

IN THE SUPREME COURT OF FIJI ISLANDS
AT SUVA
APPELLATE JURISDICTION

PETITION FOR SPECIAL LEAVE TO
APPEAL NO: CAV009/2013

IN THE MATTER OF AN APPEAL from
the decision of the Court of Appeal of Fiji in
Criminal Appeal No: AAU0069/2007.

[Labasa High Court HAC009/04]

BETWEEN : MOHAMMED HAROON KHAN *Petitioner*

AND : THE STATE *Respondent*

Coram : The Hon. Chief Justice Anthony Gates,
President of the Supreme Court
The Hon. Mr. Justice Suresh Chandra,
Judge of the Supreme Court
The Hon. Mr. Justice William Calanchini,
Judge of the Supreme Court

Counsel : Ms N. Nawasaitoga for the Petitioner
Ms M. Fong for the Respondent

Date of Hearing : 2nd, 9th April 2014

Date of Judgment : 17th April 2014

JUDGMENT

Chief Justice Anthony Gates

- [1] The Petitioner seeks special leave to appeal his conviction for murder. On 28th June 2007 he was convicted at the Labasa High Court of one count of murder contrary to section 199 of the Penal Code.

- [2] On 13th March 2013 the Court of Appeal rejected his appeal which had been conducted in person, and according to that Court the petitioner had there argued his case competently.
- [3] On 28th March 2013 he wrote a letter from prison indicating his intention to appeal to this court. He said he was “negotiating” with the Legal Aid Commission for representation. No grounds were submitted then. On 19th June 2013 he submitted grounds of appeal without legal assistance.
- [4] On 3rd April 2014 this court permitted counsel for the Legal Aid Commission a short adjournment in order to file amended grounds. These have been filed and both counsel in the time allowed have assisted the court commendably with submissions relating to the new grounds.
- [5] There are now 4 grounds. In reality they amount to three. They argue that there were inadequate directions on malice aforethought, on the approach to the caution interview and the weight to be attached to the disputed confession, and finally on circumstantial evidence.
- [6] It is important to keep in mind however that the petitioner must be able to point to errors in the judgment of the Court of Appeal against which this petition is lodged.

The Evidence at Trial

- [7] The victim of the murder, one Abdul Lateef, was a taxi driver aged approximately 56. His wife testified that he had a weak heart. His son said he was a stroke patient also. On 5th July 2002 his son reported to the police at Delailabasa Police Post that he was missing. Mr. Lateef had gone out in his taxi as usual the day before but had not returned home. Later his taxi was found abandoned at Tuatua Housing.
- [8] After preliminary investigations, the petitioner was identified as a suspect, arrested, and brought in for questioning. He was interviewed under caution. He made full and frank

admissions in that interview. Subsequently he disputed the interview. The petitioner alleged a severe assault upon him by police officers. However he did not complain of assault when taken before a doctor who wrote in his report "No external injuries seen over body. No clinical evidence of any body injury." The doctor noted the patient was in good general health and was calm.

- [9] The learned trial judge found the confession to have been made voluntarily and admitted it into evidence.
- [10] In the course of the interview it was obvious the petitioner was fluent in English. His education had included an advanced certificate in computer science from USP. He admitted he had been seen driving the deceased's taxi on the day the deceased had gone missing, 4th July 2002. He said he had parked it at the house of one Mukesh Chand at Wailevu.
- [11] The petitioner said he had engaged the deceased's taxi from Labasa market. He wanted to go to Yalava, Tabia. Ostensibly, he was directing the taxi to his aunt's place, but instead he said he asked the deceased to stop on a hill. It was there he decided to rob the driver. He punched him in the face then pulled him out of the taxi. He asked the deceased for money. He was given \$4.
- [12] The petitioner then punched him on the face again and the deceased fell down. He said he did so as he wanted more money. The deceased had fallen on a rock. The petitioner said he punched him on the face and with his right knee hit him on the chest. The petitioner took out another \$30 from the deceased's shirt pocket. The petitioner's account of his assault on the victim suggests a relatively minor assault. The petitioner's account of the injuries caused as opposed to the assault suggests a more powerful and prolonged assault leading to so many broken ribs and the collapsed lungs that the pathologist found upon her examination.

- [13] The petitioner said he dragged the deceased by his legs down the slope, then off the road and into the dense bush. He was left approximately 100 metres from the road in high grass, which meant the body could not be seen from the road. He said when he left, the deceased "was motionless and I knew he was dead." He said he decided to kill him "because I didn't want to be caught by police."
- [14] Later during the interview the petitioner showed the police where he had placed the body. He went with the police to the hilly area and so the body was discovered. Up till then the police had no lead as to where the deceased might be.
- [15] After returning to the road, the petitioner said he sat in the driver's seat and started to drive the taxi. The key was in the taxi and the engine was still running. He drove back towards town and at Wailevu he parked the taxi in "this Indian man's" compound. He did not know his name. He set off from there by foot eventually getting into another taxi.
- [16] He went to look for a friend named Aisake to take him to Savusavu. He was unable to meet him. Instead he returned to where he had parked the deceased's taxi. He drove off and went for a ride to Savusavu. He was spotted in the taxi by another taxi driver. Later he returned and parked the taxi at Tuatua Housing where it was eventually discovered.
- [17] When Dr. Kiran Gaitiweed gave evidence of his examination of the petitioner on 12th July 2002, he said the petitioner had not said anything about an assault or of injuries caused to him. The doctor said there were no signs of injuries. He said "My findings were that there were no internal injuries and no clinical evidence of any body injury. Clinical Examination means looking for internal injuries by signs and symptoms."
- [18] This evidence was in contrast to the petitioner's own sworn testimony. He insisted he had been assaulted by police at his home. He was hit on the head and with a coconut branch. This allegation arising during the defence evidence was objected to by

prosecuting counsel since no such allegation had been put to the police witnesses. The petitioner said he was assaulted again at the station, this time by 8 police officers.

[19] The nub of the defence case as related in his sworn testimony was that the petitioner had arrived by bus and later by foot at the scene. He saw one man standing near the car and two men fighting. "One of them got hold of me, they told me not to go anywhere and they pulled me inside the car." This man had been a Fijian. The fight was between a Fijian man and an Indian man. The Fijian man held a knife and told the petitioner to drive. He said he did not know how to, but they insisted and so he drove. They told him to drop them at the Savusavu junction. He wanted to report this to the police but he was scared to do so. The police statement he said the police wrote and he, the petitioner, signed it.

[20] The petitioner's fingerprints were found inside the deceased's taxi. The deceased died after several ribs were broken, causing flooding of the pleural cavity with 1.5 litres of blood. Both lungs therefore collapsed so that the deceased could not breathe said the consultant pathologist. This tended to support the petitioner's account given to the police in interview that the petitioner was present when the taxi driver died. He knew he had achieved his intent.

Ground 1 – Inadequate directions on malice aforethought

[21] The ground in the amended petition read:

Ground One

The Learned Trial Judge erred in law when he did not direct the assessors on the essential elements of the charge of murder contrary to section 199 and 200 of the Penal Code, Cap. 17 especially the meaning of malice aforethought.

[22] As we have already observed the petition must be directed to errors in the judgment of the Court of Appeal. Ground 2 may indirectly have brought that in. It was drafted in these terms:

Ground Two

The Learned Court of Appeal Judges erred in law in stating that though at times the Learned Trial Judge was not very elaborate however, had dealt with important ingredients of the offence and other related things in a concise and lucid manner.

[23] It will be convenient to deal with Grounds 1 and 2 together.

[24] In argument counsel urged that the full meaning of section 202 of the Penal Code which provided the definition of *malice aforethought* had not been put to the assessors. Section 202 stated:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.”

[25] If the confession were accepted as truthful and illustrative of the petitioner’s intentions it was clear the purpose of the assault on the elderly deceased by this younger stronger petitioner was to kill, and thereby the risk of being reported for the robbery would be eliminated. He intended to kill the taxi driver so that the crime of robbery would not be exposed. This was naïve thinking, but that is of little relevance to our task now.

[26] In the way this case was litigated, the second limb of the definition was not a live issue for the judge and assessors. The petitioner in his sworn evidence claimed not to have been involved in any robbery, or altercation with the deceased. Nor had he travelled with the deceased in his taxi to the scene. The court had to decide whether that account had been disproved by the prosecution or whether there remained a reasonable doubt. If the

prosecution had failed to do so, or there remained a reasonable doubt, the verdict must be one of acquittal.

[27] If the petitioner is believed in the explanation he gave in interview, the intention was not to cause grievous harm, but only to kill. A failure on his part to apprehend either of the two outcomes from his assault on the taxi driver did not arise.

[28] At para [22] of the judgment in the Court below, Lecomwasam JA said:

“In the light of the above judgment the learned High Court judge had addressed the assessors on the important aspects that would assist them to decide the real issues. I find that though at times not very elaborate yet the learned judge has dealt with important ingredients of the offence and other related things in a concise and lucid manner.” (emphasis added)

[29] The learned trial judge in the summing up had dealt with malice aforethought in this way:

“Murder is committed when a person causes the death of another by an unlawful act and with malice aforethought. The offence of murder has three elements which the prosecution must prove beyond reasonable doubt. They are:

1. The Accused did an unlawful act;
2. Which caused the death of the deceased and;
3. He acted with malice aforethought.

Malice aforethought is a legal term defined by the Penal Code. It required proof of either –

1. Intention to kill or to cause serious harm or
2. Knowledge that death or serious harm is likely to occur.

In this case, the Accused disputes all the elements of the offence. He disputes doing any unlawful act, he disputes causing the death of the deceased and he disputes malice aforethought.

So the question for you in this trial is whether or not the Accused assaulted the deceased with malice aforethought at the time he assaulted the deceased. What did he know or foresee? What was his intention?

What is in the mind of the Accused is of course not always capable of direct proof because only the Accused really knows for sure. But it is possible to deduce a person's intentions from his conduct at any given time. What for instance can you conclude when a person shoots directly at another person with a gun? Surely we can conclude that the person who fired the shot must have intended to kill or cause serious harm, because we all know that the gun is a potentially lethal weapon. So the question for you in determining whether the Accused had malice aforethought if you accept the contents of his interview and of the pathologist's evidence, is what can you conclude from his conduct towards the deceased? Why did he assault the deceased? Was it to remove a potential witness permanently? Or was it to "neutralize" him to allow him to rob the deceased? This is a question of fact for you."

[30] In this direction, there was an omission of the clause in section 202(b) dealing with knowledge of probable consequences, whether death or grievous bodily harm would be caused.

[31] It is a well known requirement of a fair trial for a judge to frame his or her summing up to include all possible conclusions arising from the evidence adduced. In *Von Starck v. The Queen (PC)* [2000] 1 WLR 1270 at p1275C the Privy Council said:

"The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside."

- [32] This principle was approved by this Court in *Tej Deo v. The State* Crim. App. No. CAV0017 of 2008S, 18th October 2010. The defence of intoxication was thought not open in that case in view of the sworn testimony of the petitioner. The Court said:

“The law requires the trial judge to direct the jury fully and correctly if on the evidence a defence is raised. That is subject to an exception. If there is a conflict between the defence that the defendant through his counsel is putting to the jurors or assessors, and some other defence theoretically available on the evidence, *the trial judge should only put the defence not being put, if he has ascertained that there is no objection from defence counsel.*” (emphasis added)

- [33] What was necessary for inclusion in a summing up and relevant to the issues that were being litigated was canvassed in *Praveen Ram v. The State* CAV0001 of 2011, 9th May 2012. In that case, this court held that the judge was correct in not putting provocation to the assessors. The court had referred to the opinion of Lord Bingham in the Privy Council case of *Robert Smalling v. The Queen* [2001] UKPC 12 where his Lordship said:

“Before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury’s consideration that the defendant was provoked to lose his self control and act as he did.” (emphasis added)

- [34] I must conclude therefore that there was no evidence necessitating directions on the second limb of the definition of malice aforethought. If accepted, the confession confirmed that the petitioner was aware of the consequences before he left the scene. Second, he had stated what his intent prior to the assault had been, namely to kill the taxi driver so that the robbery would not come to light. In his sworn testimony, stronger evidence than the unsworn statement as given in *Reg. v. McGann* (unreported) 30th May 1988: Court of Appeal of Jamaica; *Mills v. The Queen* [1995] 1 WLR 511, the petitioner denied any involvement with the deceased that day. There was no nexus between the petitioner and the deceased. There was no evidence necessitating further definition. It was not relevant to the litigation issues, either as litigated or as capable of arising assessed from an independent viewpoint.

- [35] The Court of Appeal dealt properly with this issue. This ground did not form a ground of appeal to the Court below, at least not framed as such. Special leave criteria cannot be met.

Ground 3 – The caution interview – how to approach and what weight to attach to it

- [36] The petitioner's counsel argued that the directions on how to approach the answers in the caution interview were inadequate. It was also argued that there were no adequate directions on weight.
- [37] The suggested alternative put up by counsel dealing with weight is very little different. There is no incantation which must be read here. The required guidance need not be formulaic. The judge began the directions as follows:

“The State tendered the caution and charge statement of the Accused while he was in police custody. The Accused disputes both statements saying that he was assaulted by the police when he was arrested, dragged into the police vehicle then assaulted again at Labasa Police Station by 8 or 9 police officers who kicked and punched him causing internal bleeding which he noticed when he was remanded at the prison. What weight you put on these confessions is a matter for you. If you accept that he gave these statements to the police, that he did so without pressure and that he was telling the police about events as he saw them then you may think that they present a complete picture of how the Accused died on the 4th of July. To prove that the Accused made the statements and not under pressure, the State called a number of police officers who said that the Accused was not assaulted, that he showed them where the body was at Yalava, and that he was given all his constitutional rights at the station and was treated fairly. Further the State called Dr Kiran Gaitiweed who gave evidence that at 6.05pm and shortly after the Accused was charged, he examined the Accused who made no complaint to him of anything. The doctor found no injuries on him after a physical and clinical examination.”

- [38] The judge went on to deal with the defence allegations of untruthfulness against the police. The judge continued:

“Which version of the facts you accept is a matter for you. However if you accept the contents of the statements as being reliable, then you should consider the contents with all the other evidence, the forensic evidence of the scene, the photographs, the evidence of where the taxi was seen all of the 4th of July in deciding what evidence is acceptable to you.”

- [39] This was a sound and proper direction to the assessors recommending that they consider the contents of the statements along with all of the evidence in the case. For if they accepted the interview admission as having been given voluntarily, not elicited by pressure or assaults, and that the account of events given by the only witness to the murder were to be relied upon, the prosecution case was complete. The judge asked the assessors to go on and consider all of the other evidence and to decide whether they accepted any of that. This ground has no merit and could not meet the special leave criteria.

Ground 4 – The failure to direct on circumstantial evidence

- [40] This ground is misconceived. The main evidence is direct not circumstantial. If the assessors accepted the confession as reliable, an admission of murder with its account of the disposal of the body, and the reasons for killing, such evidence has always been acceptable for a conviction for murder: *R v. Davidson* 25 Cr. App. R. 21 CCA. The Court of Appeal correctly identified and listed this evidence at para [7] of its judgment:

- “(a) Fingerprints of the accused found in the taxi and admitted by accused.
- (b) Chain of events as unfolded by prosecution witnesses as to the presence of the accused in Labasa area in a taxi.
- (c) Evidence of Dr Chang as to the fight over fare.
- (d) No injuries on the body of the accused.

- (e) Recovery of the body of the deceased after the arrest of the accused and as pointed out by the accused.”

- [41] The taxi in (b) was of course the deceased's taxi. Although she did not identify the petitioner as the driver of her husband's taxi, the widow Nasiban Bi gave evidence that the same white taxi which was her husband's came past her at the bus stand in the morning of the day he went missing before 10am. This was evidence which tended to support the evidence given to police in interview by the petitioner of his movements in the same vehicle on that day.
- [42] In his interview he said he had gone out to see an aunt over a personal matter. After the killing, he did not proceed on to see the aunt. It would be open for the assessors to reject the story of intending to visit the aunt therefore and to infer instead that he deliberately asked the taxi driver to drive to this remote hilly place away from habitations. He explained to the consultant psychiatrist Dr Chang “that he never intended to kill, that there had been an altercation over the fare and they had a fight.” This may have been a downgrading of the extent of the assault afflicted on the taxi driver, but it was also a confirmation of the crucial part of his interview admissions. Acceptance of such an incident was in direct conflict with his sworn evidence of being in no way associated with the deceased and with how he met his death. The fracture of so many ribs would indicate a powerful and vigorous assault, not just a few punches. Intent could have been inferred from the ferocity of the assault.
- [43] Had the petitioner been found to have external and internal injuries to his body there would have been supporting evidence to his suggestion that he had been seriously assaulted at the time of the interview. The failure to report that assault, or injuries, to the doctor examining him for signs of assault, together with the absence of any injuries, tended to confirm the authenticity and voluntariness of the interview and of the petitioner's account of what had happened.

[44] Of great significance in linking in with, and confirming the interview, was the petitioner's pointing out to the police where the body of the deceased lay. No one else knew, nor was it found by police dogs, or by someone stumbling across the corpse in this remote steep sloped area. This again was direct evidence of his involvement, if as with all evidence, the admissions were accepted by the assessors, and if the police evidence of his showing them the site were similarly believed. They clearly did not accept his testimony that he only took the police to where the car was parked, not to the body hidden down the slope many metres away.

[45] Ground 4 must fail and special leave could not be granted for such a ground.

[46] There is no merit in any of these grounds. They could not meet the special leave criteria of section 7(2) of the Supreme Court Act. A grant of enlargement of time for a late appeal for such reasons cannot be granted. None of the criteria for enlargement are met either.

Suresh Chandra JA

I agree.

William Calanchini JA

I agree.

Chief Justice Anthony Gates

Accordingly the Court orders:

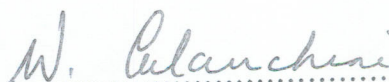
- (i) that the application for enlargement of time be dismissed;
- (ii) and that the petition for special leave be similarly dismissed.



Hon. Chief Justice Anthony Gates
President of the Supreme Court



Hon. Justice Suresh Chandra
Judge of the Supreme Court



Hon. Justice William Calanchini
Judge of the Supreme Court