015. Thereafter 2 other applications were received by the Court of Appeal on 30 October 2015 and 12 January 2016 respectively. All had been lodged against conviction and sentence. The last notice of appeal (received on 12 January 2016) giving amended grounds were related to the Voir dire Ruling and the directions given to the assessors concerning the caution interview. Before the single Judge of the Court of Appeal the Petitioner had indicated that he was seeking leave to appeal only against conviction on the amended grounds. Leave to appeal against conviction had been granted by the Ruling of the single Judge dated 22 June 2017, specifically on grounds 2.2, 2.3 and 2.4 appearing in the last amended notice.

[11] As per paragraph 7 of the judgment of the Court of Appeal the Petitioner again had confirmed that he was not canvassing the sentence. Thereafter the Court of Appeal, in paragraph 8 had proceeded to consider the 3 grounds on which leave was sought against conviction. Said paragraph 8 of the Court of Appeal judgment is reproduced below:

> "Thus, the grounds of appeal that would be considered in this Judgment are as follows:
>
> (i) 'That the record for caution interview was wrongly admitted by failing to appropriately consider the impact of the contusion to the voluntariness of the caution interview.'
>
> (ii) 'That the learned trial Judge had totally failed to direct the assessors on the missing first part of the medical report.'
>
> (iii) 'That the learned trial Judge erred in law and in fact in failing to direct himself and/or the assessors on the fact that the prosecution had totally failed to establish as to how the Appellant came by the injury namely the contusion."

[12] For the reasons expressed in the impugned judgment of the Court of Appeal, the learned Justices had dismissed the appeal and affirmed the conviction.

Grounds of appeal submitted to this Court

[13] The Petitioner has filed a notice of appeal to this Court dated 20 December 2018 together with a covering letter of 28 December 2018 (which appears to have been received by the Registry on 5 January 2019), seeking leave to appeal against the decision of the Fiji Court of Appeal delivered on 29 November, 2018. Three grounds of appeal were submitted by this document. Those grounds are same as the grounds of appeal that had been considered by the Court of Appeal in the impugned judgment.

> The Petitioner by another notice dated 7th June 2019 together with a covering letter dated 26th June 2019 (which appears to have been received by the Registry on the same day) has submitted 2 additional grounds of appeal. Those grounds are reproduced below:
>
> "2.0 Additional Grounds of Appeal
>
> I.V That the learned trial Judge erred in law and in fact in failing to direct himself and/or the assessors on the weight to be attached to the confession in the light of all other evidence in the case.
>
> V. That the learned Judge also failed to test the carbon copy documents tendered as exhibit evidence in court by applying the "Lobendahn Test" whereby neither counsel raised it nor the bench on the existence of the original document since the accused was going to

be judged on the only evidence of an involuntary police caution interview"

[14] In my view, the 1st notice of appeal received by the Registry on 5 January 2019 was a notice lodged within the time frame of 42 days stipulated in Rule 5(a) of the Supreme Court Rules 2016, thus it is a timely application.

[15] Learned Judges in paragraph 9 of the impugned Court of Appeal judgment had identified that the 3 grounds raised were grounds relating to the Voir dire Ruling admitting the caution interview (ground 1) and grounds 2 and 3 with regard to the directions of the Trial Judge given to the assessors and how he directed himself on medical evidence.

1st Ground of Appeal Advanced in the Court of Appeal

[16] The above ground is reproduced in paragraph 11 above. The judges of COA had paid due consideration to the challenge raised with regard to the admission of the caution interview in the light of the assault by the police. Even the contusion that was found on the lower back as shown in Petitioner's Medical Report. In paragraph 18 of the Court of Appeal judgment it is mentioned that only one medical report was available in the case record and where Part A of it was filled up by DC 1715 Esira Bari on 5 August 2008 and Part B by the doctor who examined him on 6 August 2008, who had ordered an x-ray on the Petitioner. But no x-ray report had been produced at the Voir dire or at the trial.

[17] As per paragraph 21 of the Court of Appeal judgment, the learned High Court Judge's observation on the medical report goes as follows:

> 'The medical report after examination of the first accused and dated 05th August reveals that the first accused had complained to the Doctor about a pain on his back. The doctor opined that his general health condition was good but that he had "contusion in the lower back area." 'He was prescribed pain killers.'

[18] The learned High Court Judge having carefully considered the evidence of the first 4 police officers who were called by the prosecution, had found that evidence to be reliable and consistent in the face of the Petitioner's evidence and the medical report. In paragraph 22 of the Court of Appeal judgment following observations were made:

> 'The first accused gave evidence which seemed to be embellishing the situation as he found it. If he had been "tortured" as he said he was, by having his feet beaten and punched and sat upon, he would have had injuries visible to the medical practitioner, yet there were none. The only injury found on examination was contusion to his lower back and in his evidence he had not mentioned anything about his back until an entirely improper leading question from his counsel alerted him to the lacuna. I did not believe the evidence of the first accused and I am left

then with consistent and reliable evidence of the first four Police Witnesses and I find that I can rely on that evidence as proof of the voluntariness of the first accused's caution interview. The record of that interview and the answer to charge may both be led in evidence in the trial on the general issue.'

[19] As demonstrated by questions 10 and 11 (appearing at page 104 of the High Court Record) the Petitioner had been afforded with his Constitutional Rights under Section 27 with regard to presence of any relative, spouse, any religious or social worker etc. But the Petitioner had declined to avail himself of this opportunity.

[20] I opt to reproduce the following questions and answers in the course of the Petitioner's interview appearing at page 113 of the High Court Record:

"Q133. Is there anything you wish to add, alter or correct from what you have said?
A. No.
Q134. Was there any inducement, threat or promise held to you that you have gave your answers as recorded?
A. No.
Q138. Did you give your statement from your own free will?
A. Yes. "

[21] On an examination of the evidence of the 4 police officers called by the prosecution at the voir dire the learned Justices of the Court of Appeal at paragraph 23 of the judgment had arrived upon the following conclusion:

> "Having perused the evidence of the four police officers, I do not find any material contradictions or inconsistencies among them. I think that it is fair to say that if the medical report lends some support to the Appellant's allegations it is only in respect of the police officers having allegedly hit him on the back with a baton. However, even though he had made that allegation in the Magistrate's Court, he had not spoken to such an attack in his evidence at the voir dire inquiry. The rest of the alleged brutal attack comprising of an assault lasting for more than one hour at Feeder Road on the way to the Police station and another beating for 30-40 minutes prior to the caution interview and more torture on the second day is not borne out by the medical report at all. There is not a semblance of any such brutality revealed by the examining doctor."

[22] Furthermore, the stance taken up by the Petitioner in his testimony at Voir dire inquiry was that the medical report which was produced by him was an incomplete one. This report appears at pages 131 and 132 of the High Court Record. On 5 August 2008 Petitioner had consented to be examined by a doctor who appears to have had 12 years experience. Under item 14 – Diagnosis: "Contusion at low back." Under item 15 – Treatment: "pain killer prescribed." Having considered all this the Court of Appeal had concluded that there is not

a semblance of any such brutality revealed by the doctor. In the light of all the evidence I am unable to conclude that the above finding of the Court of Appeal is irrational and/or perverse.

[23] The Petitioner had been represented by Counsel at the Voir dire inquiry. After calling the prosecution witnesses the Petitioner had elected to give evidence, but not called any witnesses on his behalf. On an examination of the Voir dire Ruling of the High Court Judge dated 18 December 2014 in respect of the Petitioner, he had opted to outline the test for the admissibility of statements made by an accused to persons in authority in the following manner. At paragraph 3 of the ruling:

> "The test for the admissibility of statements made by an accused to persons in authority is whether they were voluntarily obtained in the absence of oppression or unfairness or in breach of any constitutional rights. The burden of proving voluntariness, fairness, lack of oppression or unfairness or in breach of any constitutional rights. The burden of proving voluntariness, fairness, lack of oppression and observance of constitutional rights rests on the Prosecution and all matters must be proved beyond reasonable doubt. I have kept these tests and that burden uppermost in my mind in deciding upon this issue."

[24] In paragraph 21 of the Ruling the High Court Judge has further concluded that:

> "In contrast to the Prosecution evidence I find that the evidence of the first accused is unreliable. While I am well aware that he does not have to prove anything to me, neither does he tell me anything which makes me doubt the consistency and reliability of the Police evidence."
> For the reasons enumerated in paragraph 23 of the ruling he has stressed that he did not believe the evidence of the petitioner and he was left then with the consistent and reliable evidence of the first 4 police witnesses and he had concluded that he can rely on that evidence as proof of the petitioner's caution interview.
> On the above footing he had been satisfied with the proof of the voluntariness of the Petitioner's (then 1st Accused's) caution interview. In the light of the above reasoning I agree with the conclusion of the learned High Court Judge.

2nd Ground in the Court of Appeal

[25] That is the failure of the Trial Judge to direct the assessors on the missing first part of the medical report.

[26] In relation to this ground, following salient factors are noted:-

- Only one medical report has been produced in this case(at pp 131 and 132 of HC record).

- It appears to be a complete report and same was produced in defence case without any objection;
- It was not even suggested on behalf of the petitioner that the report was incomplete.

[27] The learned Justices of the Court of Appeal having proceeded to examine this ground in para 45 of their judgment had concluded that, there was no basis or reason for the High Court Judge to have addressed the assessors on this so called missing part of the medical report. Said paragraph of the Court of appeal judgment is reproduced below:-

> "[45] The Appellant had spoken to a missing part of the medical report in his evidence under cross-examination at the Voir dire inquiry. However, he had not elaborated as to what part was missing. As mentioned before, I do not find any such missing part from his medical report. In any event, the Appellant had been silent with regard to this complaint in his evidence at the trial. Nor had his counsel questioned Dr. Joeli Marakou or Inspector Esira Bari who had completed Part A of the medical report and called on behalf of the Appellant to ascertain whether the medical report was incomplete. The doctor had not said that any part was missing from the medical report. The Appellant's written submission tendered to the CA Registry on 17 October 2018 does not take up this as a ground of appeal at all. In the circumstances, there was no basis or reason for the Learned Judge to have addressed the assessors on the so called missing part of the medical report".

[28] On the above footing, the Learned Judges had rejected the above ground of appeal and I am satisfied with their conclusion.

3rd Ground of Appeal before the Court of Appeal

[29] That is- 'The learned trial Judge erred in law and in fact in failing to direct himself and/or the assessors on the fact that the prosecution had totally failed to establish as to how the Appellant came by the injury namely the contusion.'

[30] To my mind, the thrust of this complaint is that the learned Trial Judge had failed to specifically direct the asessors on the point that the prosecution had failed to prove how the petitioner had a contusion on his back. At the outset itself, I am unable to concur with the above propositon that the burden of proving as to how the petitioner's contusion occurred lies with the prosecution.

[31] As per the proceedings had before the High Court on 16.4.2015, after the delivery of the summing up, the trial Judge had asked – re-directions? The petitioner had been represented by counsel throughout. Both counsel had said – "No re-directions". I opt to quote how the Court of Appeal had dealt with this in paragraph 47 of the impugned judgment. Said paragraph 47 is to the following effect:

"[47] The Learned Trial Judge had asked for re-directions at the end of the summing up and both counsel had said 'no re-directions'. The non-direction complained of by the Appellant could have been easily brought to the attention of the Trial Judge and therefore for this reason alone this ground of appeal need not be considered. The Court of Appeal has dealt with this type of omission which seems to be happening with alarming and embarrassing regularity giving rise to a plethora of appeal grounds.
In **Prasad v State** Criminal Appeal No. AAU0010 of 2014: 4 October 2018 [2018] FJCA 152 the Court of Appeal stated as follows:

'The appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, the appellate court would not look at the complaints against the summing-up in appeal based on such misdirections or non-directions favorably. The appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in Raj that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and once again reiterated this position in Tuwai v State CAV0013 of 2015: 26 August 2016 *[2016] FJSC 35* and in Alfaaz v State CAV0009 of 2018: 30 August 2018 *[2018] FJSC 17*.'

[32] When examining the issue involved in the 3rd ground of appeal to the Court of Appeal, the following paragraphs in the Summing Up of the Learned High Court Judge would lend assistance:

Paragraphs 5 and 6 of the Summing Up had dealt with the issue of proof and the standard of proof. These two paragraphs are to the following effect:

"5. On the issue of proof, I must direct you as a matter of law that the onus or burden of truth lies on the prosecution to prove the case against the accused. The burden remains on the prosecution throughout the trial and never shifts. There is no obligation upon the accused to prove his innocence. Under our system of criminal justice an accused person is presumed to be innocent until proved guilty.

6. The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about the guilt of the accused, then it is your duty to express an opinion that the accused is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the accused that you can express an opinion that he is guilty."

Then paragraphs 24 to 26 and 28 dealing with the caution interview also would be relevant. These are:

> "24. I now direct you Ladies and Gentleman how you should approach this interview and the consequent statement that he made in answer to the formal charge.
>
> 25. The prosecution say that the answers given in the interview were answers that he provided and that they are true. The accused's case is that he was assaulted in the Police Station and he was in pain and in order to stop the assaults he gave those answers but they are not true. He was forced to say that.
>
> 26. In deciding whether you can safely rely upon those admissions, you must decide two issues:

and

> 28. If however you are sure that the accused made the admissions and that they were not obtained in that way, you must nonetheless decide whether you are sure that the admissions are true. If, for whatever reason, you are not sure that the admissions are true then you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them."

Medical consultant's evidence too has been dealt in the Summing Up in paragraph 40:-

> '40. A medical consultant came to court and said that the medical report showed that there was contusion to the accused's back. He said contusion is bruising that can be caused by blunt force. He said that there were no other injuries noted by the examining doctor.'

[33] On perusal of the summing up as a whole I am convinced that the High Court Judge not only had addressed his mind but also had the defence case fairly and completely put to the assessors for their consideration. Further I stress that – always a summing up have to be objective and balanced as observed in R v Fotu (1995) 3 NZLR 129. I would take the liberty to cite the following passages also of Cooke P, in the aforesaid case of R v Fotu which would be of importance.

"New Zealand practice has generally accorded with and we cannot do better than adopt the following passage in the speech of Lord Hailsham of St Marylebone LC in R v Lawrence [1982] AC 510, 519:
It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definition is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

For the above reasons I conclude that the Court of Appeal has not erred in rejecting the above ground of appeal.

Additional 2nd ground of appeal submitted to this court

[34] The ground spelt out in 2(IV) of the additional grounds to this court submitted by the document received on 26.6.19, was that the learned High Court Judge erred in law and in fact in failing to direct himself and/or the assessors on the weight to be attached to the confession in the light of all other evidence in the case. This ground almost appears to be same as the third ground presented to the full court of appeal and which has been already rejected by them.

New ground of appeal submitted to this court

[35] Now I shall advert to the 2nd additional ground of appeal submitted to this court (under Item 2.V) of the Notice of Appeal received by this Court on 26.6.19). Manner in which this ground is drafted bears ample proof of the fact that neither counsel had raised this matter in any court below. Thus this appears to be a new ground raised in this court. In those circumstances this court would not entertain a fresh ground of appeal unless its significance upon the special leave criteria was compelling. In such a situation it does not meet the required standards. In this regard observations made by this court in Kamalesh Kumar v State would become relevant. At para 20 –

"[20] The applicant in his petition for special leave to this court purported to raise numerous grounds, not raised in the court below. Such an approach will not find

favour with this court unless the omitted ground is compelling and meets the criteria for special leave of section 7(2). The court finds nothing compelling, or of that category, in the informal petition."

The grounds of appeal submitted to this court by the petitioner's document seeking special leave, are new grounds not taken up or argued in the Court of Appeal. In this regard I wish to quote the following observations made by this court in **Anand Abhay Raj v The State**; FJSC 12; CAV 003.2014[20 August 2014], citing with approval the principle of law enunciated in **Dip Chand v The State**, at paragraphs 27 and 28 thereof:

> "27] In **Dip Chand v The State** *CAV0014/2012, 9th May 2012* this Court [at paragraph 34] held that:
> "Given that the criteria set out in section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course, the fact that the majority of the grounds relied upon by the petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult."
>
> [28]The Court continued at paragraph 36:
> "The Supreme Court has been even more stringent in considering the applications for special leave to appeal on the basis of grounds of appeal not taken up or argued in the Court of Appeal. In **Josateki Solinakoroi –v- The State** Criminal Appeal No. CAV 0005 of 2005 the Supreme Court of Fiji in an exceptional case took into consideration the principles developed by (the) Privy Council in similar situations and in particular relied on the following observation in **Kwaku Mensah -v- The King** (1946) AC 83:
> "Where a substantial and grave injustice might otherwise occur the Privy Council would allow a new point to be taken which had not been raised below even when it was not raised in the petitioner's printed case."

[36] However, I am mindful of the fact that this court does not lack jurisdiction to hear new grounds of appeal. But there are stringent tests or a very high threshold has to be satisfied before leave will be granted by this court on new grounds. At this juncture I wish to cite the principle of law enunciated in **Eroni Vaqewa v The State** [2016]FJSC 12; CAV 0016.2015(22 April 2016 , at para 28:-

> "…The petitioner did have the advantage of very able counsel before the single judge. This ground was not raised in the High Court or in the Court of Appeal. In such circumstances this court would not entertain a fresh ground of appeal unless its significance upon the special leave criteria was compelling."

[37] It must not be a routine practice to allow every petitioner to argue new grounds in the Supreme Court which were not taken up before the lower court. See Balekivuya v State [2016] FJSC 37; CAV 0014.2016 (26 August 2016). In the case at hand the significance of this new ground cannot be considered as the most exceptional case to grant leave for the reason that the document in question had been tendered at the trial without any objection. Thus this court would not entertain this fresh ground of appeal unless its significance upon special leave criteria was compelling. Further it has not satisfied if the ground is not allowed substantial and grave injustice might occur.

Special Leave to Appeal

[38] Under Section 98 (3) of the Constitution, the Supreme Court derives exclusive jurisdiction, to hear and determine appeals from all final judgments of the Court of Appeal. Section 98 (3) thus reads as follows:-

> "(3) The Supreme Court—
> *(a)* is the final appellate court;
> *(b)* 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; and
> *(c)* has original jurisdiction to hear and determine constitutional questions referred under section 91(5)".

[39] Section 7 of the Supreme Court Act No.14 of 1998 also becomes relevant.

> "7 (1). In exercising its jurisdiction under Section 98 [formerly section 122] of the Constitution with respect to special leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstance of the case-
> (a) refuse to grant special leave to appeal;
> (b) grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
> (c) grant special leave and allow the appeal and make such other orders as the circumstances of the case require.
>
> Section 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.

[40] The above Section 7(2) which relates to criminal matters would show that the Supreme Court must not grant special leave to appeal in a criminal matter unless the court is satisfied

that a question of general legal importance is involved, or a substantial question of principle affecting the administration of criminal justice is involved or substantial or grave injustice may otherwise occur.

[41] The decisions in this jurisdiction have re-affirmed the position that the criteria stipulated in Section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent and special leave to appeal should not be granted by this Court as a matter of course.

[42] The following observations were made by this Court in **Dip Chand v State**; CAV 004 of 2010 (9th May 2012) would strengthen the above principle:

> *"....Given that the criteria is set out in Section 7 (2) of the* Supreme Court Act *No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course the fact that the majority of the grounds relied upon by the Petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the Petitioner of crossing satisfying (sic) the threshold requirements for special leave even more difficult."*

[43] Viewed in the above context and having considered the facts and circumstances of this case together with submissions advanced before this court, I am not satisfied that grounds submitted met the threshold criteria spelt out in Section 7(2) of the Supreme Court Act no. 14 of 1998 against the conviction. Thus the application for leave to appeal against conviction should fail. Leave to appeal against conviction is refused.

The sentence

[44] By the 1st Notice of Appeal of the Petitioner received by the Registry on 5 January 2019, leave to appeal had been sought on 3 grounds enumerated therein, against the decision of the Fiji Court of Appeal in Criminal Appeal No. AAU 0053 of 2015 of 29 November 2018. As evidenced by the impugned decision of the Court of Appeal, they had dismissed the appeal and affirmed the conviction.

[45] The 2nd Notice of Appeal received by the Registry on 26 June 2019 is another notice submitting additional grounds of appeal. This too is silent about any grounds of appeal against sentence.

[46] The Petitioner when appearing before the single judge of the Court of Appeal had not urged leave to appeal against sentence. In the written submissions filed by the Petitioner in the full Court of Appeal also nothing has been advanced with regard to any appeal against sentence. Further, it is amply clear from paragraph 7 of the impugned judgment of the Court of Appeal, at the hearing before that Court, the Petitioner had once again confirmed

that he was not canvassing the sentence. The Petitioner's written submissions filed in the Court of Appeal and in this Court also nothing was mentioned with regard to an appeal against sentence. All above leads to the inescapable conclusion that the Petitioner never canvassed the sentence in the Court of Appeal or here.

[47] However, at this juncture I wish to state that I am mindful of the recent pronouncement by the Supreme Court with regard to fixing of non-parole period in the case of Nacani Timo v. State CAV 0022 of 2018 dated 30 August 2019 to the following effect. In paragraph 54(ii) therein:-

> *"(ii) It is not mandatory for a Court to award a non-parole period to every convict. However, a decision to award or decline to award a non-parole period must be taken by a Court after hearing a convict and the decision must be accompanied by reasons, with an economy of words, as a part of a just, fair and reasonable procedure keeping the interests of the convict and society (including the victim) in mind."*

[48] The case at hand can be clearly distinguished from the aforecited case of Timo for the following reasons:-

a) Timo's was an appeal against sentence with a non-parole period fixed by the Learned High Court Judge which was affirmed by the Court of Appeal.
b) In the present case COA whilst specifically stating in paragraph 7, had proceeded to hear only the appeal against conviction lodged by the Petitioner. Said paragraph states that Petitioner once again confirmed that he was not canvassing the sentence. When the Petitioner has not canvassed his sentence no necessity would arise to refer the case back to the High Court Judge to address his mind with regard to fixing of the non-parole period. The impugned judgment of the COA has not dealt with appeal against sentence.

[49] In terms of Rule 2 of the Supreme Court Rules, 2016 – unless the context otherwise requires "appeal" means an appeal to Supreme Court after leave has been granted - Section 98 (4) of the Constitution. As such not only there had been no appeal by the Petitioner against sentence, even none of the notices of appeal lodged in this Court had assailed the sentence.

[50] In a situation where the Petitioner has not canvassed his sentence no necessity would arise to refer the case back to the High Court Judge to address his mind with regard to fixing of the non-parole period. Further, the impugned judgment of COA also has not dealt with appeal against sentence.

[51] For the above reasons I am of the view that the principle of law enunciated in Timo's case has no application to a situation where there is no appeal against sentence. In view of the

analysis spelt out under "Sentence", in the preceeding paragraphs of this judgment no necessity arises to consider granting leave against sentence.

Keith, J:

[52] I have had an opportunity to read a draft of the judgment of Ekanayake J. I entirely agree with her that leave to appeal should be refused, and I add a few words of my own because I approach the appeal from a slightly different angle.

[53] The core point taken by Kacivakawalu is that the trial judge's finding that his confession was made voluntarily was inconsistent with the agreed medical evidence that there was a contusion on his back. There are, in my opinion, two problems with that argument. First, the doctor who prepared the medical report on Kacivakawalu which had referred to the contusion was not asked to give evidence. There was therefore no evidence about how old the contusion was. It might have predated the arrest. Secondly, and more importantly, the judge explained why the presence of the contusion on Kacivakawalu's back did not support his case. If he had been ill-treated in the way he claimed he had been, his injuries would have been much more serious than they were. That led the judge to conclude that Kacivakawalu's evidence about his ill-treatment could not be relied upon. Once the judge had rejected Kacivakawalu's evidence about how he had been treated by the police, there was no basis for the judge to disbelieve the accounts of the police officers.

[54] Kacivakawalu has claimed that the medical report which was put before the High Court was incomplete. It turned out that what he was really saying was something else. It was not the case that the medical report was incomplete. Rather that an X-ray had been taken at the hospital to which the police had taken him, and it was that which had not been before the High Court. This was not a failure on the part of the State to disclose to Kacivakawalu a relevant document which was in its possession: Mr Burney for the State told us that the police had never had the X-ray themselves. So the criticism of the judge is limited to the absence of any direction he gave to the assessors about the non-production of the X-ray. Apart from specifically telling the assessors that they were not to speculate about what the X-ray would have showed, it is difficult to see what other direction the judge might have given. As it was, he warned the assessors that they were not to speculate on what the evidence might have been. That was a sufficient direction on the topic.

[55] Although the trial judge's reasons for concluding that the confession was voluntary were clearly expressed by him, the Court of Appeal embarked on a discussion about the extent to which a judge in Fiji is required to give reasons for his conclusion on any procedural ruling in general and a ruling following a *voir dire* on the voluntariness or otherwise of a defendant's confession in particular. That was because the single judge had granted Kakivakawalu leave to appeal on the basis that the trial judge may not have given sufficient weight to the decision of the Court of Appeal in *Nacagi v The State* [2015] FJCA 156 about

the court's approach when there is independent medical evidence which supports the defendant's complaint.

[56] In my opinion, what the Court of Appeal said in *Nacagi* does not arise in this case since the trial judge found that the independent medical evidence did *not* support Kacivakawalu's case. It was inconsistent with the nature of the ill-treatment to which he claimed he had been subjected. It was therefore unnecessary for the trial judge to have taken into account what had been said in *Nacagi*. But I mention it because the Court of Appeal thought that there may be a difference between *Nacagi* and the later decision of the Supreme Court in *Lesi v The State* [2018] FJSC 23 about the extent to which a judge is required to give reasons for his ruling following a *voir dire* on the voluntariness of a defendant's confession. Indeed, the Court of Appeal invited the Supreme Court to resolve the issue.

[57] I do not think that we should accept that invitation – not because there is no difference between *Nacagi* and *Lesi* (on which I express no view whatever) – but because this is not the case to do so. For the reasons I have given, the issue does not arise for consideration in this case. In any event, if the Supreme Court is to embark on a consideration of the topic, it should do so in a case in which both sides are legally represented.

[58] These, then, are my reasons for agreeing with Ekanayake J that leave to appeal against conviction should be refused, and I turn to Kacivakawalu's sentence. As Ekanayake J has pointed out, he was not seeking leave to appeal against sentence, but the Court noticed that his circumstances were similar to those of the petitioner in *Timo v The State* [2019] FJSC 22. Like the petitioner in *Timo*, he had had a non-parole period fixed in his case without the judge explaining why it was appropriate to do so. In those circumstances the Supreme Court in *Timo* had remitted the case back to the High Court for it to reconsider whether to fix a non-parole period in his case. Should not we do the same in this case? In other words, should we give Kacivakawalu leave to appeal out of time to challenge that aspect of his sentence?

[59] I do not think so. Mr Burney pointed out that if we did that the appellate courts would be inundated with applications for leave to appeal out of time in cases where the judge had not given any reasons for fixing a non-parole period. That argument has been accepted in other jurisdictions. For example, it was held by the Court of Final Appeal in Hong Kong in *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 that it is only in truly exceptional cases that the time for appealing will be extended on the ground that a subsequent judgment has held that the previous understanding of the law was incorrect. There is nothing exceptional about this case.

Stock, J:

[60] I have read the judgment in draft of Ekanayake J. I agree with her that leave to appeal should be refused. I have also read the judgment of Keith J and agree with it.

The orders of the court:-

1. Leave to appeal against conviction refused.
2. Appeal dismissed.
3. The decision of the Court of Appeal dated 29 November 2018 affirmed.

.....
Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

.....
Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

.....
Hon. Mr. Justice Frank Stock
Judge of the Supreme Court

Solicitors:

In Person for the Petitioner

Office of the Director of Public Prosecutions for the State