IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0006 of 2022
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0079/2017; High Court No: HAC HAC 243 of 2014]

BETWEEN: **DESHWAR KISHORE DUTT**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court**
The Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
The Hon. Mr. Justice Madan Lokur, Judge of the Supreme Court

Counsel: **Mr Mohammed Yunus for the Petitioner**
Ms Sadaf Shameem for the Respondent

Date of Hearing: **5th April, 2023**

Date of Judgment: **28th April, 2023**

JUDGMENT

Gates J

Introduction

[1] On 27th April 2017 the Petitioner was convicted after trial in the Suva High Court of 2 counts of aggravated robbery contrary to Section 311 (1) (a) of the Crimes Act. The

circumstance of aggravation was stated in the information to be that the offence had been committed "*with others*." The wording of the section states: *"in company with one or more other persons."* The allegation as made however, was clear enough.

[2] The next day, though he had escaped meanwhile from police custody, the petitioner was sentenced in absentia to 15 years imprisonment on each count, concurrent to each other, with a non-parole period of 14 years imprisonment. Sentence was to commence on the date that he could be arrested.

[3] In spite of the petition having been misplaced in the registry a panel of this court had accepted that a timely petition had indeed been lodged.

[4] The petitioner advanced in his amended petition 13 grounds of appeal against conviction. There was no ground argued against sentence. For the most part counsel for the petitioner argued his case on the basis of the wrongful admission and acceptance of the caution interview. He indicated parts of the evidence which he said threw doubt on the prosecution case. He argued that the evidence pointed to various assaults having been made on the petitioner prior to and during his interview.

[5] The trial commenced with a *voir dire*. The judge ruled the interview voluntary and admissible. It was the only evidence against the petitioner.

The evidence

[6] On the 20th July 2014 Shaleshni Devi lived at the address in Hanif Road Nadera, where the two robberies took place. Her husband Kishore Kumar lived there too. Their evidence related to count 1. Shaleshni's brother Dharmendra was staying with his sister. He was a farmer and lived in Labasa. His evidence related to count 2.

[7] It was in the middle of the night, just after 2am, when these witnesses were disturbed by the breaking in of four persons. They were all masked, dressed in black and armed with pinch bars, a screw driver, pliers, and a cane knife.

[8] Nothing was said by the Kumars about the departure of the intruders using Mr Kumar's Mitsubishi Pajero. It was referred to by the petitioner in his caution interview, where he said he had driven the vehicle away from the scene and had abandoned it in Caubati Village road.

[9] At the time of the break-in Shaleshni was preparing the milk for her 3 year old daughter. The intruders entered the house from a downstairs grill door. The alarm went off. The bedrooms were upstairs. She retreated to her bedroom where her husband was awake, and then locked the door. The intruders broke open that door. Four of them entered her bedroom.

[10] One of the masked men held her by her hair and punched her on her head repeatedly. She fell to the floor whereupon she was kicked 4 to 5 times. She said:

"*One was standing at the doorway armed with a cane knife. One had a pinch bar and was with my husband. One was holding me and (the) other one was ransacking the room and searching our properties."*

[11] They then left. As they left, she said they threw her baby against the wall. In cross-examination it was put to Shaleshni that she had not mentioned this incident with the baby in her police statement. She accepted that. None of what she had said about the robbers was challenged.

[12] Her brother Dharmendra Raj gave evidence next. He was sleeping in an adjoining room. He was awoken by some noise. He opened his door to see what it was, and saw the four masked men. He rang his other sister for her to call the police. This act brought retribution upon him. He was beaten with a cane knife and then a pinch bar quite severely.

The knife went to his forehead injuring him close to the eye which required stitching later. He was also hit on the back of the head by the pinch bar. He became unconscious. His sister found him later in a pool of blood. The robbers stole his clothes and $3,600.00 in cash.

[13] Kishore Kumar was a building contractor. In this robbery he lost many items, such as 2 laptops, a camera, gold and other jewellery, a mobile phone, and a safe containing cash of between $80,000 - $100,000 Fijian dollars. There were electrical items also taken.

[14] Mr Kumar was left bleeding from this robbery. His baby daughter was also present. She witnessed the robbery and assault on her father and mother, and later she herself was thrown against the wall. The broken safe was recovered. But neither the cash nor anything else was recovered.

[15] It would seem that prosecuting counsel did not take the witnesses through their resultant injuries in any detail. Nor was Mr Kumar asked about the getaway of the masked men, and the fact that they had departed in his Pajero.

[16] None of these witnesses could identify the masked men, and none referred to the petitioner as being outside the house or at the wheel of Mr Kumar's Pajero, ready to drive away the intruders.

[17] The final prosecution witness was DC Alan Nair. He worked in the Transnational Crime Unit at Nadi, and had been in the Police force for 19 years. On 19.08.14 he was based at Valelevu Police Station. He was asked to interview the Petitioner concerning this case. He was not the investigating officer.

[18] Parts of the interview record were blocked out by consent, and not shown to the assessors. They contained matters unnecessarily prejudicial to the Petitioner. The Petitioner was chiefly educated in the USA and so the interview was conducted in English. D/Cpl Vinod Chand was also present. Chand did not give evidence in the main trial.

[19] The interview was conducted over 2 days – 4 hours on 19.08.14 and just over one hour on 20.08.14. He was given meal breaks. The procedural requirements were followed.

[20] DC Nair was cross-examined by defence counsel. DC Nair said he did not know of an allegation of assault during the time when the petitioner was being conveyed to Valelevu Police Station. He was at Valelevu when the petitioner arrived. The officer said he did not see any bleeding on the petitioner. He saw some old scratch marks on his face. He did not see that his left and right arms were swollen or that he was wearing a blood stained shirt. On presenting himself for the interview, the petitioner did not appear injured.

[21] DC Nair did not have the Petitioner medically examined before interviewing him. He said the Petitioner made no complaints to him. He did not notice that the petitioner had a red eye, on his right or left eye. DC Nair denied various allegations of impropriety, threats to take him to the military camp, or any assaults or bullying. He said the petitioner did not exercise his right to remain silent. No other police officer kicked him or punched him whilst he was sitting in a chair across a table from DC Nair. Later he said he noticed that the petitioner had no difficulty in walking.

[22] Counsel referred DC Nair to the Valelevu Police Station Diary of 19.08.14 where an entry recorded the petitioner had a cut on the mouth, swollen arms left and right, and a blood stained t-shirt. When he saw the petitioner Nair said he saw none of those things. Nair said he should have suspended the interview and called the petitioner's wife. He said D/Cpl Chand telephoned her and there was no answer. Nair said he should have noted this. The interview record refers to Cpl Chand handing a mobile over to the petitioner to speak to his wife [Q & A 97 and thereafter].

[23] DC Nair said he did not know whether the petitioner had complained to the Magistrates Court (Nasinu). He said the injuries and bandages were not on him when he interviewed the petitioner. He said that the petitioner was given an opportunity to speak to his wife and the petitioner took that up.

[24] In his defence the petitioner gave sworn evidence. He called the doctor whom he saw at the Makoi Medical Centre, and finally his wife to give evidence.

[25] The petitioner testified that on 19.08.14 he was arrested at Navua. He was at Navua Police Station for 10 – 15 minutes. At that time he was fit and fine, except he said he had some old bruises on his face. I note, in the voir dire trial, he had said the old bruises were on his hands (not his face). He was conveyed by vehicle to Valelevu Police Station. On the way he was questioned about some robbery cases by police officers. He denied the allegations. He said he was slapped twice on the left cheek and one officer slapped him on his nose. He was punched on the right knee twice. He was injured on the right leg because a police officer hit him with his fist. On arrival at Valelevu Police Station he was limping.

[26] At Valelevu Police Station he was put in the Crime Office and was seated on a chair. Four officers were present. He said he was hassled, threatened, and given two slaps. He was kicked in the leg.

[27] As a result he said he suffered an eye injury, swollen arms (he had tried to save his face with his arms) and was limping afterwards from injured knees and could not walk properly. He denied that Cpl Vinod had called his wife. He said he signed the interview statements because Vinod threatened to assault him and to take him to the military camp.

[28] He was medically examined after the interview. When taken to the Nasinu Magistrates Court on 22.08.14, he said he told the Magistrate of the assault. Apparently there were three separate cases brought against him concerning different allegations being made against him.

[29] The petitioner maintained that his wife came to see him whilst he was held at the Nasinu Police Station, not at Valelevu Police Station. She saw him at the Nasinu Magistrates

Court also. His wife took photographs of his injuries. At Valelevu he had been kicked by an officer wearing boots, though some wore canvas, hard kicks to the knees and arms.

[30] In cross examination he maintained his account. He insisted he had told the Nasinu magistrate of the assaults. The judge recorded that he was evasive at this part of the evidence. He said he complained about one of his cases only, not the other one.

[31] He called the doctor from Makoi Health Centre who examined him after the interview. She was Doctor Susana Suliana. She referred to the standard Medical Examination Form [ex.DE2]. She often had to deal with police cases referred from Nasinu. She conducted a full body examination of the petitioner. She noted the injury she found on the form itself. She said if the petitioner had been kicked five or six times on the knees with a police officer's boot (one such was in court with the assessors) she expected to see bruises, scratches, and abrasions as a result. The area would be swollen and the victim in pain. She said she found no swelling or fracture of the petitioner's knee. [DE2] the medical examination form recorded there had been an x-ray taken on the petitioner's right and left knee – both found to be normal. Of the other injuries that she was asked about, she said she did not find his mouth bleeding or that his arms were swollen.

[32] She said the petitioner told her that he was assaulted at Navua Police Station and nowhere else. She found no injuries to the face, only on his right eye [haemorrhage]. She noted the patient was "*conscious. In no distress.*" He had a superficial laceration on the right forearm and abrasions and bruising on both knees.

[33] The final witness was the petitioner's wife, Shiwani Vikashni. She said she had been called by Nasinu Police Station on a date she could not recall. She went to the police station. She saw the petitioner was injured. She said his eyes were swollen, and also his left forearm. His left cheek had old bruises. He had blood on his right arm. His knee was injured. He had blood stains on his t-shirt. She had not been called by Valelevu police. She had taken photographs of the petitioner outside court.

[34] Defence counsel summed up the case at the end of the trial saying that there had been no evidence to link the petitioner to the robbery, except the confession. She said they had forced the confession from him.

[35] The defence pointed out that nobody saw the petitioner at the Hanif Road home. He was not identified as one of the robbers. He was said to have confessed to his involvement as the getaway driver, but there was no linking evidence with Mr Kumar's Pajero vehicle, no finger prints, no DNA. Everything depended on his confession.

[36] The answers given by the petitioner in the interview with DC Nair were detailed. The admissions were not challenged as a fabrication, in the sense that the answers had been invented by the police out of their own heads. The petitioner's case was that the answers had been given by him but only after he had been threatened, assaulted, and oppressed. The interview was not voluntary, and actual violence had been used to make him confess.

[37] In the course of the interview the petitioner revealed that a certain man, whom he had known from before, told him he had a job for him. He asked him to be their driver in that job. He only told him of the plan later. He met up with this man at his house on 19.07.14. They walked to Maqbool Road. The petitioner wore black clothes and a black cap. The other man had on black clothes as well.

[38] The other man took a mask, hand gloves, and a pinch bar. He said this was to break into a house off Hanif Road, and to steal items. They met two other men at the roundabout. They were also wearing all black clothes. One of them was carrying a black bag with a pinch bar. He was asked whether anyone was carrying a cane knife and an axe. He said he did not see anyone carry thoee items.

[39] He said the leader told them about the various parts they were to play. The petitioner was told he was to be the getaway driver. They climbed over the fence just after 2am and the break in started. Eventually he was given the vehicle key. He got in and started the engine. He backed the car up to the front door. They all came out of the house and got

into the car with the items stolen from the house. He drove off and the vehicle was abandoned in Caubati village Road.

[40] The safe was opened in the cassava patch. There was a great deal of cash in it. He was given $15,000 as his share. Near the Kinoya lights, they went their separate ways. He pointed out various things to the police and told them what he had used the money on. The court has had difficulty in seeing the full document of the interview. Not every page was available to us, which Keith J has dealt with in his judgment.

Court of Appeal

[41] The court below was well aware of the importance of the determination of the admission into evidence of the confessional material. The correctness of that acceptance was pivotal to the sustainability of the conviction. Taking into account all of the matters observed and noted by the trial judge the court concluded he had given sufficient reasons why the confession was to be regarded as voluntary.

Ground 1 – Rejection of spouse's evidence

[42] This ground largely concerns the *voir dire* ruling. The trial judge was not impressed by the petitioner's spouse as a witness. He considered her a less than objective witness. He noticed she was smiling when giving evidence. Some witnesses when giving evidence smile because they are nervous. As an experienced Judge with understanding of local social behaviours the judge was properly able to take that factor into account in assessing the credit of the witness. The Judge also rejected the medical report sought to be produced by the defence, without the doctor being called or the proper procedures for exhibiting such documents being followed. It remained inadmissible. Later it was tendered properly through the doctor called by the defence in the main trial. This ground fails.

Ground 2 – Failure to direct assessors on matters in summing up

[43] These were not urged in oral arguments which had concentrated instead on factual circumstances of the allegations of assault.

(a) It was said the assessors should have been warned of the dangers involved in convicting an accused on confessional statement alone whilst made in police custody. There was only one litigation issue in this case which was made clear in the judges summing up, and that was whether the confession had been voluntary. The assessors were directed to focus on that issue. Having found the interview statements to have been given voluntarily, the judge admitted them into evidence in the main trial. He did not change his mind on this sole issue at the end of the trial proper.

(b) Courts sometimes feel it is right to direct assessors (or jurors) on the need to keep in mind that police witnesses can be practiced witnesses. Giving evidence in court is part of their job. However such direction may depend on the length or nature of their evidence. Here the evidence was short and there was a clear difference in the accounts of the police interviewer and the petitioner. The directions were not appropriate or necessary in this case.

(c) It was said the defence case was not put accurately or fairly. A careful reading of the summing up shows that adequate focus was given to the defence case as much as to the prosecution. This complaint is not borne out.

(d) The Australian High Court decision in **McKinney v R** [1991] HCA 6 was cited by petitioner's counsel where it was said:

> *"Whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated, the judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone…."*

The supporting witness D/Cpl Vinod who gave evidence in the *voir dire* was not called in the main trial. In this case the defence claim that though the petitioner gave the answers to DC Nair's questions, DC Nair's evidence of the voluntariness of the process was not corroborated. Nowadays that could have been provided by a video recording of the interview where the court could see how the proceedings had been conducted. It could have shown that there were no improprieties and that the petitioner had given his answers freely and without discomfort. Other evidence was available which undermined the accuracy of what the petitioner had said. At the end of the day the Judge had to decide whether the prosecution had proved that the statements made by the petitioner had been made voluntarily. **McKinney** was a rule of practice not a mandatory or statutory rule. This ground fails.

Grounds 3, 4, 5, 6, and 11

[44] These grounds all deal with issues surrounding the conduct of the interview. They were, in summary: the failure to consider the evidence provided in the Valelevu Police Station diary, the medical report, and the later trial evidence of Dr. Susana Suliana, the rejection of the medical report in the *voir dire* [ground 4]: the violation of constitutional rights in the conduct of the interview, and the failure to apply the burden of standard of proof as to voluntaries [ground6].

[45] The burden and standard of proof for the *voir dire* was stated and applied in the judge's ruling of 21.04.17. At para.4 the Judge wrote:

> *"The law in this area is well settled. On 13th July 1984, the Fiji Court of Appeal in **Ganga Ram & Charan v Reginam**, Criminal Appeal No. 46 of 1983, said the following, "…. it will be remembered that there are two matters each of which requires consideration in this area. First, it must be established affirmatively by the crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force threats of prejudice or inducement by offer of some advantage – what has been picturesquely described as the "flattery of hope or the tyranny of fear" **Ibrahim v R** (1941) AC 599, DPP v*

Ping Lin (1976) AC 574. Secondly even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. ***Regina v Sang*** *(1980) AC 402, 436 @ C-E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account ...."*

[46] By the judges acceptance of DC Nair's account of the interview procedure the Judge was holding there had been no violation of the petitioner constitutional rights. He accepted there had been an attempt made to contact the petitioner's wife [ground 5]. The Judge accepted what was said in the interview about this.

[47] The Judge gave a four page ruling on the *voir dire.* Judges are exhorted to be briefed in such matters so as not to stress adverse findings particularly on credibility issues, in order to maintain impartiality through to the end of the trial. Not all issues are expected to be dealt with. The Judge concluded his brief reasons by saying:

"Considering the evidence as a whole, I find the prosecution's evidence credible. I find the defence's evidence not credible. I accept the prosecution's version of events that the accused gave his caution interview statements voluntarily and the same are declared as admissible evidence, and it may be used in the trial proper as evidence. However, its acceptance or otherwise, will be a matter for the assessors.

Despite reaching the above decision, my mind is not closed. The accused is still presumed innocent until proven guilty beyond a reasonable doubt and the burden is on the prosecution to prove his guilt within the standards mentioned above, from the start to the end of the trial proper."

[48] It is said [ground 11] the Judge failed to evaluate the medical evidence. That is not correct. He assessed the evidence of the petitioner and his wife along with DC Nair, Dr Susana Suliana and the Medical Examination Form. It was the conflict between what the doctor said, the injuries she noted, and what the two defence witnesses had said. He found the two defence witnesses lacked credibility. The Judges findings were open to him on the conflicting evidence. All these grounds fail.

Ground 7 – Summing up one-sided

[49] This is a criticism which is often levelled. But here very similar space in the summing up had been given to the two conflicting cases, that of the prosecution and that of the defence. In that part dealing with analysis of the evidence, again similar space had been allocated. The issues were not particularly complicated. The judge said:

At 29: *"So you can see the competing version of events of the prosecution and the defence on whether or not the accused gave his caution interview statements voluntarily."*

At 31: *"If you accept the accused's above confession, then you will have to find the accused guilty as charged. If you don't accept the same, then you will have to find the accused not guilty as charged. It is a matter entirely for you."*

This ground fails.

Ground 8 – Failure to direct on need for separate consideration of each count

[50] The Judge did not give a direction that the charges were to be considered separately. This was because this factor was not a litigation issue. The sole issue was whether the petitioner had been involved at all in these robberies. The defence accepted that both robberies had occurred. But the petitioner had not been there. Therefore such a direction was not relevant to the contest in this case. Ground 8 fails.

Grounds 9 and 13 –Failure to direct on reasonable doubt

[51] It is said the Judge failed to direct the assessors that the version of events given by the petitioner was sufficient to establish a reasonable doubt, and that therefore the benefit of that doubt should be given to the petitioner. Second it is said the Judge failed to direct them on the intermediate position of doubt. This was not expanded. The Judge dealt with the burden and standard of proof near the outset of his summing up. On doubt he said *"if*

you had any reasonable doubt so that you are not sure about his guilt, then you must express an opinion that he is not guilty." If this was not satisfactory to the defence in this case, defence counsel should have asked for a re-direction. As for the first point, many judges would not be inclined to steer the assessors into any of the possible areas of decision making. The Judge on more than one occasion said the decision on evidence was for the assessors themselves to make. Only in the clearest of cases should a judge make a more robust comment. These two grounds fail.

Ground 10 – Defective charge

[52] This ground was not particularized in the petition nor included in the argument of the written submissions, or urged by counsel orally. If the place of the offence was incorrect in the particulars of the offence, this was not a trial litigation issue, and could have had little bearing on the way the case was conducted by the defence. The place of the offence was not an element of the offence requiring proof. This ground fails.

Conclusion

[53] If the ruling on the *voir dire* had to be circumspect in dealing with the credit worthiness of the witnesses it would have been nonetheless helpful to have had included in the judgment after the assessors had tendered their opinions, further findings on the evidence. The judgment could have shown how the judge saw the evidence, which he had accepted, and how that related to the contrary evidence.

[54] However it is not the function of this court to replace the Judge's findings on credibility. Only when it is found that the Judge has clearly made a wrong decision or had acted without regard to correct principles would this court intervene. The criteria for special leave have not been met.

[55] In the result, special leave is refused, the petition is dismissed, and the orders of the Court of Appeal are to be affirmed.

Keith, J

[56] I agree with Gates J that leave to appeal should be refused, and I only add a few words of my own on the issue whether the Petitioner's confession could be said to amount to a confession to aggravated robbery as the State contended or only to burglary as the Petitioner's counsel argued.

[57] The confession was made in the course of the Petitioner's interview by a police officer following the Petitioner's arrest. The evidence of the police officer which the trial judge accepted was that he recorded in his own handwriting the questions he asked the Petitioner together with the Petitioner's replies. The record of the interview was subsequently transcribed. Unfortunately, not all the pages which had been transcribed found their way into the High Court Record. We are missing pages 7 and 8, as well as all pages after page 9. At the hearing, we asked Ms Shameen for the State to provide us with copies of the missing pages, but we did not receive anything from her. So we asked to see the High Court file, but we have not been provided with that either.

[58] What *is* in the High Court Record is the record of the interview in the police officer's handwriting. Unfortunately, part of the record has been obscured by the spiral binder holding the Record together. In any event, much of what is recorded is not sufficiently legible for us to be able to read it with any accuracy. The upshot of all this is that we do not know what the Petitioner is recorded as having said in the parts of the interview for which the transcript is missing. I have therefore proceeded on the only assumption which can be made in the circumstances – namely, that the Petitioner did not say anything in those parts of the interview which made the case against him any stronger.

[59] Another problem is that it was not apparent from any of the documents in the High Court Record precisely what the Petitioner's case on the *voir dire* or at the trial proper had been on one important feature of his case. He could have been saying that he had not said at all what the police had attributed to him, that the police officer had made up what had been attributed to him, and that he had signed the interview as an accurate record of what

had been said only because of the ill-treatment which he claimed he had received at the hands of the police. Alternatively, he could have been saying that he had indeed said what the police officer had attributed to him, but that he had only said that because of the ill-treatment to which he had been subjected. Accordingly, we asked Mr Yunus for the Petitioner which it was. He told us that it was the latter. That must have come out in the Petitioner's evidence, even though we could find no reference to it in the judge's note of the Petitioner's evidence either in the *voir dire* or the trial proper.

[60] For the reasons given by Gates J, I entirely agree that that there is no basis for concluding that the judge erred in law in admitting the confession into evidence. Since the State conceded that the Petitioner's confession was the only evidence against him, it is therefore critical to identify what he was confessing to. He was confessing to having been the getaway driver for a gang including four other men who were intending to break into the home of their victims in the early hours of the morning when it was dark and when their victims might have been expected to be at home. Although he said that he did not see any of the men with a knife or an axe, he said that one of them had a pinch bar, gloves and a mask. That plainly amounted to a confession to being a party to a joint venture to commit the crime of burglary, but did it amount to a confession to being a party to a joint venture to commit the crime of aggravated robbery?

[61] The law in Fiji on this topic is governed by section 46 of the Crimes Act, which provides:

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such a purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

[62] The Petitioner was undoubtedly confessing to committing burglary with the other men by driving the getaway car. The critical question therefore is: in the particular circumstances of the case, was the commission of the offence of aggravated robbery a probable consequence of committing the offence of burglary?

[63] The charge of aggravated robbery was under section 311(1)(a) of the Crimes Act. In other word, what was alleged to have made this robbery an aggravated one was the fact that more than one person took part in the robbery. One of the ingredients of robbery is the use or threat of force with intent to commit theft or to escape from the scene. Because the Petitioner was confessing to a burglary of someone's home in the middle of the night, it was highly probable that the occupants of the property would be there at the time, and it was highly probable that if the burglars disturbed them and they woke up, the burglars would threaten them with force of some kind or another in order to complete the burglary and make good their escape. So even if a weapon was neither used nor displayed nor even carried, and even if no one had in fact been injured, the commission of the crime of aggravated robbery was unquestionably a probable consequence of committing this particular burglary. That is so whether the test of probable consequence is subjective, ie whether *the Petitioner* himself thought that it was a probable consequence of breaking into the house, or objective, i.e. whether *the well-informed bystander* would have thought that.

[64] In reaching that view, I have not regarded the fact that one of the Petitioners' accomplices had a pinch bar as significant. That was just as attributable to burglary as to aggravated robbery, since it could be used – indeed, the Petitioner said that it was used – to break into the property. But the fact that one of his accomplices had a mask *was* significant. It would have made the Petitioner think that at least one of his accomplices feared that the occupants of the house might be there, and he needed to hide his face.

[65] Having said all that, the trial judge did not approach the case in that way. It is plain from his summing-up to the assessors and his own short judgment that he simply treated the Petitioner's confession as a confession to aggravated robbery. That is not surprising. It was not suggested at the Petitioner's trial that the confession only amounted to a confession to burglary. Nor was that a ground of appeal to the Court of Appeal. Indeed, it was not referred to in Mr Yunus' written submissions to the Supreme Court, although they ran to 33 pages. The point was taken for the first time when Mr Yunus stood up to address the Court. But I am sure that had the argument been raised before the trial judge,

and analysed properly by reference to section 46 of the Crimes Act, the trial judge would have reached the same conclusion as I have.

Lokur, J

[66] I have had the benefit of reading the draft judgment prepared by Justice Gates and Justice Keith. The issues and grounds urged by learned counsel have been comprehensively dealt with. There is nothing for me to add except to record my agreement with their reasons and conclusions.

Orders:

1) *Special leave is refused.*
2) *The petition is dismissed.*
3) *The decision of the Court of Appeal is affirmed.*

The Hon. Mr Justice Anthony Gates
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Mr Justice Brian Keith
JUDGE OF THE SUPREME COURT

The Hon. Mr Justice Madan Lokur
JUDGE OF THE SUPREME COURT