

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0006.2017
(On Appeal from Court of Appeal No: HAC 0083.2010)

BETWEEN : ROSHNI LATA

Petitioner

AND : THE STATE

Respondent

Coram : Hon. Chief Justice Anthony Gates, President of Supreme Court
Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

Counsel : Mr. T. Lee for the Petitioner
Ms. S.K. Puamau for the Respondent

Date of Hearing: 13 October 2017

Date of Judgment: 26 October 2017

JUDGMENT

Anthony Gates, P

- [1] I concur with the judgment of Marsoof JA which follows. I add my own emphasis on two procedural matters only.
- [2] The petitioner in a letter to the Supreme Court Registry simply gave notice that she wished to appeal against the judgment of the Court of Appeal. She said her counsel would “forward all necessary grounds and submissions.” However, it is necessary that proper grounds should be contained within any petition lodged with this court. Without

such grounds no timely notice is given to the Respondent as to what the appeal is about. These procedures are aimed at ensuring a fair trial which includes the fair hearing of an appeal.

- [3] The grounds eventually sought to be argued, and which were argued before us, did not arise from the judgment of the court below in its decision of 26th May 2017. That may be, and was here, an abuse of the process. Similarly, it is an abuse to argue grounds upon which leave to appeal has been refused by the single judge and which decision had not been renewed and argued before the Full Court pursuant to section 35(3) of the Court of Appeal Act, Cap. 12.

Saleem Marsoof, J

- [4] In the application before this Court, the Petitioner, Roshini Lata, has sought leave to appeal against the judgment of the Court of Appeal [Chandra JA, A. Fernando JA and Temo JA] dated 26th May 2017, which dismissed the said Petitioner's appeal against her conviction but allowed her appeal against sentence granting her relief by reducing her term of imprisonment and non-parole period. The Petitioner seeks leave to appeal in this application, only against the said decision of the Court of Appeal dated 26th May 2017 dismissing her appeal against conviction.
- [5] The Petitioner was charged and convicted after trial on one count of possession of an illicit drug, contrary to Section 5(a) of the Illicit Drugs Control Act, 2004 before the High Court in Lautoka. The illicit drug the Petitioner was charged with possessing was 1990.4 grams of cocaine, which is listed as an "illicit drug" in Schedule I to the Illicit Drugs Control Act.
- [6] By her letter dated 30th May 2017, which was received in the Registry of this Court on 31st May 2017, the Petitioner who was then detained in the Women's Correction Centre, Korovou, Suva, gave timely notice of her intent to seek leave to appeal against the judgment of the Court of Appeal dated 26th May 2017. In the said notice, she also indicated that since the Legal Aid Commission was in the process of considering her request for legal aid, all grounds of appeal will be notified later.

[7] In the written submissions filed on 4th September, 2017, the only grounds of appeal against conviction on which the Petitioner solely relied were:-

(1) The issue of “chain of custody” was dismissed by the Court of Appeal *in the First Instance without any proper direction.*

(2) No adequate and sufficient proof was obtained to positively confirm that the “white substance” that was seized from her custody was indeed pure cocaine, but reliance was placed on the evidence of Jone Sauvakacolo, a police officer who had been attached to the Drug Intelligence Enforcement Unit, to confirm it was cocaine.

[8] The reference in ground (1) above to the “*First Instance*” is to the Ruling of a Judge of the Court of Appeal [Goundar J] made on 13th March 2015 in response to the Petitioner’s application for leave to appeal to the Court of Appeal against her conviction and sentence. In the said application, the Petitioner, who was represented by Counsel, had sought leave to appeal against her conviction on 21 grounds and against her sentence on 11 grounds. The honourable Judge of the Court of Appeal had granted leave to appeal on 12 grounds and refused leave to appeal on the remaining 9 grounds against conviction, and granted leave to appeal against the sentence on 6 out of the 11 grounds raised by the Petitioner.

[9] The Court of Appeal thereafter examined all grounds on which leave to appeal had been granted against the conviction and dismissed the Petitioner’s appeal against conviction, but varied the sentence after quashing the sentence imposed by the High Court.

[10] In this context a preliminary question that arises for determination in this case, is whether the two grounds relied upon by the Petitioner for seeking leave to appeal against conviction in her application dated 4th September, 2017 arise from the judgment of the Court of Appeal dated 26th May 2017.

[11] It is the contention of the learned Counsel for the Respondent that both the grounds on the basis of which leave is sought were dealt with in the Ruling of the Judge of the Court of Appeal dated 13th March 2015, and leave to appeal was refused in terms of section 35(1)(a) of the Court of Appeal Act, Cap 12. Learned Counsel contended that the decision to refuse leave to appeal made by a single judge of the Court of Appeal was not a “final judgment” of the Court of Appeal from which leave to appeal to the

Supreme Court may be sought, and in any event, the Petitioner has only sought leave to appeal against the judgment of the Court of Appeal dated 26th May 2017 which clearly did not deal with the matters encompassed within the two grounds on which leave to appeal is now sought from this Court. Learned Counsel has described the application filed by the Petitioner as an abuse of process.

- [12] Responding to the said contention of the Learned Counsel for the Respondent, the learned Counsel for the Petitioner has submitted that the two grounds on the basis of which leave to appeal is sought from this Court were part of the Petitioner's arguments in the Court of Appeal in the course of the appeal that culminated in the judgment of 26th May 2017. Learned Counsel for the Petitioner argues that "the wordings of the grounds may be different, however the crux of the issue is similar or the same."
- [13] It is in this background that it is necessary to make reference, at the outset, to the Ruling of this Court dated 13th March 2015.

The Ruling of 13th March 2015

- [14] As already noted, the Petitioner had sought leave to appeal from the Court of Appeal against her conviction in the High Court in Lautoka on 21 grounds, and the sentence imposed by the High Court on 11 grounds, and the matter was considered in the first instance by Goundar J in his Ruling dated 13th March 2015. It appears from paragraph [25] of the said Ruling that his Lordship Goundar J. refused leave to appeal against the conviction on grounds 1-3, 7, 14, 17, and 19-21, but paragraph [26] shows that he granted leave to appeal against the conviction on grounds 4-6, 8-13, 15-16, and 18.
- [15] What is of crucial relevance to the application now before this Court is that ground 1-3 on which leave to appeal was refused by Goundar J were as follows:-

1. The Learned Trial Judge erred in law by *failing to give proper directions* to the Assessors and himself on the central issues in the case regarding the *Chain of Custody* and upon request for re-direction he gave inadequate directions and failed to assist the Assessors with the evidence available *and he erroneously implied that it was for the Defence to disprove the chain of custody, thereby causing a miscarriage of Justice.*

2. The Learned Trial Judge stated in paragraph 5 of his judgment that “*I am in difficulty to understand the Defence referring to chain of custody*” as a result of this admission he fell into error by not giving proper directions in law as is required to prove Chain of Custody in drug related matters thereby causing a miscarriage of justice.
3. The Learned Trial Judge failed to assist the Assessors with the Defences submissions and evidence regarding the missing bag and photographs taken of the bag at the Crime Scene, which was not produced at court or disclosed to the Defence and he erroneously concluded in paragraph 4 of his judgment that “the Prosecution witness clearly states that he took possession of the white coloured powder into his personal custody and transmitted it to government analyst which is confirmed by government analyst hence I find the Chain of Custody of the production is intact” and as a result he fell into error because *the black leather knapsack which was locked was never taken to the analyst and further it was not continuously in the possession of the Prosecution Witness (3)* as in the record of interview it is clear that the bag that was allegedly recovered from the crime scene was in the custody of the interviewing officer thereby causing a grave miscarriage of Justice, as the Prosecution failed to prove the Chain of Custody beyond all reasonable doubt.

[16] Despite the very elaborate wording of the above 3 grounds on which leave to appeal against conviction had been sought by the Petitioner in the Court of Appeal, Goundar J. dealt with these grounds rather briefly in paragraph [6] of his Ruling in the following manner:-

“[6] The appellant's contention is that since the alleged drugs were found in a knapsack bag, the bag should have been produced in court to prove the chain of possession. This contention is misconceived. *The chain of possession rule applies to the illicit substance and not to its storage facility. In the present case, the prosecution relied upon DC Sauvakacolo's evidence to establish the chain of possession. DC Sauvakacolo's evidence was that after seizing the substance, he took it to the Government Analyst for an analysis and obtained a report. At para 43 of the summing up, the trial judge gave clear directions on the issue of chain of possession. Grounds 1-3 are not arguable.*”(Emphasis added)

- [17] It is on this reasoning that Goundar J. went on to *refuse leave to appeal* on grounds 1 to 3 taken up by the Petitioner. The learned Judge did not purport to dismiss the application of the Petitioner on grounds 1-3, and in fact he granted leave to appeal against the conviction on grounds 4-6, 8-13, 15-16, and 18, as well as on the grounds 3, 6, 7, 8, 10 and 11 out of the eleven grounds urged by the Petitioner against the sentence. In doing so, Goundar J. clearly exercised his discretion to grant or refuse leave to appeal in terms of section 35(1)(a) of the Court of Appeal Act, and did not exercise his power in terms of section 35(2) of the said Act to dismiss the petition of the Petitioner which he considered vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal.
- [18] This Court is, as clearly laid down in section 98(3)(a) and (b) of the Constitution of the Republic of Fiji, “the final appellate court” in Fiji, and “has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all *final judgments* of the Court of Appeal”. Learned Counsel for the Respondent has contended that a decision of a single judge of the Court of Appeal to grant or refuse leave to appeal in terms of section 35(1)(a) of the Court of Appeal Act, was not a “final judgment of the Court of Appeal” from which an application for leave to appeal may be entertained by this Court.
- [19] In order to appreciate the argument advanced by learned Counsel for the Respondent, it might be instructive to first examine section 35(1) along with the connected sections 35(2) and 35(3) of the Court of Appeal Act, which are quoted below:

“35(1) A judge of the Court may exercise the following powers of the Court-

- (a) To *give leave to appeal* to the Court;
- (b) To extend the time within which notice of appeal or of an application for leave to appeal may be given;
- (c) To allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without leave;
- (d) To admit an appellant to bail;
- (e) To cancel an appellant’s bail on good cause being shown;

- (f) To recommend that legal aid be granted to an appellant
- (2) If on the filing of a notice of appeal or of an application for leave to appeal, a judge of *the Court determines that the appeal is vexatious or frivolous* or is bound to fail because there is no right of appeal or no right to seek leave to appeal, *the judge may dismiss the appeal.*
- (3) If the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant's favour, *the appellant may have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act*"(Emphasis added)

[20] The question as to what constitutes a "final judgment of the Court of Appeal" within the meaning of section 98(3)(b) of the present Constitution has been considered in several judgments of this Court. Language similar to that used in the said section of the present Constitution was found in section 121(2) of the Constitution of 1997, which was considered by this Court in *Native Land Trust Board v Narawa*, [2004] FJSC 7; CBV0007.2002S (21 May 2004) in which this Court observed at paragraph [35] that-

"The word "*final*" qualifies the class "*judgments of the Court of Appeal*" and on that basis refers to the decisions upon proceedings in that Court. That could be construed as referring to the disposition of appeals whether they have been brought as of right from final judgments of the High Court or by leave from interlocutory judgments of that Court. The question would then arise as to what work is to be done by the word "*final*" in relation to the Court of Appeal on this construction. *It would exclude from the jurisdiction of the Supreme Court a range of interlocutory decisions which may be made in the Court of Appeal including decisions granting or withholding leave to appeal, decisions extending or refusing extensions of time, decisions providing for the stay of execution or of proceedings under the judgment at first instance and decisions relating to security for costs and the grant or withholding of bail pending appeal in criminal cases. When reference is made to these matters it can be argued that there is a purpose to be served by the word "final" when used to refer to judgments of the Court of Appeal in relation to appellate proceedings.*"(Emphasis added)

[21] The rationale for characterising certain judgments of the Court of Appeal as “final” and others as not final was explained by this Court in *Ralumu v The Commander Republic of Fiji Military Forces Civil Appeal* No CBV0008 of 2003S, where it stated in paragraph [51] that-

“In our opinion the better view is that a *final judgment* of the Court of Appeal, for the purposes of section 122 of the Constitution, is any judgment of the Court of Appeal *which finally disposes of a proceeding in that Court.*”(Emphasis added)

[22] Applying the rationale adopted in *Ralumu*, a decision of a single judge of the Court of Appeal *to refuse leave to appeal in terms of section 35(1)(a)* of the Court of Appeal cannot be characterised as final since such a decision does not finally dispose of the matter in that Court because a party aggrieved by such decision may move to have the application determined by the Court of Appeal as duly constituted for the hearing and determining of appeals under this Act as provided in section 35(3) of the Act.

[23] However, where a single judge of the Court of Appeal decides to *summarily dismiss an application for leave to appeal under section 35(2)* of the Court of Appeal Act, such decision may be characterised as a “final judgment” of the Court of Appeal, and the aggrieved party may invoke the jurisdiction of this Court to seek leave to appeal against such decision. In the course of his judgment in *Tiritiri v State* [2014] FJSC 15; CAV9.2014 (14 November 2014) Calanchini JA made reference in paragraph 24 thereof to decisions of this Court in *Ralumu v The Commander Republic of Fiji Military Forces* (CBV 8 of 2003; 10 September 2004), *Raurav The State* (CAV 10 of 2005; 4 May 2006), *Tubuli v The State* (CAV 9 of 2006; 25 February 2008) and *Naisua v The State* (CAV 10 of 2013; 20 November 2013) and made this very pertinent observation:

“The effect of these decisions is that for the purposes of determining the Supreme Court's jurisdiction in respect of final judgments of the Court of Appeal, *a final judgment of the Court of Appeal is any judgment of the Court of Appeal which finally disposes of a proceeding in that Court.* Consequently, a final judgment of the Court of Appeal is not only a judgment of the Court duly constituted by 2 or 3 justices of appeal, *but also any decision of a justice of appeal exercising the power of the Court under section 20(1) or section 35(2) of the Court of Appeal Act that effectively disposes of the proceedings in the*

Court. That position was affirmed by this Court in its recent decision of *Dromodole v The State* (CAV 13 of 2013; 19 August 2014).”(Emphasis added)

- [24] In paragraphs [37] to [40] of his judgment in *Tiritiri v State*, his Lordship Calanchini JA with Chandra JA and Guneratne JA concurring, adverted to the summing up of the trial judge and the grounds of appeal raised before the Court of Appeal in that case, and held that the appeal in question was not a vexatious or frivolous appeal which justified dismissal under section 35(2) of the Court of Appeal Act. Accordingly, Calanchini JA decided to grant the petitioner in that case an enlargement of time and special leave to appeal, and went on to set aside the order made by the single judge of the Court of Appeal in that case to dismiss the appeal in terms of section 35(2) of the Court of Appeal Act. His Lordship also directed that the petitioner's renewed application for leave to appeal against conviction should be heard by the Court of Appeal as contemplated by section 35(3) of the Court of Appeal Act upon a direction from the President of the Court of Appeal.
- [25] I have endeavoured to examine the provisions of section 35(1), (2) and (3) of the Court of Appeal Act in the light of the approach adopted by our courts in interpreting and applying the said provisions in order to highlight, in the factual circumstances of the present case, that when his Lordship Goundar J made his Ruling dated 13th March 2015 refusing leave to appeal on certain grounds including grounds 1-3, which constitute the bedrock of this application, the Petitioner Roshini Lata, was entitled in law to move that those grounds be referred for determination by the Court of Appeal in terms of section 35(3) of the Court of Appeal Act. It is significant that she has chosen, or has been advised, to refrain from taking that decisive step with respect to those grounds to date, and the question that arises in this application is whether she could seek to canvass those grounds in the course of this application.
- [26] In view of the submission made on behalf of the Petitioner Roshini Lata before this Court, it will now be useful to examine the judgment of the Court of Appeal dated 26th May 2017 to ascertain whether the grounds on which leave to appeal is sought in this application against the said judgment ever went into the questions that are raised before this Court in the two grounds of appeal urged as set out in paragraph [7] of this judgment.

- [27] As noted in paragraph [7] of this judgment, the Petitioner has, in her written submissions lodged in this Court dated 4th September, 2017, raised only two grounds of appeal against her conviction, and none against her sentence, and the said two grounds related to, firstly, the alleged dismissal in the first instance by the Court of Appeal, without any proper direction, of the issue of “chain of custody”, and secondly, the alleged inadequacy and sufficiency of proof to positively confirm that the “white substance” that was seized from the Petitioner’s custody was indeed pure cocaine, and the total reliance on the evidence of police officer Jone Sauvakacolo, to confirm it was cocaine.
- [28] On the face of it, both these grounds were those for which leave to appeal was refused in the first instance by the single judge of the Court of Appeal in terms of section 35(1)(a) of the Court of Appeal Act. The question is whether the Petitioner is entitled to seek leave to appeal from this Court on those grounds against the judgment of the Court of Appeal dated 26th May 2017, and the learned Counsel for the Respondent has submitted that this would amount to an abuse of process. However, the learned Counsel for the Petitioner has submitted that the said two grounds were part of the Petitioner’s arguments in the Court of Appeal in the course of the appeal that culminated in the judgment of 26th May 2017, and that though “the wordings of the grounds may be different, however the crux of the issue is similar or the same.” The accuracy of this assertion has to be examined.
- [29] In this context, it is worth noting that in paragraph [6] of the impugned judgment of the Court of Appeal dated 26th May 2017, the Court of Appeal has noted specifically that in her written submissions filed before the Court of Appeal by the Petitioner Roshini Lata, it has been stated that-
- “For the purpose of this hearing, the appellant wishes to rely *on those grounds where leave is granted.*”
- [30] In paragraph [7] of the said judgment of the Court of Appeal, the said court has reproduced *verbatim* the 11 grounds on the basis of which leave to appeal had been granted by the single judge of the Court of Appeal by his Ruling dated 13th March 2015, which were the identical grounds which were examined very exhaustively by the Court

of Appeal in its impugned judgment dated 26th May 2017, against which the Petitioner, Roshini Lata has sought leave to appeal from this Court

- [31] It is noteworthy that of the 11 grounds against conviction on which the Petitioner's appeal to the Court of Appeal was considered by that court, grounds (1) to (3) dealt with the issue of duress, grounds (4),(5),(6), (7) and (8) related to the requisite mental element for the crime referred to in Latin as *mens rea*, ground (10) dealt with good character and ground (11) went into the propriety of the learned trial judge allegedly instructing the assessors not to worry about what has been said to them, presumably by learned Counsel in their addresses, as that may be difficult to understand, and which the trial judge went on to explain in simple terms. It is obvious that none of these grounds referred to the "chain of custody" or the testimony of police officer Jone Sauvakacolo, which was said to have been led to confirm the "chain of custody" and that the "white substance" seized from the Petitioner was in fact cocaine.
- [32] The judgment of Fernando JA, with which Chandra JA, and Temo JA, concurred, was an extremely comprehensive one. As already noted, after setting out verbatim, the grounds against conviction and sentence on which leave to appeal had been granted in the first instance by Goundar J respectively in paragraphs [7] and [8] of the said judgment, in paragraphs [9] to [12], Fernando JA has sought to summarise the prosecution evidence and has set out in paragraph [9] the gist of the testimony of PW 1, *Kelera Miriama*, the Petitioner's neighbour to whom the Petitioner had entrusted the safe custody of a knapsack black bag in March 2010 and asked her to keep it in her house saying that it contained Shalen's books. In paragraph [10], his Lordship has given a summary of the testimony of PW 2 Cpl 3231 *Timoci Vuli*, a police officer attached to the Drug Intelligence Enforcement Unit, who said that on 12th June 2010, acting on information received, he had arrested the Petitioner, who had led him and two other police officers to Kelera's house, and produced the knapsack bag which she had kept there. The knapsack bag was closed with a padlock, which she had opened with a key she had, and within the bag were four parcels of white substance, packed in PIL Supermarket and RIL Supermarket white plastics and a pillow case. All these things were wrapped in a black garbage bag. The knapsack bag and its contents had been seized by Jone Sauvakacolo and kept in his custody. The garbage bag, the

pillow case, the plastics and the four parcels of white substances had been produced before the Court.

- [33] It is paragraph [11] of his judgment that his Lordship Fernando JA has summarised the testimony of *Jone Sauvakacolo*, and I cannot do better than quote the summary of Fernando JA, which was as follows:-

“He had been the officer who had seized the drugs and later taken them to the Government Analyst, for purposes of analysis. He had produced the Government Analyst's Report before the Court under section 133 of the Criminal Procedure Decree. *There is no challenge before us, as to the chain of custody, the expertise of the Government Analyst, or his report pertaining to the analysis.* The only issue raised is, *in the grounds of appeal against sentence*, that is, that the certificate did not state the purity of the cocaine, save for the fact that it was positive for cocaine.”

- [34] His Lordship Fernando JA, has proceeded to summarise the caution interview statement of the Petitioner and the Defence evidence in paragraphs [12] and [13] of the impugned judgment, and in the remaining paragraphs of the said judgment dealt with only the matters raised as grounds of appeal against conviction and sentence in the Court of Appeal. There was absolutely no opportunity to deal with either the question of chain of custody or the testimony of *Jone Sauvakacolo* pertaining to the chain of custody in the remaining paragraphs of the judgment of Fernando JA, with which Chandra JA, and Temo JA, had concurred.

- [35] In these circumstances, I regret that I cannot agree with the submission of the learned Counsel for the Petitioner that the two grounds raised in the petition filed in this Court were part of the Petitioner's arguments in the Court of Appeal in the course of the appeal, and that though the wordings of the grounds may be different, however the crux of the issue is similar or the same. It is manifest that the application is misconceived and is clearly an abuse of process of this Court, as submitted by the learned Counsel for the Respondent.

Conclusions

- [36] In view of the finding of this Court that although the Petitioner has sought leave to appeal against the judgment of the Court of Appeal dated 26th May 2017 which was a

“final judgment” within the meaning of section 98(3)(b) of the Constitution, the two grounds of appeal raised on behalf of the Petitioner did not arise from the said judgment, and were in fact grounds for which leave to appeal had been refused by the Ruling dated 13th March 2015, which was not a “final judgment” against which an appeal lies to the Supreme Court. In the circumstances there is no basis to consider granting leave to appeal.

[37] I would formally refuse leave to appeal, and would dismiss the application of the Petitioner.

Brian Keith, J

[38] I agree that leave to appeal should be refused for the reasons given by Marsoof J., whose judgment I have read in draft.

[39] I add only that even if it had been possible to consider the application for leave to appeal on its merits, I would have concluded that the two grounds of appeal were unarguable for the reasons given by Goundar J.

Orders of the Court

- (1) *Leave to appeal is formally refused;*
- (2) *The application is dismissed.*



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Hon. Mr. Justice Anthony Gates
President, Supreme Court



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



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Hon. Mr. Justice Brian Keith
Justice of the Supreme Court

Solicitors:

Office of the Legal Aid Commission for the Petitioner

Office of the Director of Public Prosecutions for the Respondent