

IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0016 of 2018
CRIMINAL PETITION NO: CAV 0018 of 2018
CRIMINAL PETITION NO: CAV 0020 of 2018

[Court of Appeal Nos: AAU0102/14; AAU0063/14 & AAU0068/14]

BETWEEN: ALIPATE LESI
SAMUELA BEEBY
SITIVENI TUISAMOA

Petitioners

AND: THE STATE

Respondent

Coram: Hon. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Justice Brian Keith, Judge of the Supreme Court
Hon. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel: Petitioners in person
Mr. Y. Prasad for the Respondent

Date of Hearing: 19 October, 2018
Date of Judgment: 1 November, 2018

J U D G M E N T

Chandra, J

- [1] The Petitioners along with one other were indicted for one count of aggravated robbery contrary to section 311 (1)(a)(b) of the Crimes Act of 2009 and one count of theft of motor vehicle contrary to section 291(1) of the Crimes Act of 2009.

- [2] They were found guilty of both counts by a unanimous opinion of the Assessors with which the learned trial Judge concurred. They were convicted and sentenced to 14 years of imprisonment with a non-parole period of 12 years.
- [3] The Petitioners appealed against their convictions and sentences and they were granted leave to appeal against convictions and sentences by a Ruling of the Single Judge of the Court of Appeal on 8th June 2015.
- [4] The 1st and 2nd Petitioners had filed applications for bail pending appeal which applications were refused by a Ruling delivered on 20th October 2017 by a single Judge.
- [5] The 1st and 2nd Petitioners had filed additional grounds of appeal against conviction and sentence on 27th March 2018 for which no leave had been granted.
- [6] The Court of Appeal by its judgment delivered on 14 June 2018 dismissed the appeals of the Petitioners.
- [7] The 1st Petitioner by petition dated 18th June 2018 filed a notice of appeal in the Supreme Court against the judgment of the Court of Appeal and set out the following grounds:
- “a) That the Court of Appeal erred in law in not properly addressing grounds of appeal.
 - b) That the Court of Appeal erred in law purporting to overrule or not follow the Supreme Court celebrated decision in Praveen Ram v. State CAV 001 of 2011.
 - c) That the Court of Appeal erred in law in not properly distinguishing each ground of each petitioner and in so resulting in wrong references.
 - d) That the Court of Appeal erred in law in purporting to establish a requirement for petitioners to raise issue of assault on first court appearance, such requirement would effectively nullify the purpose of voir dire proceedings and is unknown in law.”

[8] The 1st Petitioner had filed in the Court of Appeal amended grounds of appeal on 27th September 2018 which are as follows:

- “1. The learned trial Judge erred in law to ignore the denial of due process of law arising from the interviewing officer in compliance with section 13(1)(k) of the Constitution of Fiji.
2. The learned trial Judge erred in law when his Lordship failed to apply the correct legal test in admitting the appellants confession.
3. The learned trial Judge erred in law when he shifts the burden of proof to the appellant by requiring the appellant to prove his innocence.”

[9] The 1st Petitioner thereafter filed amended grounds of appeal in the Supreme Court on 15th September 2018 which are as follows:

- “1. That the Appellate court erred in law, in not considering any aspects of the petitioners additional grounds of appeal filed on 27th March 2018 as per leave granted by the Honourable President, grounds with which, the State included in its response, thus in breach of the petitioner’s rights of appeal conferred by the 2013 Constitution.
2. That the appellate court erred in law in not properly addressing each of the petitioner’s grounds of appeal and in so doing, failed to distinguish grounds relevant to the petitioner separately resulting in a number of wrong references, particularly in a case of multiple petitioners, as in the petitioner’s circumstances.
3. That the Appellate court erred in law in purporting to establish a requirement for petitioners to raise issue of assault during court appearance, a requirement unknown in law, which nullifies the purposes of voir dire objections in voir dire proceedings.
4. That in establishing such requirements to raise issues of assault during court appearances, the appellate court erred in not considering the existence of an evidence that the petitioner did complain of police assault on 14/9/12 during his first high court appearance (File No.304/12) before the matter was amalgamate. The matter was given judicial notice by the learned trial judge and is reflected on p.350 of the record.

5. That the appellate court erred in law, in failing to consider that the learned trial judge erred in the exercise of his discretion to exclude the petitioner's medical report, an independent evidence, relying on the Lobendahn's test is in direct conflict with petitioner's constitutional right, to call witnesses, present evidence, and to challenge the evidence presented against him or her under section 124(2)(1) of the 2013 Constitution. The issue is reflected at page 349 of the copy record.
6. That the appellate court erred in law by failing to consider in totality, the cumulative effects of the prejudicial evidence contained in the petitioner's caution interviews, in answer to Q16 and Q17, on issues of prior prison stints of the petitioner, and therefore failed to consider the impact of the trial judge's failure to give proper propensity warnings to assessors as required by law."

[10] The 2nd Petitioner filed a notice of appeal in the Supreme Court on 6th July 2018 setting out the same grounds of appeal as the 1st Petitioner had filed on 18th June 2018.

[11] The 2nd Petitioner had filed amended grounds of appeal in the Court of Appeal on 27th March 2018 (Record of Supreme Court pages 11-12):

- "A. That the learned Trial Judge erred in directing the assessors on the burden of presenting "Medical Evidence" relating to the 2nd and 4th appellants.
- B. That the Learned Trial Judge erred in misdirecting himself on para 6 in his judgment with regard to the burden of proof when considering the appellant and his witness was not credible against the prosecution by accepting their witnesses as they were credible.

The 2nd Petitioner has filed additional grounds of appeal in the Supreme Court on 12th September 2018 which contained grounds A and B filed on 27th March 2017 before the Court of Appeal and the following additional ground:

- C. There was a grave, substantial miscarriage of justice by reason of the doctrine of joint enterprise whereupon the petitioner was jointly oppressed with his-co-accused at Nakasi Police Station yet the co-accused confession was ruled out.

[12] The 3rd Petitioner by petition dated 12 July 2018 sought to appeal against the judgment of the Court of Appeal and set out the following grounds of appeal:

- a. The Court of Appeal erred in law in not properly addressing the first ground of appeal.
- b. The Court of Appeal erred in law in wrongly purporting to review the facts and wrongly making findings on the credibility and relied more on the evidence of Sikeli Waqaituinayau when it was seriously challenged in cross-examination in that he (Sikeli Waqaituinayau) admitted that he had been motivated by a desire for revenge on the petitioner because the petitioner had a relationship with one of his (Sikeli Waqaituinayau) girlfriend.
- c. The Court of Appeal erred in law in failing to make an independent assessment of the evidence of Sikeli Waqaituinayau which had been tainted by an important motive.
- d. The Court of Appeal erred in law in not adequately assessing and analyzing the misdirection of the trial judge to the assessors at paragraph 46 sentence 4 of the summing up.
- e. The Court of Appeal erred in law in relying on the evidence of Sikeli Waqaituinayau when this was of no value, unreliable and motivated by his own dishonesty and it was unsafe to convict on his evidence.
- f. The Court of Appeal erred in law in not setting aside the Petitioners conviction even though it held that the learned High Court Judge had not assisted the assessors by way of analyzing and drawing in reference to assist them in coming to correct conclusion.
- g. The Court of Appeal erred in law when it wrongly purported to overrule and not follow the decision of the Supreme Court in Praveen Ram v The State (2012) FJSC 12.:CAV001.2011. 9 May 2012).

Factual Background

[13] On 25 July 2012 after about 3 a.m. Mr. Ram had been awoken on hearing knocking sounds on their back door. Thereafter about six people had forced their way through the front door of the house. One of them had assaulted Mr. Ram. Another had attacked and

injured Mr. Ram's son. The robbers had been armed with pinch bars, cane knives and a bolt cutter. They had threatened Mr. Ram and his family and had demanded money, jewellery and other valuables. They had ransacked the house and stolen several items. They had demanded the keys of the car from Mr. Ram and had got away with the loot in that car. They had been masked and as a result none of them could be identified by the victims.

- [14] The prosecution relied on the caution interviews of the 1st and 2nd Petitioners which were ruled admissible after a voir dire inquiry. As against the 3rd Petitioner the Prosecution relied on circumstantial evidence.

Jurisdiction of the Supreme Court

- [15] Section 98(3) of the Constitution provides exclusive jurisdiction to the Supreme Court to hear and determine appeals from final judgments of the Court of Appeal subject to such requirements as prescribed by law.

- [16] Section 98(4) provides that an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

- [17] Section 79(2) of the Supreme Court Act No.14 of 1998 provides:

“In relation to a criminal matter the Supreme Court must not grant special leave to appeal unless

- a. A question of general importance is involved;
- b. A substantial question of principle, affecting administration of criminal justice is involved; or
- c. Substantial and grave injustice may otherwise occur.”,

- [18] The threshold for granting special leave by the Supreme Court is very high as set out in Livia Lila Matalulu and Anor v. The Director of Public Prosecutions [2003] FJSC 2; (17 April 2003):

“The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for

special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice.”

- [19] In the present application some of the grounds of appeal which have been advanced by the Petitioners are new grounds and were not argued before the Court of Appeal.
- [20] In *Eroni Vagewa v. The State* [2016] FJSC 12; CAV0016.2015 (22 April 2016), it was acknowledged that although the Supreme Court has powers to entertain fresh grounds of appeal which were not raised in any Court below, it will not be entertained “*unless its significance upon the special leave criteria was compelling*”: [at para. 28].
- [21] In considering the issue of whether new issues should be allowed to be argued in the appellate court when it was not raised in the trial Court Justice L’Heureux-Dube in *R v. Brown*, [1993] 2 SCR 918, 1993 CanLii 114 (SCC) in his dissent said:

“Courts have long frowned on the practice of raising new arguments on appeal. Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on questions of law alone are more likely to be received, as ordinarily they do not require further findings of fact. Three prerequisites must be satisfied in order to permit the raising of a new issue,..., for the first time on appeal: first there must be sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial, and third, the court must be satisfied that no miscarriage of justice will result...”.

The appeal of the 1st Petitioner

- [22] At the hearing before this Court the 1st Petitioner who was unrepresented complained that the Court of Appeal had failed to consider the grounds that had been tendered by him to the Court of Appeal on 27th March 2018.

- [23] The single Judge of the Court of Appeal gave his ruling on 8th June 2015. The Petitioner had also applied for bail pending appeal and the Ruling refusing bail had been made on 20th October 2017.
- [24] A perusal of the Court of Appeal record revealed that leave had not been granted for the additional grounds tendered by the Petitioner. Those additional grounds had been tendered long after the Ruling of the single Judge given on 8th June 2015.
- [25] At the hearing of the appeal the 1st Petitioner relied on the grounds of appeal that he had presented as amended grounds of appeal which were filed on 15th September 2018. The initial grounds of appeal relied upon by him in his notice of appeal (paragraph 7 above) are vague and reflect what he has urged in his grounds in the amended grounds of appeal filed on 15th September 2018.
- [26] The first ground of appeal is that the Court of Appeal had failed to consider the grounds of appeal filed on 27th March 2018. The Ruling on the grounds of appeal filed by the Petitioner against his conviction and sentence had been given by the single Judge of the Court of Appeal on 8 June 2015. It is thereafter the Petitioner had filed additional grounds on 27th March 2018. No leave had been granted on these grounds. It is clear from the Court of Appeal record that submissions had been made by both Petitioners and the State on the additional grounds of appeal. The Court of Appeal having dealt with the initial grounds of appeal has stated that the new grounds of appeal are without any merit. Of the additional grounds of appeal filed on 27th March 2018, ground I is the only ground that is not subsumed in the additional grounds relied on by the 1st Petitioner in his submissions before this Court. That ground relates to denial of due process of law arising from the interviewing officer not complying with section 13(1)(k) of the Constitution. A perusal of the caution interview statement of the 1st Petitioner shows that there has been sufficient compliance of the due process and therefore there is no merit in that ground.
- [27] The second ground of appeal is that the Court of Appeal failed to address each ground of appeal properly. The Court of Appeal had dealt with the grounds of appeal that were

raised by the 1st Petitioner, the 2nd Petitioner (and the other Appellant Peni Tuilaselese) which had a common basis, together. Unlike in the case of a trial in an original Court where there are several accused, the case of each accused has to be dealt with separately, when there are several Appellants in an appeal case, the Appellate Court may deal with the grounds of appeal raised by such appellants which have a common basis together rather than repeating each ground separately in respect of each Appellant. As long as the grounds of appeal have been considered and dealt with, such a procedure cannot be faulted.

- [28] The third ground of appeal is regarding the placing of an evidential burden on the Petitioner by the trial Judge amounted to a serious error. It was submitted that the learned Trial Judge in his summing up at paragraph 42 and the Court of Appeal in its judgment at paragraphs 21 and 22 has enumerated the issues of failure to raise complaints of assault during court appearances.
- [29] The learned trial Judge in the course of his summing up directed the Assessors on the burden of proof at paragraphs 4 to 7, 12, 26, 48 in very clear terms, by stating that the burden of proving the charges beyond reasonable doubt was on the prosecution. At paragraphs 26 and 48 the learned trial Judge stated that the accused are not required to prove their innocence.

The learned High Court Judge had in his summing up to the Assessors stated thus at paragraph 42:

“[42] You will note that when Accused No. 2 and 4 first appeared in the Nasinu Magistrate Court on 14 August 2012, none of them made a formal complaint against the Police to the Resident Magistrate. Accused No. 3 when he first appeared in the Sigatoka Magistrate Court on 31 August 2012, also did not complain against the police to the Resident Magistrate. When accused no. 2 and 4 first appeared in the High Court on 28 August 2012, none of them complained to the court about police assaults. Nevertheless, the court ordered they be medically examined at CWM Hospital. However, neither accused no. 2 nor 4, produced the relevant medical examination to verify their claims. Accused no.3 on 14 September 2012, first appeared in the High Court. He also did not make any complaint against police. You have heard

the evidence of the parties. Which version of events to accept is entirely a matter for you."

- [30] The Court of Appeal in its judgment at paragraphs 20 to 22 had referred to this passage in the summing up of the learned High Court Judge in relation to the allegation of assault on the 1st and 2nd Petitioner and had arrived at the conclusion that the learned High Court Judge had approached the matter relating to voluntariness of the confession as required by law. The Court of Appeal at paragraph 22 had referred to the fact that the 1st and 2nd Petitioners had failed to make any complaint to Court against the alleged oppressive treatment meted out to them by the police.
- [31] When the summing up of the learned High Court Judge and the reference to paragraph 42 by the Court of Appeal are considered, together with the instances where reference was made to the burden of proof, and taking into account the entirety of the summing up, it cannot be said that the evidentiary burden was transferred to the Petitioner at any stage. The submission of the Petitioner that an evidentiary burden had been placed on him is misconceived and therefore has no merit.
- [32] The fourth ground of appeal is to the effect that the Court of Appeal erred in failing to take into account the existence of evidence regarding his complaint of police assault during his first High Court appearance on 14th September 2012 in considering the issue of oppression.
- [33] The Petitioner gave evidence on his behalf at the trial. In his evidence in chief he stated that he was assaulted by the Police after he was arrested and taken to Nakasi Police Station while he was being interviewed. Under cross examination he stated that he did not complain to the Sigatoka Magistrate's Court of assault by police officers. He had stated that on 14.9.2012 when he was produced before the High Court that he was assaulted by the Police and the Prosecution had wanted the High Court File HAC 304/12 to be judicially noticed and the Court had taken judicial notice of High Court File HAC 304/12 (High Court Record p.350).
- [34] The Court of Appeal at paragraph 22 of the judgment had stated that when the Petitioner appeared before the High Court on 14th September 2012 he had not made any complaint

against the police for the alleged oppressive treatment. Apparently, this would be contrary to what is recorded in the evidence of the Petitioner at page 350 of the High Court Record.

- [35] The question that arises would be whether the failure of the Court of Appeal to refer to this matter amounted to an error which was prejudicial to the Petitioner. What is recorded in the evidence of the Petitioner is the fact that he had mentioned to court that he had been assaulted by the Police. Prior to that he had been produced before the Magistrate's court, but he had not mentioned to Court about any assaults by the Police.
- [36] The Petitioner in his evidence-in-chief stated that he was punched several times by the Police and also stated that they had been referred to the CWM Hospital by Court. Apart from his mere statement of assault the Petitioner had failed to produce any material to substantiate his claim. He had produced a copy of a medical report which was objected to by the Prosecution and the Court had upheld the objection.
- [37] In the absence of any material to substantiate the allegation of the Petitioner this ground fails to reach the high threshold required leave before the Supreme Court.
- [38] The fifth ground of appeal is regarding the failure of the Court of Appeal to consider that the learned trial judge erred in excluding the petitioner's medical report.
- [39] As stated above when the Petitioner was giving evidence, he attempted to produce a copy of a medical report which was objected to by the prosecution.
- [40] On the objection (recorded atp.349 of the High Court Record) raised by the prosecution, the Court had upheld the objection. In fact the Defence in reply had agreed that the document was not the original document and that it only amounted to hearsay documentary evidence and that they could not satisfy the Lobendahn's test.

- [41] In view of this position even in the absence of the Court of Appeal not referring to this matter, this ground does not meet the threshold required for the granting of leave.
- [42] The sixth ground of appeal relates to the Court of Appeal failing to consider the cumulative effects of the prejudicial evidence contained in the petitioner's caution interview in answers to Q16 and Q17 on issues of prior prison stints of the petitioner.
- [43] It is a fact that the caution interview of the petitioner has reference to his previous prison stints in Q16 ad Q17. It has to be considered whether the cumulative effect of the entirety of the caution interview would outweigh the prejudicial effect on the Petitioner in terms of his bad character as evinced in these answers. Flowing from this position is the question whether there was a miscarriage of justice which would satisfy the granting of special leave.
- [44] Counsel for the Respondent cited the decision in *Josua Raitamata & Anr v. The State* AAU 010 & AAU 058, 2012 on the issue of bad character evidence accidentally led. The Court had held there that:
- “Even if we were to assume, that bad character evidence has been accidentally led, it would not have caused a substantial miscarriage of justice. Any reasonable panel of assessors listening to other parts of the confession would have opined the second appellant was guilty of the offences charged with. In any event, unlike the jury trial, in the case of assessors in Fiji, the final decision is vested with the High Court Judge,. Whilst concurring the opinion of the assessors he has concluded that the appellant is guilty.”
- [45] The Court of Appeal adverted to this ground at paragraph 30 of the judgment and stated that the Petitioner had failed to raise any objections during the trial regarding the prejudicial statements in their confessions and therefore that the said ground of appeal lacked merit. It is also noted that no request had been made of the trial judge regarding any re-directions after the summing up was concluded.
- [46] In view of the above reasoning this ground of appeal fails as it does not meet the threshold required for the grant of special leave.

Appeal of the 2nd Petitioner

- [47] In the first ground of appeal, the Petitioner complains that the learned trial Judge had placed the burden of proof in lines 7 and 8 of paragraph 42 of the summing and that the learned trial Judge had stated in line 6 that the “court ordered that they be medically examined at CWM Hospital”.
- [48] At paragraph 42 of the summing up, the learned Trial Judge had referred to the facts relating to the appearances of the Petitioner and the other accused before the Nasinu Magistrate’s Court and the Sigatoka Magistrate’s Court and their appearances before the High Court on different dates. He also referred to the fact that they had not complained either to the Magistrate of the relevant Court or the Judge of the High Court of police assaults. The trial Judge stated however, that the court ordered them to be medically examined at CWM Hospital but that none of them had produced any medical reports of the examination to verify their claims. It was only a narrative of events that had taken place regarding their appearances in Court and what transpired at the trial. No adverse comments had been made by the learned trial Judge against any of the Petitioners in that paragraph.
- [49] The trial proceedings as seen in the High Court Record at p. 342, indicate that Dr. Josese Vuki was a witness for the 3rd Petitioner. Court had asked him as to who else he had examined on 28.8.12 and he had stated that he had examined the 2nd Petitioner. It is also recorded thereafter that Accused 2 (Samuela Beeby) doesn’t need the doctor as his witness.
- [50] The Petitioner had given evidence at the trial but had not produced any medical evidence nor called any witness to produce any medical report. If he was relying on any medical evidence he had to take steps to produce that evidence.
- [51] In the above circumstances, his submission that the learned trial Judge had placed the burden of proof on him is misconceived as the summing up at paragraph 42 does not in any way indicate that such a burden had been placed on him. Therefore this ground of appeal fails to satisfy the threshold required for special leave.

- [52] In the second ground of appeal the 2nd Petitioner complains that the learned trial Judge in his summing up had misdirected himself on the burden of proof at paragraph 6 of the judgment. Paragraph 6 of the judgment of the learned trial Judge is as follows:-

"6. The assessors are there to assist the trial judge to come to a decision on the guilt or otherwise of the accused. I agree with and accept the assessors' verdict. I accept that Accused No.2,3 and 4 gave their confessions voluntarily and out of their own free will to the police, when caution interviewed, at Nakasi Police station, in August 2012. I accept that the prosecution's witnesses were credible, and I accept their evidence. I find Accused No.2 and his witnesses not credible, and I reject their evidence. I also reject Accused No.4's denial."

- [53] In a trial before the High Court , the final arbiter is the trial Judge himself. In this case, having ruled that the confessions of the 1st and 2nd Petitioners were admissible after the voir dire inquiry, the learned trial Judge in his summing up directed the Assessors on the evidence of the prosecution which included the confessions and the evidence of the Petitioner and his witnesses. In his summing up, as has already been discussed above, the learned trial Judge directed the Assessors on the burden of proof resting on the prosecution throughout. He dealt with the evidence led by the prosecution and the defence in his summing up adequately and the Assessors came up with the opinion of finding the Petitioner guilty. Thereafter the learned trial Judge in his judgment agreeing with the opinion of the Assessors stated that he had reviewed the evidence and directed himself in accordance with his summing up in arriving at his conclusion. By stating that he accepted the evidence of the prosecution witnesses and treating them as credible and rejecting the evidence of the Petitioner and his witnesses on not being credible, has not imposed any burden of proof on the defence as alleged by the petitioner in his submissions.
- [54] This ground of appeal is misconceived and fails to meet the threshold required for granting of leave.

- [55] The additional ground of appeal urged by the 2nd Petitioner is based on his understanding of the doctrine of joint enterprise that if the confession of one of his co-accused was ruled out then his confession too should be ruled out.
- [56] Evidence was led regarding the confessions of the caution interview of four accused at the voir dire inquiry. At the end of the inquiry the learned trial Judge ruled the confessions of three accused admissible and the confession of the 3rd Petitioner inadmissible.
- [57] What the 2nd Petitioner is seeking to achieve by placing this ground appears to be challenging the voir dire ruling of the learned trial Judge.
- [58] Even the 1st Petitioner's appeal was based on the admissibility of his confession. The learned trial Judge in his Ruling after setting out the evidence led at the inquiry stated at paragraphs 10 and 11 that:

“10. I have carefully considered the evidence of all the prosecutions' and defences' witnesses. I have compared and analyzed all of them. After considering the authority mentioned in paragraph 9 hereof, and after looking at all the facts, I have come to the conclusion that all accused, except Accused No.1' gave their police caution interview statements voluntarily and out of their own free will to the police. I therefore rule that accused No.2, 3 and 4's police caution interview statements are admissible evidence, and could be used in the trial proper, and its acceptance or otherwise, will be a matter for the assessors.”

11. In giving my reasons abovementioned, I bear in mind what the Court of Appeal said in *Sisa Kalisoqo v Reginam* criminal Appeal No.52 of 1984, where their Lordships said: “We have of recent times said in giving a decision after a trial within a trial there are good reasons for the Judge to express himself with an economy of words...”

- [59] In Fiji, it has been the practice in trials before the High Court where there have been voir dire inquiries, for the trial judge to give a ruling with an economy of words. This is mainly to avoid situations at the trial which follows any bias on the part of the trial Judge.
- [60] The Privy Council in *Wallace v. R* [1997] 1 Cr App R 396 stated that there is no rule of general application that a judge should give reasons for any procedural ruling made in the course of a trial within a trial. There may be circumstances where it would be unwise to give reasons which the accused would conclude that he would not be believed on the general issue if he chose to give evidence.
- [61] The learned trial Judge in his summing up dealt with voluntariness of the confession. The Court of Appeal in dealing with this question as to whether the learned trial Judge had dealt with same as required by law was satisfied that the directions were adequate and without any defect in law.
- [62] The ruling on the voir dire inquiry of the learned trial though economically worded was sufficiently reasoned out. His directions to the Assessors in his summing up regarding the confessions has been adequate and therefore the contention of the 2nd Petitioner as well as the 1st Petitioner based on their confessions being inadmissible is without merit and does not meet the threshold required for granting of leave.

The appeal of the 3rd Petitioner

- [63] His first ground of appeal that the Court of Appeal erred in law in not properly addressing the first ground of appeal. The Court of Appeal judgment does not set out the particular ground of appeal, but the Ruling of the Single Judge sets it out as follows:

“That the learned Trial Judge erred in law and fact when he accepted the guilty opinion of the Assessors against the Appellant despite the fact that the State had not proved reasonable doubt that the ‘pompom’ tendered at trial belonged to the Appellant.”

- [64] This ground together with grounds (b) to (f) relate to his conviction based on circumstantial evidence. In his submissions he has also taken up the position that the evidence of Sikeli Waqaituinayau had not been corroborated and to rely on such uncorroborated evidence to find him guilty amounted to a miscarriage of justice. He further submitted that the said witness had an ulterior motive to implicate him.
- [65] The 3rd Petitioner chose not to give evidence at the trial and got his counsel to cross-examine Sikeli Waqaituinayau. The learned trial Judge in his summing up at paragraph 43 explained to the assessors what circumstantial evidence was and how they should consider the evidence led. The evidence relating to the pompom that was discovered at the scene of the crime and the evidence of Sikeli Waqaituinayau was summarized at paragraphs 44 to 47 including the cross examination of the said witness by his Counsel, and had directed the assessors to find the petitioner guilty if the circumstantial evidence points to his guilt and if it is otherwise to find him not guilty. The learned trial Judge had also dealt with the third petitioner's case at paragraph 22 of the summing up.
- [66] The Court of Appeal dealt with this position regarding circumstantial evidence and found the directions of the learned trial Judge to be accurate and adequate directions. The Court of Appeal summarized its conclusion on the question of circumstantial evidence at paragraph 15 of the judgment thus:

"In the instant appeal, the directions given by the learned High Court Judge with regard to the discovery of the pompom and the other attendant circumstantial evidence in my view is adequate to deal with the 1st ground of appeal of Sitiveni Tuisamora. The evidence against the third appellant was not confined only to the finding of the pompom at the scene of crime. The evidence of Waqaituinayau was un-contradicted that the third appellant wanted the witness to desist from giving evidence against him in the trial. Further he had requested in case if he decided not to keep away from courts the witness should testify in a way to exonerate the third appellant. The third appellant wanted the witness to give evidence to the effect that the pompom was associated with him at the behest of the police. This is uncontroverted evidence. In the light of such unchallenged evidence there was a strong case built up against the third appellant. I find that the directions given by the learned trial Judge on circumstantial evidence is quite accurate and satisfying the legal requirements....."

- [67] The directions given by the learned trial Judge to the Assessors had put the case of the third petitioner fairly and had dealt with the position taken up by him at the trial. The Assessors opined unanimously of the guilt of the third petitioner as they would have found there was sufficient evidence to find him guilty. The learned trial Judge while concurring with the opinion of the Assessors and was satisfied himself when he stated that he accepted the prosecution's witnesses on the circumstantial evidence produced in court and that he accepted PW6 and PW9's evidence as he considered them to be credible witnesses. The Court of Appeal was satisfied with the directions of the trial Judge regarding the case of the third petitioner.
- [68] I do not find any error in the judgment of the Court of Appeal in dealing with the appeal of the third Petitioner and therefore the grounds of appeal adduced by the third Petitioner lack merit and do not satisfy the threshold required for special leave.
- [69] In the result, the application of the Petitioners for special leave is refused and their petitions are dismissed.

Keith, J

Introduction

- [70] I have read a copy of the judgment of Chandra J in draft, and I entirely agree with the outcome which he proposes. I add a few words of my own to address some of the problems which the case has highlighted.
- [71] None of the three petitioners are represented. Their petitions, together with their grounds of appeal and written submissions, have been drafted by them. They are not lawyers, and the various documents they have prepared are not as crisp as ones drafted by lawyers would have been. They are repetitive, and many of the arguments overlap with each other. That is not a criticism of the petitioners. They have no doubt done the best they can. But it has been difficult at times to see what they were getting at.

- [72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.
- [73] Two other comments need to be made. First, some of the grounds of appeal now put forward were not advanced in the Court of Appeal. They are new points. This is neither the time nor the place to add to the many observations over the years about the need for appellants not to raise new arguments in the Supreme Court for the first time. In a nutshell, they will only be considered if they are compelling and if not considering them might result in a miscarriage of justice. But that does not mean that the Supreme Court is entitled to ignore them. Far from it. The Supreme Court will have to consider them in order to see how compelling they are and whether a miscarriage of justice might result if they were not considered.
- [74] Secondly, much of the petitioners' focus was on the judgment of the Court of Appeal. Their grounds for the most part set out the ways in which they say the Court of Appeal fell into error. That is entirely understandable. After all, they are seeking leave to appeal from the decision of the Court of Appeal. But it should not be forgotten that, although the Supreme Court is a second-tier court, its focus is still on what happened in the trial court – just like the Court of Appeal. It has the advantage, of course, of the views of the Court of Appeal on whether things went wrong in the trial court, but what it is ultimately reviewing is the course which the trial took rather than whether the Court of Appeal's analysis of the grounds of appeal was correct.

Tuisamoa's case

- [75] With these preliminary observations, I turn to the arguments advanced by the petitioners, and I trust that I will be forgiven for referring to them by their family names from now on for convenience. Tuisamoa was the first defendant on the indictment. His case is, of course, very different from that of the two other petitioners. He was convicted on the basis that (a) a brown hat with a highly distinctive feature – a pompom – was found near the scene of the robbery and Tuisamoa was seen wearing a brown hat with a pompom similar to it on the evening before the robbery by someone who had known him for many years (PW6), and that (b) PW6 claimed that following Tuisamoa's arrest but before his trial Tuisamoa had asked him not to give evidence along the lines of his witness statement to that effect and to say that the police had forced him to say what was in his statement. Tuisamoa's argument is that it was not open to the judge to conclude that the hat was his, which the judge must have done to have found him guilty.
- [76] I do not agree. The prosecution's case was not that strong but it was sufficient. Had the evidence consisted only of the finding of the hat and the evidence that it was similar to the one Tuisamoa had been wearing the previous evening, I would have expected a submission of no case to answer to be upheld. But it is what PW6 said had happened subsequently which in my opinion makes all the difference. It is true that PW6 admitted in cross-examination that Tuisamoa had had a relationship with one of PW6's girlfriends, and the defence case was that this had given PW6 a motive to lie. But PW6's evidence called for an explanation from Tuisamoa, and one was never forthcoming because Tuisamoa elected not to give evidence. That was his right, of course, but it meant that there was no evidence to contradict what PW6 had said or to provide an explanation for Tuisamoa getting in touch with PW6 consistent with his innocence.
- [77] Of course, the case against Tuisamoa was entirely circumstantial. That required a direction to the assessors about how to approach a case based on circumstantial evidence alone. No set form of words is necessary, provided that the judge gets the essence of it across – namely that the prosecution is relying on different pieces of evidence, none of which on their own point directly to the defendant's guilt, but when taken together leave

no doubt about the defendant's guilt *because there is no reasonable explanation for them other than the defendant's guilt*. The judge did not include the words italicised, but in my opinion, the judge's direction to the assessors sufficiently got the message across.

- [78] Tuisamoa criticises one particular passage in that direction: "It is not necessary for the evidence to provide an answer to all the questions raised in a case." I do not accept this criticism. It is the well known "loose ends" direction. There are many cases in which there are some unexplained loose ends, and that is what assessors are sometimes told, coupling that with an observation that it would be an unusual case if the assessors knew everything there was to know about the case. That is what the judge went on to add, and although some people might quibble with whether including such a direction in a direction on circumstantial evidence was the appropriate place for it, it does not, in my opinion, undermine what the judge said.

Lesi and Beeby's cases

- [79] The cases of Lesi and Beeby can be considered together because they were both convicted on the basis of their confessions which the judge ruled admissible following a *voir dire*. A very large number of criticisms are made of the course which the trial took, and they have been considered at length in Chandra J's comprehensive judgment. I propose to deal only with those which he has thought it unnecessary to address or on which some amplification of what Chandra J has said might be helpful.
- [80] *Their time in prison in the past*. In the course of their interviews, both Lesi and Beeby said that they had spent time in prison. These answers were not part of their narrative, and could easily have been edited out of the records of their interviews. They were not. Lesi and Beeby argue that they should have been. The Court of Appeal was unimpressed with that contention because they could and should have raised that objection at the trial, but did not. I do not agree. The prosecution should have taken the initiative, and asked the defence whether they wanted these passages edited out, especially as one of them, Beeby, was unrepresented at his trial. Moreover, once the passages had not been edited out, it was, I think, incumbent on the judge to direct the assessors either to ignore the fact

that the two of them had spent time in prison, or at least instructed the assessors not to hold the fact that they had spent time in prison against them. He did neither of those things.

- [81] However, these were, in my opinion, the only irregularities in the course of the trial, and I have no doubt that the assessors' opinions would have been the same, as would the judge's verdict, if it had not been known that Lesi and Beeby had spent time in prison. After all, once the judge had concluded that the confessions had been made of their own free will, and once both the assessors and the judge had concluded that the confessions were genuine (as they must have done), the fact that Lesi and Beeby had previously spent time in prison would have been of little, if any, significance. It follows that I would apply the proviso to section 23(1) of the Criminal Appeal Act 1949 on the basis that no substantial miscarriage of justice had occurred as a result of these irregularities.

- [82] Their time in police custody. Lesi and Beeby both complain that they were kept in police custody for more than 48 hours before being produced in court. The time limit of 48 hours comes from Art 13(1)(f) of the Constitution. At first blush, it looks as if the time limit was substantially exceeded in Beeby's case and possibly in Lesi's case as well. As far as I can tell, Beeby was arrested on 8 August 2012 but not brought before Nasinu Magistrates' Court until 14 August, while Lesi was arrested on 28 August 2012 but not brought before Sigatoka Magistrates' Court until 31 August. Their case is that this was yet another example of the oppressive way in which they were treated in police custody, and eventually contributed to their reluctant signing of false confessions which the police had concocted. They point out that the judge did not refer to this breach in his ruling, nor remind the assessors of it. The Court of Appeal did not address this ground of appeal save to say that "the available evidence is not in their favour".

- [83] It must be remembered that the Constitution recognises that it may sometimes not be possible to produce a defendant in court within 48 hours of his arrest. That is why it goes on to provide that, should it not be reasonably possible to do so, the defendant has the right to be produced as soon as possible thereafter. That is important for Beeby's case. 8 August 2012 was a Wednesday. I have not found anything in the court record which tells

us what time on that day Beeby was arrested. For all we know, 48 hours may not have elapsed by the time the magistrates' court had closed on the following Friday. I assume that he could not have been produced over the weekend as the court would have been closed, and the court record reveals that the court was closed on the Monday due to a blackout. Tuesday 14 August would therefore have been the earliest practicable time for him to have been produced in court if the police wished to use the whole of the 48 hours to interview him. Similar considerations apply to Lesi. 28 August 2012 was a Tuesday. We do not know what time he was arrested. For all we know, 48 hours may not have elapsed by the time the magistrates' court had closed on the following Thursday. Not that any of this matters. The new constitution came into force in 2013 – well after the arrest of Lesi and Beeby – and although there was a similar provision in the previous constitution, the previous constitution had been abrogated in 2009. There was therefore no provision in force at the time of the kind relied on by Lesi and Beeby. Their protection from arbitrary treatment in police custody was provided by the common law and the Judges' Rules. Neither of them imposed a specific time limit of the kind in the Constitution.

- [84] *The reasons for the ruling following the voir dire.* Lesi and Beeby claim that the judge's ruling following the *voir dire* failed to give his reasons for ruling the records of the interviews admissible. The Court of Appeal rejected that complaint. I do not agree. The ruling covered a number of topics: the charges the defendants faced, the course which the police claimed the questioning of the defendants had taken, a summary of the ill-treatment which the defendants claimed they had been subjected to and the law to be applied. It ended with the judge's conclusion that the defendants had confessed voluntarily and of their own free will. But crucially it did not explain why the judge accepted the accounts of the police officers, and rejected the defendants' version of events. In particular, he never said why the defendants might have freely confessed their guilt when we now know that their confessions were the only evidence against them. In the circumstances, I do not think that the judge gave reasons for his ruling.

- [85] But the complaint proceeds on the assumption that the judge *should* have given reasons for his ruling. The judge himself cited what O'Regan JA had said in *Kalisoqo v Reginam*

(Criminal Appeal No 52 of 1984) at p 9, namely that "in giving a decision after a trial within a trial there are good reasons for the Judge to express himself with an economy of words". But giving one's reasons economically is different from not giving any reasons at all, and so one needs to look elsewhere for the answer. It is not hard to find. The issue was addressed head on by the Privy Council in *Wallace and Fuller v Reginam* [1997] 1 Cr App R 396, to which Chandra J has referred. In that case the judge gave no reasons for finding that the statements under caution were admissible, beyond stating that he found them to be voluntary, and it was contended in the Privy Council that a judge should always express his reasons for any procedural ruling given during a trial. The Privy Council rejected that contention, saying that it all depended on the particular circumstances of the case. Good practice may require a reasoned ruling, for example, where the judge was deciding a question of law so that his reasoning could be reviewed on appeal, or where the judge was deciding a mixed question of law and fact so that the law could be put in context, or where the judge was exercising a discretion in circumstances in which the existence of the discretion was in issue. But when it came to a case like the present, Lord Mustill said at pp 407D-408B:

"Here, the trial judge was faced with an irreconcilable conflict of evidence between the police officers and the defendants, turning on credibility alone. No principles of law were in issue, and there was no discretion to be exercised. The only question was whether the judge believed one set of witnesses or the other. His ruling leaves the answer in no doubt. Simply to announce that he accepted the account given by the officers and the justice, and found the appellants' story unworthy of credit would not have advanced an appeal ... In a case hinging on confessions the tasks of the judge and of the jury, although technically distinct, are in reality very much the same. The decision of the jury is announced in a non-speaking verdict at the end of the trial. For the judge to expound in detail almost at the beginning of the trial his reasons for preferring one story to the other would wholly unbalance the proceedings. His reasons, which would be given in the presence of the public, the advocates and the defendants would inevitably leave their mark not only on the future conduct of the trial but also on its atmosphere."

I agree with these observations. It follows that there was no obligation on the judge to give reasons for his ruling.

[86] The medical evidence. Lesi wanted to produce a medical report following an examination of him by a doctor in April 2013 for the purpose of supporting his case that he had been mistreated while in police custody. The judge ruled the report to be inadmissible. Lesi challenges that ruling on the basis that it violated his right under Art 14(1)(l) of the Constitution (which had been promulgated by the time of the trial) to “present evidence” at his trial. That right, however, can only apply to admissible evidence, and in my opinion the judge’s decision that the report was inadmissible cannot be faulted. Not only was the document which Lesi wanted to produce a copy, not the original, and the requirements for producing a copy set out in *R v Lobendahn* (1972) 12 FLR 1 had not been complied with. In addition, Lesi wanted to produce the report without calling the doctor who wrote it. That would have made the report hearsay. In any event, leaving these technical points to one side, it is difficult to see how a report of Lesi’s injuries following an examination in April 2013, 8 months after his time in police custody, could have helped in any way in attributing any injuries the examination revealed to that time.

[87] No contemporaneous complaint. The evidence both in the *voir dire* and in the trial was that neither Lesi nor Beeby complained on their first appearance at the magistrates’ court that they had been ill-treated by the police. They contend that by taking that into account the court effectively reversed the burden of proof. I assume that the argument is that they were presumed not to have been mistreated in police custody and they were being required to prove that they had been by raising the question of ill-treatment at the earliest opportunity. I do not agree. The fact that no complaint was made of any ill-treatment when they were first produced in court was merely one factor the court was entitled to take into account. It may not have been a very persuasive factor, because there may have been particular reasons for Lesi and Beeby not to have made the complaint then, but that is not to say that it cannot be taken into account. As it is, neither of them said why they did not make a complaint then. Nor do we know whether that fact was taken into account by the judge or the assessors, or if they did, how significant they thought the point was.

Conclusion

[88] In the circumstances, I do not think that the petitioners' proposed appeal has any real chance of success. It follows that no grave or substantial miscarriage of justice might occur if leave to appeal was refused, and the case has not involved a question of general legal importance. It has merely involved the application of established legal principles to the facts of the case. I therefore agree with Chandra J that the petitioners' application for special leave to appeal against conviction should be refused.

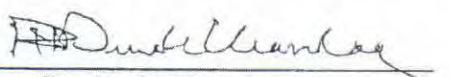
Chitrasiri, J


[89] I have read in draft the judgments of Chandra J and Keith J. I agree with their conclusions and reasoning and with the orders proposed.

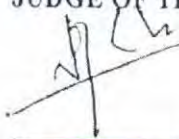
Orders of Court:

1. The application of the 1st, 2nd and 3rd Petitioners seeking special leave is refused and the petitions are dismissed.
2. The convictions and sentences imposed on the 1st, 2nd and 3rd Petitioners by the High Court are affirmed.




Hon. Justice S. Chandra
JUDGE OF THE SUPREME COURT


Hon. Justice B. Keith
JUDGE OF THE SUPREME COURT


Hon. Justice K. Chitrasiri
JUDGE OF THE SUPREME COURT