

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. CAV 022/2015
[Court of Appeal No: AAU0071/2010]

BETWEEN : **VILIAME GAUNA**

PETITIONER

AND : **THE STATE**

RESPONDENT

CORAM : **Hon. Chief Justice Anthony Gates, President of the Supreme Court**
Hon. Mr. Justice Saleem Marsoof, Justice of the Supreme Court
Hon. Justice Buwaneka Aluwihare Justice of the Supreme Court

COUNSEL : **Petitioner In Person**
Mr. L. J Burney for the Respondent

Date of Hearing: **5 April 2016**

Date of Judgment: **21 April 2016**

JUDGMENT OF THE COURT

Gates, P

I have read in draft the judgment of Aluwihare J. I agree with it and its reasons and with the orders proposed.

Marsoof, J

I have perused in draft the judgment of Aluwihare J, and I respectfully agree with his reasoning and conclusions.

Aluwihare, J

1. The petitioner by this application seeks special leave to appeal from the judgement of the Court of Appeal dated 28 May 2015.
2. The petitioner along with one Timoci Delana were jointly charged before the High Court of Suva, on three counts: robbery with violence, damaging property, and unlawful use of a motor vehicle contrary to sections 293(1) (a), 324(1) and 292 respectively of the Penal Code.
3. Timoci Delana pleaded guilty before the commencement of the trial and was accordingly sentenced.
4. Following the trial, the petitioner was found guilty on all three counts referred to above by a unanimous decision of the assessors and the learned High Court Judge and accordingly the petitioner was convicted and sentenced.
5. A cumulative sentence of 17 years imprisonment with a non-parole period of 15 years was imposed on the petitioner.
6. At the outset, I wish to refer to the statutory threshold for special leave in criminal cases as set out in section 7 (2) of the Supreme Court act of 1998, which states thus:-

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

 - a) *a question of general legal importance is involved.*
 - b) *a substantial question of principle affecting the administration of criminal justice is involved or;*
 - c) *substantial and grave injustice may otherwise occur.*

7. The provision referred to above, in my view, imposes a relatively high threshold being satisfied before special leave is granted. I concur with the comments of Justice William Marshall in the case of Taj Deo v The State, Criminal Appeal CA 0017 of 2008, wherein he said, “The Supreme Court does not replicate the process of the Court of Appeal but is reserved for cases of special legal or public interest. So the requirement of special leave exists with its relatively high threshold in order to promote and protect the really important but limited jurisdiction of the Supreme Court”
8. Before the Court of Appeal, the petitioner had raised six grounds of appeal and leave was granted on grounds 1 to 4.
9. Before this court, the petitioner by his application dated 20 July 2015 raised only three grounds of appeal, of which two are in fact fresh grounds that were not urged before the Court of Appeal.
10. On the very day this application was supported for special leave, that is, on 5th April 2016, the petitioner submitted written additional grounds of appeal. Upon perusal of the same, it appears that the additional grounds of appeal so filed are in fact expanded grounds of appeal, stemming from the ground of appeal raised in paragraph 3.2 (i) of the petition.
11. The learned Counsel for the respondent, following the best traditions of the office of the DPP, intimated to the court that he has no objection to the petitioner urging the additional grounds of appeal before this court, although he was given notice of the additional grounds of appeal only just before the commencement of the hearing of this matter.

12. For the sake of clarity, the grounds of appeal and the expanded grounds of appeal are reproduced below, verbatim.

“3.1 – that the amendment done in respect of the inclusion of Mrs Bimla Wati (P.W1) to give evidence on behalf of the prosecution was bad/wrong decision of law.

3.2 – that: the summing up of the learned trial judge was faulty, unfair and unbalanced in all circumstances by reason of;

- (i) *The learned trial judge failed to identify the essential features of the defence case, from the defendants (petitioner) caution interview statement, which was tendered as prosecution Exhibit 3, to the assessors;*
- (ii) *The learned trial judge’s improper comment at paragraph 30, despite having insufficient evidence to support the conviction against the defendant (petitioner).*

3.3 – that: the receiving of Vereniki Ravulolo’s (P.W3) evidence on behalf of the prosecution case was a wrong decision of law as it was not according to the recognised practices set out in paragraph 1297 of Archibald, 36th edition (now para, 401 of the 38th edition)”

13. As an additional ground of appeal, the petitioner raised the following issue by motion dated 5th April 2016;

“the warning as to the danger of acting on the uncorroborated evidence of an accomplice –

- a) was inadequate;*
- b) the explanation of the nature of corroborative evidence was imprecise and unclear;*
- c) evidence pointed out as being corroboration lacked that capacity”.*

14. The petitioner, however, confined himself to the additional ground of appeal in his oral submissions and stated that for the purpose of the present application, he is

relying only on the ground raised as additional grounds of appeal and abandoning the grounds raised in his original petition.

The Evidence in the High Court

15. Bimla Wati taking the witness stand, told the court that, on 15th June 2008, she and her husband Vijaya Chand were about to retire for the day, and upon hearing a noise, her husband had checked it out. He had hurriedly come back to the bedroom and had locked the door. Then her husband had phoned his cousin, Babu Lal and had told Babu Lal that intruders were trying to break in. The intruders having entered the house had tried to open the bedroom door, by making an opening close to the lock of the door. This witness had said that one of the intruders poked his hand through the opening they had made on the door and her husband dealt a blow on the hand of that person with a spear. However the intruders had managed to unfasten the door lock and two men had walked into the bedroom. Having so entered, one man had attacked her husband with a pinch bar and they had relieved them of cash to the value of \$3000 and Jewellery worth \$ 3000. After the intruders had left, Babu Lal had arrived and had rushed her husband to the hospital. This witness had categorically stated that she could not identify the persons who were responsible for the mischief caused.
16. Witness Babu Lal had stated in his evidence that he rushed to the house of Vijaya Chand upon receiving a call from him. He had added that when he was approaching the house, he observed Vijaya Chand's car being reversed. This witness had then attacked the person who was at the wheel, on the neck, shoulder and the head, with a steel pipe. However, he had managed to drive away.
17. Both witnesses Mrs. Wati and Babu Lal had taken up the position that they were unable to identify the intruders

18. The prosecution, at the trial, summoned and adduced the evidence of Vereniko Ravulolo. He happened to be an accomplice to the crime, but testified on behalf of the prosecution upon being granted immunity by the Director of Public Prosecutions.
19. Ravulolo in his testimony stated that on the day in question he joined the accused who is known to him, and a few others and proceeded to house that was broken into, in a taxi.
20. Having entered the compound of the house by cutting through the fencing, the petitioner and some others had broken the grill of the main door with the aid of pinch bars. Then they had forced open the front door and all of them had walked into the house. The petitioner along with two others had attacked the bedroom door, again with pinch bars and had managed to create an opening on the door, close to the door handle. The petitioner had then put his hand through the opening they had made to unfasten the lock and someone from inside had injured the petitioner's hand.
21. The witness had gone on to say that he was inside the house when the petitioner walked into the bedroom. Whilst the petitioner was still inside the house the witness along with a another person named Sairusi, had come out at that point and the two had gone away to Raiwaqa, as Sairusi had developed a pain in one leg.
22. Around 2.00 a.m. the entire group of men had met again at Raiwaqa and had divided the loot among themselves. He had said further that when he saw the petitioner, subsequent to the incident, around 2.00 a.m., the petitioner had a cut on his hand and he had gone on to say that when the petitioner put his hand through the opening they had made on the door, his hand was cut.
23. Under cross examination, it was suggested to this witness that he was lying, in saying that he broke into the house and was challenged by the petitioner to draw a sketch,

depicting the layout of the house. The witness had drawn out a sketch which was marked and produced as exhibit P3.

24. The petitioner also had challenged the voluntariness of the evidence given by witness Ravulolo and had suggested to the witness that he did not tell the truth to the police. The witness, however, had refuted the suggestion and had stated that he was giving evidence of his own free will and that he had given a truthful account of what had transpired on that day.
25. Although this court does not have the benefit of observing the demeanour and the deportment of the witness, considering the manner in which the witness had given evidence, I am of the view that it would be reasonable to conclude, that witness Ravulolo's evidence remains unassailed and the testimony is bereft of any infirmities, subject, however, to the fact that he remains an accomplice to the crime.
26. Dr. Gene Bogitini, who examined the petitioner on the afternoon of 16th June 2006, which was two days after the alleged crime, had testified to the effect that the petitioner carried three injuries on him at the time; two abrasions on the forehead and an infected laceration between the knuckles and the wrist of his right hand. The doctor had gone on to say that, he cannot fix an exact time as to when the injuries were caused, but had said they would have been caused around 48 hours before his examination.
27. The doctor Bogitini has also said in his evidence that he was told by the petitioner, that he was struck on the hand and on the forehead by the owner of the house, the petitioner tried to rob, on the 14th June 2008. Doctor had expressed the opinion that all three injuries the petitioner carried, were of the same vintage.

28. It is to be noted that whilst the witness Volivale was testifying, he was called upon to draw a sketch of the premises, that is of the house that was broken into. The trial judge, the assessors, the petitioner, Counsel for the prosecution and some members of the court staff had visited the scene, subsequently.
29. At the closure of the prosecution case, when the petitioner was called upon to state his defence, he opted to remain silent
30. Of the three grounds of appeal raised in the petition, dated 20 July 2015, one is in two segments (referred to in paragraphs 12 and 13 of this judgement). Two are fresh grounds of appeal.
31. It is to be noted that, when entirely fresh grounds are sought to be argued before the Supreme Court, without impugning the decision of the Court of Appeal in relation to the grounds of appeal urged before that Court, the criteria of grant of special leave by this Court, are much more stringent.
32. The Supreme Court observed in the case of **Dip Chand v The State** CAV0014/20102:
“given that the criteria set out in section 7 (2) of the Supreme Court Act No.14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course, the fact that the majority of the grounds relied upon by the petitioner for special leave have not been raised in the Court of Appeal, makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult”
33. In the case referred to above the court further observed that:-
“the Supreme Court has been even more stringent in considering the application for special leave to appeal on the basis of grounds of appeal not taken up or argued in the court of appeal. In Josateki Solinakoroi-v-The State, Criminal Appeal CAV0005 of 2005 the Supreme Court of Fiji, in an exceptional case, took in to consideration the principles developed by (the)privy Council in similar situations and in particular relied on the

*following observations in **Kawaku Mensah –v- The King** (1946) AC 83: 'where a substantial and grave injustice might otherwise occur the privy Council allowed a new point to be taken which had not been raised below even though not raised in the petitioner's printed case.' (Paragraph 36 of the judgement).*

GROUND OF APPEAL RAISED

34. **Ground No.1**

The petitioner complains that permitting Mrs.Wati to testify on behalf of the prosecution was bad in law.

35. The reason to include Mrs Wati as a prosecution witness, at a subsequent stage, was due to the death of her husband Vijaya Chand, the complainant, before the commencement of the trial.
36. Mrs Wati had stated in her evidence that Vijaya Chand passed away on 15 February 2010. The prosecution had cited Vijaya Chand as a witness and the petitioner had notice of that fact well in advance of the trial date. The prosecution by adding Mrs Wati as a witness had only filled the void created by the death of Vijaya Chand.
37. Mrs Wati had merely stated in her evidence, what transpired that night in the presence of her deceased husband and had not implicated the petitioner, as one of the persons responsible for the crime.
38. According to the material placed before court, both Vijaya Chand and Mrs Wati had been in the bed room when the incident happened. There is, however, no material before this court to say that evidence of Mrs Wati is substantially different to what Vijaya Chand would have said had he been alive or that she disclosed new material.

39. Upon considering the facts and circumstances under which Mrs. Wati was permitted to testify on behalf of the prosecution, I hold no prejudice or miscarriage of justice had occurred from the perspective of the petitioner.

Ground No. 2

40. The second ground of appeal consists of two segments: firstly, the petitioner complains that the trial judge failed to address the assessors with regard to the essential features of the defence case emanating from the petitioner's caution interview statement which was marked and produced as exhibit 3.
41. Upon perusal of the caution interview statement, it is evident that the Petitioner exercising his statutory right had been unresponsive to most of the questions that were put to him by the interviewing police officer and had remained silent.
42. The petitioner however on three instances had made a bare statement: "I don't know anything about such robbery" in the course of recording the caution interview.
43. The trial Judge, it appears had not referred to the caution interview statement of the petitioner, in his summing up.
44. There is then, a non-direction on matters concerning the evidentiary value of the caution interview statement. What is required to be considered by this court is, as to whether the non-direction referred to has caused substantial and grave prejudice to the petitioner.
45. In this regard, I shall, adopting the words of Viscount Simon L.C in the case of **Stirland v D.P.P** (1944 A.C 315) ask myself, "whether on the evidence, a reasonable

assessor properly directed on the aspects of the caution interview , would without doubt have convicted the petitioner”.

46. I am of the opinion, in view of the cogent and un-contradicted evidence placed before the court, that the assessors, properly directed, could not have reasonably returned a more favourable opinion. I therefore hold that the non-direction referred to has not caused substantial and grave prejudice to the petitioner.
47. The petitioner has also complained that the “comment made by the trial judge at paragraph 30 is improper” alleging that the comment caused prejudice to him.(The second segment of the 2nd ground of appeal)
48. The learned trial judge at paragraph 30 of his summing up had stated-“*when the prosecution closed the case, the accused didn’t make any application to no case to answer. Anyhow considering all I decided to call for the defence*”.
49. The only part of the summing up, one may say is objectionable, in my view is the remark “*...the accused did not make any application to no case to answer...* ”.
50. At the outset it must be said that the said comment is unwarranted and was best avoided. One needs to bear in mind that the assessors are expected to base their opinions on relevant and admissible evidence led at the trial and not on procedural issues. As such I am of the view that the trial judges must exercise caution while summing up, to avoid making remarks on extraneous matters that might even remotely cause prejudice to an accused.
51. When one considers the impugned comment of the trial judge *vis a vis* the evidence led at the trial, whatever impact it may have had on the minds of the assessors, could it

be said to have caused grave and substantial miscarriage of justice to the petitioner? I do not think so.

Ground No. 3

52. The third ground in the original petition of the petitioner, is to be found in the expanded grounds of appeal of the petitioner submitted to this court on the 5th April 2016. Thus I would consider the latter as the third ground of appeal.
53. At the heart of the petitioner's submission is the proposition that, in the absence of corroborative material, the learned trial judge failed to warn the assessors of the danger of acting on the uncorroborated evidence of the accomplice.
54. The petitioner asserts that in addition to inadequacy of the directions given to the assessors on this aspect, "the explanations offered by the trial judge as to the nature of the corroborative evidence was inadequate, imprecise and unclear, and further what was pointed out to the assessors as corroborative evidence lacked that capacity".
55. The petitioner, in his oral submissions before this court stressed on the matters referred to in the preceding paragraph.
56. It was the contention of the learned Counsel for the respondent that the warning given to the assessors by the learned trial judge was adequate. He contended further that there is no standard direction that should be given with regard to the requirement of corroboration of the evidence of an accomplice.
57. The learned Counsel for the respondent further contended that judges should be free to tailor the summing up taking into account exigencies of the case.

In this context, I wish to refer to what Lord Ackner stated in Reg. v Spencer 1987 1A.C 12,

"the obligation to warn a jury does not involve some legalistic ritual to be automatically recited by the judge, or that some particular form of words or incantation has to be used and, if not used, the summing up is faulty and the conviction must be quashed ... Rather must the good sense of the matter be expounded with clarity and in the setting of a particular case ... The summing up should be tailored to suit the circumstances of the particular case...."

58. The requirement for the corroboration of the evidence of an accomplice, is, in my view, a rule of practice, which now has hardened in to a rule of evidence. When one considers the criminal jurisprudence of Fiji in relation to this aspect, the rule is very much a part of it. The learned counsel for the respondent too, in his submissions, subscribed to this view.
59. What is to be borne in mind, however, is that the issue should not be approached from the perspective that every accomplice is not worthy of credit, but of the potential danger or the assumed propensity of an accomplice to implicate another, in order to escape from being prosecuted.
60. Thus, if the testimony of an accomplice is bereft of any infirmity and if the assessors are convinced of the truthfulness of the evidence given by an accomplice, taking into account the factors such as demeanour and the deportment of the witness etc., then the degree of corroboration required to act on such evidence of an accomplice, need not be of a high degree. This, in my view, is a question of fact which is entirely within the province of the assessors.
61. The rationale for the evidentiary requirement referred to above was discussed in the case of Jenkins v R (2004) 211ALR 116. The High Court of Australia stated.-

“The rule exists for a reason. That reason is related to the potential unreliability of accomplices, and unreliability thought to be so well known in the experience of courts, that judges are required, not merely to point out to jurors, but to tell them that it would be dangerous to convict upon the evidence of an accomplice unless it is corroborated. The principle source of unreliability, although it may be compounded by the circumstances of a particular case, is what is regarded as the natural tendency of an accomplice to minimise the accomplice’s role in a criminal episode, and to exaggerate the role of others, including the accused. Accomplices are regarded by the law as notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to the evidence upon which the jury may convict the accused. The reference to danger is to be accompanied by reference to a need to look for corroboration”.

62. The High Court of Australia in the case referred to above also observed that *“the application of the rule must be related to its purpose, and will require a consideration of the issues as they have emerged from the way in which the case is being conducted”*.
63. At this juncture, I wish to consider the warning given to the assessors in the instant case in the backdrop of decisions referred to above.
64. At Paragraphs 19, 20, 21, and 22 of the summing up, the learned trial judge has addressed these issues. He had warned the assessors that when they are considering the evidence of the witness (the accomplice), they need to ask themselves whether the witness is speaking the truth or whether he is putting another person into trouble and getting away’. The trial judge has also referred to the requirement, ‘that to accept the evidence of an accomplice, the prosecution is required to provide corroboration’.
65. Ideally, a trial judge should direct the assessors, as to what is meant by ‘corroboration’, which the learned trial judge had failed to do in the instant case. The learned trial judge, however, had then drawn the attention of the assessors to certain

items of evidence placed before the court that corroborated the testimony of the accomplice immediately after directing the assessors as to the requirement of corroboration of accomplice evidence. The reference so made, in my view would have been sufficient for the assessors to appreciate what is meant by corroboration.

66. In the instant case, the assessors had a unique opportunity of testing the truthfulness of the evidence of the accomplice. As referred to earlier in this judgement, the accomplice was challenged by the petitioner to draw a sketch of the house of the complainant Vijay Chand, which the witness did and a copy of that sketch was provided to the assessors. Subsequently, assessors had the benefit of seeing the premises in issue by themselves when they visited the scene, thus affording the assessors a unique opportunity to test the accuracy of the evidence of the accomplice.
67. Mere infirmities, in the summing up with regard to the directions on the requirement of corroboration, in my view, would not, by itself, sufficient to disturb the finding of the assessors and the trial judge. This view was presumably adopted way back as 1932 in **Rex v. Gregg** (1932) Cr. App. R 13. The accused was charged with indecently assaulting a girl aged seven whose evidence was admitted without her being sworn. A girl aged nine gave evidence on oath of having witnessed the indecent assault. At the trial the recorder omitted to tell the jury that by law the unsworn evidence of a child aged seven required corroboration. The accused was convicted. His appeal was dismissed on the ground that there was corroboration of the unsworn evidence and that though the summing up was defective, no injustice had been done.

CONCLUSIONS

68. The Court of Appeal had dealt exhaustively with the issue of the adequacy of the warning on the corroboration of the evidence of the accomplice as well as the issue, as to whether there is in fact corroboration of the evidence of the accomplice. I am in agreement with their lordships reasoning and conclusions.

69. There is no basis for concluding that, lapses on the part of the learned trial judge have occasioned grave and substantial injustice to the petitioner.
70. For the reasons referred to above, I refuse the application for special leave to appeal of the petitioner.



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Hon. Chief Justice Anthony Gates
President of the Supreme Court



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Hon. Mr. Justice Saleem Marsoof
Justice of the Supreme Court



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Hon. Mr. Justice Buwaneka Aluwihare
Justice of the Supreme Court