IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0012 of 2024
[Court of Appeal No. AAU 0062/2018]

BETWEEN : **IMSHAD AZRAR ALI**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice Salesi Temo, President of the Supreme Court
The Hon. Mr Justice Anthony Gates, Judge of the Supreme Court
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court

Counsel : Mr A.K. Singh for the Petitioner
: Mr M Vosawale for the Respondent

Date of Hearing : 8th April, 2025

Date of Judgment : 29th April, 2025

JUDGMENT

Temo, P

[1] I agree entirely with the judgment of Her Ladyship Madam Justice L. Goddard.

Gates, J

[2] I agree with the succeeding judgment of Goddard J, its reasons and conclusions.

Goddard, J

Background

[3] The Petitioner was tried on one count of murder before a judge and a panel of three assessors. The trial took place between 15 May 2018 and 5 June 2018. On 7th June 2018 the trial judge gave his summing up and after due deliberation the assessors returned a unanimous opinion that the petitioner was guilty of murder as charged.

[4] In a reasoned judgment, delivered the following day, the trial judge said he was satisfied the prosecution had proved all elements of the charge beyond reasonable doubt and he agreed with the assessors' opinion. The petitioner was duly convicted of the crime of murder and sentenced to life imprisonment, to serve a minimum term of 18 years.

[5] The murder was committed on 1 November 2009, almost nine years before the trial took place. The victim and the petitioner were in a domestic relationship at the time of her death. It seems the fatal incident was not premeditated but the result of a loss of control by the petitioner during an argument. Some background evidence was given at the trial of intemperate conduct by the petitioner towards the victim, including evidence that he had on occasions assaulted her physically as well as verbally.

[6] The considerable lapse of time of almost 9 years between the death and the petitioner's trial for murder was occasioned by his absence from Fiji for a period of 7 years. After having appeared in court following his arrest for the murder of the victim in November 2009, and prior to arraignment or any plea having been taken, the petitioner sought and was granted bail in January 2010 for the purpose of travelling to India to receive medical treatment for diabetes. He failed to return to Fiji after this treatment, in breach of his bail terms. While in India he entered into a de facto relationship with a woman with whom

he had a child. At some point he was convicted and sentenced to imprisonment for offending against this woman and in 2015 he was imprisoned again in India for an offence against The Foreigners Act 1946. In December 2016 he was deported back to Fiji from India.

Cause of death

[7] On 3 November 2009, the victim's body was discovered lying in the kitchen of the home she shared with the petitioner. The time of her death was determined by Dr Goundar, the forensic pathologist, as having occurred two days earlier on 1 November 2009 between the hours of 9pm and 11pm. Prior to conducting the postmortem examination, Dr Goundar attended the crime scene to view the body in situ. He observed the victim to be lying on her back on the kitchen floor with a pool of blood behind her head. The immediate scene around her showed signs of a slight disturbance.

[8] Dr Goundar determined the cause of death as asphyxia by strangulation. Other injuries to the victim's head and face were also carefully examined by Dr Goundar and recorded but none of these had caused the fatality. The deceased's stomach contained some semi-digested food, indicating she had eaten about two hours prior to her death. This was in line with what the petitioner later told police about food the couple had been cooking and had shared that evening.

Events proximate to the death

[9] The petitioner and deceased lived in a compound of two flats. The occupant of the other flat gave evidence at the trial to say that on the afternoon of 1 November she saw the accused and the deceased outside in the yard and heard them arguing. The deceased was seated inside their car and the accused was shouting at her in Hindi. The witness went to bed at around 8:00 PM that evening but at some time later awoke to the sound of something being dragged across the tiled floor in the flat occupied by the petitioner and deceased.

[10] The next morning the witness awoke at around 4am to the sound of the chain which secured the gate into the compound rattling. She thought it was probably the petitioner leaving, as he often did at around that hour some Monday mornings.

[11] Two days later, on 3 November, the petitioner called on the same witness in her office at about midday and asked if she had seen the deceased. He then asked for her key to the gate of the compound as he said he didn't have his and he was worried about the deceased. She refused to give him her key and about an hour later the petitioner came back saying that he still could not get into the property. She then accompanied him to the compound and opened the security gate for him. On arrival they found police officers present.

Evidence about the relationship

[12] Before her death the victim ran a little kindergarten in a room of the flat she occupied with the petitioner. A witness at the trial, who is a preschool teacher, gave evidence of having worked for the deceased for three years before her death. The witness described the petitioner coming into the kindergarten at times and causing trouble. She said the relationship between petitioner and deceased was not good. She had often seen the deceased crying. The petitioner was unemployed during the period the witness was working for the deceased and there were many arguments about money. She said the petitioner was a very different person when angry and would throw anything that was nearby and slap and drag. He had kicked and punched the deceased in front of her and the kindergarten children. She eventually left the kindergarten job because she could not face what was going on, even though the deceased was her best friend.

[13] This evidence of prior friction between the couple was not led as having contemporaneity with the death but to provide contextual background about the relationship between deceased and petitioner. The trial judge was careful to direct the assessors that there was no clear link between the incidents this witness had described and the fatal incident some months later. The petitioner in his evidence completely denied these events, describing his relationship with the deceased as having been healthy, cordial, understanding and loving.

The trial

[14] The trial occupied some three weeks of hearing time, commencing with a voir dire hearing on the voluntariness of the police interviews which were ruled admissible. The trial proper then proceeded with evidence called from 13 prosecution witnesses, following which the petitioner elected to give evidence himself.

[15] The State's case was that the petitioner had struck the deceased on the head with an iron rod (which had been kept in a toy box in the kindergarten), kicked her on the left jaw after she fell to the ground, and then fatally strangled her with the cord of the kitchen kettle. This theory was based on the admissions the petitioner made during his police interviews, which tallied with the forensic evidence given by Dr Goundar, The theory also found support in the circumstantial evidence of co-habitation (time, place and opportunity) and the evidence of the neighbour who had witnessed the petitioner angrily shouting at the deceased that afternoon, heard dragging sounds in their flat later that night, heard what she assumed to be the petitioner leaving the compound in the small hours of next morning, and received a visit from him two days later saying he was unable to access his flat and was worried about his wife. That latter aspect, about a purported inability to access the flat, together with several unanswered phone calls the petitioner made to the deceased's phone the day after her death, and an attempt to make it look as if there had been a burglary at the flat, implied the petitioner was endeavouring to set up an alibi for himself. In addition, there was the recent history of some violence in the relationship.

[16] The petitioner's evidence at trial was focussed on the voluntariness of his caution and charge interviews and a complete denial of any wrongdoing. He alleged he had been subjected to three days of threats and inhumane treatment by police and been denied the right to remain silent and the right to consult his lawyer, also the right to have medical treatment. He said the police had fabricated his interview statements and planted the iron rod in the flat. He said the deceased was alive when he left the flat in the early hours of the morning of 2 November and he did not know how she had died.

[17] At the conclusion of the trial, all matters in issue and the evidence given for both prosecution and defence were carefully summed up by the trial judge in a fair, balanced and thorough manner.

[18] Of the judge's summing-up, the Court of Appeal said this:

> "[63] The trial judge had canvassed the totality of prosecution evidence of 13 witnesses at paragraphs 30-42 and the appellant's evidence (only he gave evidence) at paragraph 44 (with 35 sub-paragraphs) of the summing-up. This all-inclusive, succinct and accurate summary includes the positions taken up in cross-examination as well. Thus, the assessors had the benefit of both accounts before them. The trial judge had not omitted anything vital in each of the cases. With correct directions on burden of proof, respective roles of the assessors and the judge, how to assess inconsistencies, elements of the offence to be proved by the prosecution, provocation, lesser offence of manslaughter, medical opinions, circumstantial evidence, cautioned interview and charge statement, the summing-up was a custom-built one based on the nature of the case.
>
> [64] The trial judge had specifically addressed the assessors on how they should approach the cautioned interview and charge statement *vis-à-vis* their voluntariness and truthfulness in line with established legal principles from paragraphs 52-65 and generally on the same topic thereafter. Thus, the trial judge had put the defence case very clearly before the assessors and directed them in paragraph 79 that if they neither believe nor disbelieve the appellant, still he is entitled to be acquitted. All in all, the summing-up is fair, objective and well-balanced. The summing-up is not devoid of any essential characteristics."

The grounds of appeal

[19] A single judge of appeal considered the petitioner's application for leave to appeal and granted him leave to appeal against conviction on 3 of the grounds advanced (grounds 1, 2 and 6) but refused leave to appeal against sentence.

[20] Before the full Court of Appeal, the petitioner proceeded with his appeal against conviction on the following three grounds, in respect of which leave had been granted:

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in law when he failed to order prosecution to provide full disclosure vide section 290 (c) of the Criminal Procedure Decree such as:*

(i) CID Station Dairy for Murder Investigation of Rajeshni Deo Sharma.
(ii) Copy of eligible cell book record.
(iii) Copy of Vehicle's running used to convey the Appellant after his arrest on 12th November 2009.
(iv) Investigating dairy of all Police Officers involved in the investigating of this matter.
(v) Duty Roster for all Officers from 12/11/2009 to 16/11/2009.
(vi) Copy of meal Registrar.
(vii) Photograph of the iron rod at the scene.
(viii) DNA report.
(ix) Statement of DC Atish Lal.

And thereby denying the Appellant to properly prepare his case that resulted in the miscarriage of justice.

Ground 2

THAT there had been a miscarriage of justice when the Learned Trial Judge failed to exclude the Appellant's caution interview and charge statement when there was ample evidence in that the said confession were not voluntary or obtained in breach of his common law rights.

Ground 6

THAT the Learned Judge erred in law when he failed to direct himself and the assessors that in assessing the evidence before them, the totality of evidence should be taken into account as a whole to determine whether the prosecution had proved their case beyond reasonable doubt.

[21] All three grounds of appeal were dismissed by the Court of Appeal in a finely detailed and comprehensive judgment in which the evidence at trial was extensively traversed, the issues raised by the defence and the voir dire decision of the trial judge, his summing-up and his judgment, were all closely examined and analysed.

The petition to this Court

[22] The grounds advanced in support of this petition are essentially the same as those argued before the Court of Appeal. They concern the alleged failure of the prosecution to provide the listed documents which it is contended would have assisted the petitioner in his defence; a mistaken belief by the Court of Appeal that petitioner's counsel Mr Singh had prepared the High Court record when it had been compiled by the Court of Appeal Registry; an error by the Court of Appeal in not excluding the petitioner's caution interview and charge statement as having been involuntarily obtained; and failure by the

Court of Appeal to consider the totality of evidence which the trial judge should have taken into account in determining whether the prosecution had proved the case beyond reasonable doubt.

[1] Entitlement to relevant documentary evidence

[23] Counsel for the State advised that all available material provided to and in the possession of the prosecution for the trial had been disclosed to the petitioner and in terms of any material that was no longer available, an accompanying police statement had been provided confirming the material was no longer able to be found.

[24] The defence had been particularly keen to establish from police records that when the petitioner was first apprehended on 12 November and put into a police car to be taken to Samabula Police Station for interview, he was first taken to Nabua police station where he claimed to have been 'softened up' by a beating and verbal intimidation and told to admit he had killed the deceased.

[25] The police consistently denied that he had been taken first to Nabua police station and said he was taken straight to Samabula Police Station for questioning but the journey there had been slow because of traffic. It appears from the Court of Appeal's judgment, at paragraph [47], that copies of the station diaries for Nabua and Samabula for the day of arrest were made available to the defence, although the originals could not be found. The relevant vehicle running sheet for that day seems not to have been found. In relation to this and other missing documents, the Court of Appeal observed:

> [49] The State had indeed provided station diaries (possibly copies) at Nabua and Samabula police stations to the defence (see page 186 & 390). The appellant's argument is that they would have proved that he was taken to Nabua police station where he was for the first time allegedly assaulted before being taken to Samabula police station. Police witnesses strongly refute this allegation and explained that it took about 30 minutes for them to reach Samabula police station (though the distance was about 03 km) because of heavy road traffic. Even if the appellant had indeed been taken there (as he alleged) and assaulted breaking one of his tooth in half and further assaulted at Samabula police station later, one would expect Dr. Wood *[who physically examined the*

petitioner that same day after he complained about his physical treatment] to observe serious injuries on him. I have already dealt with this aspect earlier and held that other than the appellant's word of mouth there is no independent material to support the appellant's allegation. The same goes for the vehicle running sheet as well.

[50] Cell book entries at Samabula police station for 12 November 2009 (the day of the arrest) had been provided to the defence (see page 405) but not for the rest of the period of detention. The appellant submits that they would have helped to establish his movements, his condition, injuries to be noted by 'an independent' police officer. However, if the police had ill-treated the appellant in the calculated manner the appellant had claimed, I do not think that a police officer would have made any entries in the cell book. Moreover, they would not have taken the appellant to Dr. Wood at his request without any intervention by any higher authority on 12 November (itself in the midst of the interview) or allowed the appellant to have a one-to-one meeting with a Justice of Peace on 14 November 2009. In the absence of medical evidence and other circumstances suggesting coercion by the police as I have dealt with earlier, I do not think non-availability of Cell book entries at Samabula police station from 13 to 16 November would have made a big difference to the appellant's defence.

[26] It was further contended that the missing CID station diary for the investigation into the murder would have been of assistance to the petitioner regarding any record made of his movements and any notes as to what had made him a prime suspect, given there were no eyewitnesses to the deceased's death. The Court of Appeal dealt with this complaint in paragraph [51] of their judgment, pointing out:

[51] The investigation diary had not been provided as it was not available by the time the matter was taken up for *voir dire* inquiry. However, the contemporaneous statements recorded from all police officers involved have been provided to the defence and those witnesses had been thoroughly cross-examined by the defence to put forward the appellant's narrative that he was assaulted in his stomach and groin area before and while the interview was being recorded. This aspect again goes to the question of credibility of the appellant's position that he was severely assaulted by the police first at Nabua police and then at Samabula police station, rendering his confession involuntary. I have ruled on this and in the circumstances I have highlighted, the non-availability of investigation diary would not have significantly elevated the appellant's case to a credible one.

[27] The Court of Appeal noted that at trial the judge had advised Mr Singh that he would take into account the non-availability of any documents at the voir dire, when determining the voluntariness of the petitioner's police statements.

[28] Much was also made about the absence of any DNA report. The officer who initially took charge of the crime scene, Sergeant Kumar, said that the iron rod found in the flat during the scene reconstruction had been handed over to the forensic officer for DNA testing. The clothes the deceased was wearing and the electric kettle cord had also been handed over for testing. The petitioner insists these items were sent for testing (which would have been to New Zealand) and DNA results must have been obtained. However, this is reading into the evidence that which is not there. There is no evidence that the items were ever sent for testing after being handed to the forensic officer and no evidence that any witness sighted any result from DNA testing.

[29] In relation to the various complaints about lack of some documentary evidence, the Court of Appeal observed:

> *"[48] It is clear that due to the long delay caused solely by the appellant's illegal stay in India avoiding trial in Fiji after being granted bail pending trial for medical treatment, some documents had been lost."*

[30] This is a relevant observation. The petitioner left Fiji very shortly after his arrest, so at a very early stage of the case and before any requests had been made for the disclosure of documents or other evidential material. He did not return to Fiji for nearly 6 years, until December 2016. It is not entirely speculative to conclude that if he had not been deported back to Fiji by the Indian authorities, he would never have returned to Fiji to face trial. And while it is the duty of the State to preserve all items that may have relevance to a serious crime such as this, there is no indication that any relevant information or exhibits were deliberately withheld in this case. As I have observed, it is highly probable that the items intended for DNA testing were never sent for such testing. The petitioner's contention that testing of the iron rod would have proved his innocence (presumably by putting some unknown third party into the frame) is simply speculative.

[31] In conclusion, it cannot be said that any of the omissions occasioned by the inability of the prosecution to provide the missing documentary or other evidence in this case, were material omissions that rendered the totality of the State's case unsafe. None went to *"the*

heart of the matter" as characterised in the earlier decision of the Court in *Nadim v State* [2015] FJCA 130; AAU0080.2011 (2 October 2015).

[2] Whether any misapprehension by the Court of Appeal as to whether it was the petitioner's counsel Mr Singh who had prepared the High Court record for the appeal (which had not included a letter written by Mr Singh to the DPP) or the Registrar who prepared the record, caused a miscarriage of justice.

[32] There is no substance in this point and no injustice has occurred as a result of such a minor misapprehension on the part of the appeal judge. All of the issues important to the defence were clearly able to be fully ventilated at the two appeal hearings with no prejudice resulting from the misapprehension. Mr Singh received the record as certified by the Registrar well before the Full Court hearing and therefore had a number of weeks prior to the hearings to raise any issue relating to the record or to request the inclusion of any further material. He tendered extensive written submissions to the Court for the hearing. He was asked during his oral submissions at the hearing if he had requested certain materials that had not been supplied and was apparently unable to confirm that he had made such a request.

[3] Whether the Court of Appeal erred by failing to find a miscarriage of justice when the trial judge failed to exclude the petitioner's caution interview and charge statement when there was ample evidence these were not voluntarily made.

[33] It would be difficult to find a more comprehensive and detailed analysis of the conduct of a trial than that carried out by the Full Court of Appeal in this case. The narrative of events and the many challenges and the evidential issues raised were extremely thoroughly reviewed and the evidence extensively traversed.

[34] The major challenge on appeal (as it had been at trial) was to the veracity of the petitioner's confessional evidence obtained during his police' interviews and recorded in his caution and charge statements.

[35] The admissions that were obtained varied in their detail. The petitioner claims that the different versions he gave (as to the manner of the deceased's death - the final version of which involved the iron rod) were all lies induced by duress or were fabrications by the police.

[36] It is unnecessary to reiterate in detail or reproduce the large extracts of evidence given during the three weeks of hearings at the trial as that was extensively set out and reviewed by the Court of Appeal in its judgment.

[37] In relation to the allegation that a miscarriage of justice occurred when the trial judge failed to exclude the caution interview and charge statement as not voluntary it is correct that the interviewing of the petitioner took place over an extended period of 3 days. However, there were meal breaks, and time allowed for rest during that period and opportunities provided for him to converse with his lawyer and with family members. He was also examined by two medical practitioners' during that period of confinement, the first at an early stage of the interview process and the second at a later point of the interview period. The judge (and assessors) were clearly satisfied these were voluntary, based on all of the evidence given.

[38] The former Justice of the Peace who witnessed the charge statement, said the petitioner complained to him of police assault and that he had been promised lenient treatment if he signed the statement. However, the JP's only observation was that the petitioner looked upset and tired. Neither of the two medical doctors who examined the petitioner spoke of observing signs of psychological pressure or intimidation.

[39] There was some slight difference as to whether the petitioner gave two or three versions of how the death occurred but that is of no moment. The initial version he gave was that during an argument he had pushed the deceased with a chair whereupon she fell backwards on the kitchen floor with the chair on top of her. On seeing blood, he said he lost consciousness and collapsed on the chair on her neck. After regaining consciousness,

he took hold of the mobile phone cord hanging around her neck and pulled it in the opposite direction and stood on her neck.

[40] In the second version, he added that he and the deceased were arguing about a recharge card and further arguments ensued about money.

[41] In the third version (which he alleged was fabricated by police) he said there was an argument about whether he could go to Nadi. He became angry and got the iron rod from a toy box and struck the deceased from behind. She turned around and sat down and he struck her again on the head. She was bleeding and she fell backwards. He kicked the left side of her face and pressed on her neck with his right leg and then he put the kettle cord underneath her neck and pulled it across in the opposite direction.

[42] The trial judge took the view that there were essentially two versions and the injuries noted in the postmortem report prepared by Dr Goundar were consistent with severe pressure on the neck area which had caused the fatal asphyxiation. Dr Goundar thought the injury to the left jawbone could have been caused by a kick. The kettle cord could have been the cause of the fatal injury and none of the injuries were consistent with an explanation of someone having simply been pushed backwards.

[43] After hearing all of this evidence during the voir dire hearing, the trial judge ruled the caution and charge statements admissible for the assessors' consideration. Both the Judge and the assessors had the benefit of seeing and hearing the petitioner and the other witnesses for themselves. This was in addition to the evidence of the surrounding circumstances. Of this, the Court of Appeal observed:

> [71] It has been stated many times that the trial court has the considerable advantage of having seen and heard the witnesses. It is in a better position to assess credibility and weight and the appellate court should not lightly interfere. In this case too there was undoubtedly evidence before the assessors and the trial judge that, if accepted, would support the appellant's conviction.

[44] Given the careful and thorough manner in which the trial judge conducted proceedings, the nature of the evidence given at the voir dire and during the trial proper, the unanimous opinion of the assessors with which the trial Judge concurred, and the exceptionally detailed examination of all matters by the Court of Appeal, it is impossible to conclude that the Court of Appeal did not consider the totality of the evidence when upholding the trial judge's finding that the prosecution had proved its case beyond reasonable doubt.

[45] This ground of appeal also fails.

[4] Whether the Court of Appeal was correct in not properly considering the totality of evidence should have been taken into account by the trial judge to determine whether the prosecution had proved its case beyond reasonable doubt.

[46] This ground simply re-iterates some matters already pressed for in argument by the petitioner under the first three points of appeal that have been discussed and determined above.

[47] Counsel for the petitioner complains that errors were made by the trial judge but the immediate response to that is to observe that trial counsel did not raise any matters of concern at the conclusion of the summing-up and did not seek any redirections.

[48] The other complaints concern the absence of evidence in some respects but these matters have already been dealt with in the body of this judgment and the omissions concerned found not to be material or not to have materially affected the veracity of the evidence as a whole.

[49] The assessors and trial judge had the advantage of seeing and hearing the petitioner give evidence in person at the trial and while he assumed no onus of proof in doing so and the State still had the burden of proving its case beyond reasonable doubt, the petitioner was fully able to give an account of his version of events.

[50] In conclusion we find the trial was impeccably conducted and the Court of Appeal exceedingly thorough in its review of all matters.

Section 7(2) of the Supreme Court Act

[51] The issues raised in this petition do not engage any of the grounds for the grant of leave in section 7(2). They do not involve any question of general legal importance; any substantial questions of principle affecting the administration of criminal justice; and no substantial and grave injustice will otherwise occur if leave is not granted.

Conclusion

[52] Leave is refused and the petition is dismissed.

The Hon Mr Justice Salesi Temo
PRESIDENT OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon Mr Justice Anthony Gates
JUDGE OF THE SUPREME COURT

The Hon Madam Justice Lowell Goddard
JUDGE OF THE SUPREME COURT