

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0013.2013
(On Appeal from Court of Appeal No: AAU 0095.2008)

BETWEEN : AKUILA DROMUDOLE

Petitioner

AND : THE STATE

Respondent

Coram : Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court

Counsel : Mr. S. Waqainabete for the Petitioner
Mr. M. D. Korovou for the Respondent

Date of Hearing: 5 April 2017

Date of Judgment: 20 April 2017

JUDGMENT

Marsoof, J

- [1] The only question that arises for determination in this application for special leave to appeal is whether the Petitioner's right to a fair trial was violated on 30th July 2008 when the trial judge refused the Petitioner an adjournment of the proceedings to enable the Petitioner to read, study and familiarise himself with the bundle of disclosures returned by the Legal Aid Commission on the day of the trial since his application for Legal Aid was refused.

- [2] It is unfortunate that this matter has come up for determination by this Court almost 9 years later. This case has a checkered history, which has to be necessarily recounted.
- [3] By amended information filed on 11th July 2008, the Petitioner was charged before the High Court of Fiji in Suva with three others for committing robbery with violence contrary to section 293(1)(b) of the Penal Code, cap 17, at the MH Supermarket, Tamavua, in the Central Division, on 7th July 2007. The sum of money alleged to have been robbed from the supermarket was \$21,583.73.
- [4] Admittedly, the primary evidence against the Petitioner was his confession, the admissibility of which he had challenged. At the conclusion of the ‘Trial within Trial’ (*voir dire*), the learned Trial Judge had ruled that the confession was admissible. All four accused had been convicted after trial on 10th September 2008 by the learned Trial Judge [Goundar J] on acceptance of the majority opinion of the assessors and the Petitioner was sentenced to imprisonment for 14 years.
- [5] By the Ruling of a Single Judge of the Court of Appeal dated 4th May 2012 [Madigan JA] made under section 35(2) of the Court of Appeal Act, Cap 12, the Petitioner’s timely application for leave to appeal against his conviction was dismissed. The effect of the Single Judge dismissing the Petitioner’s application under section 35(2), rather than simply refusing him leave to appeal to the Court of Appeal as contemplated by section 35(1), was that the Petitioner was deprived of his right to move for his application to be determined by a fuller bench of the Court of Appeal in terms of section 35(3) of the Court of Appeal Act.
- [6] Having failed to lodge an application for special leave to appeal against the Ruling of the Single Judge of the Court of Appeal in the Supreme Court within the time permitted by law, the Petitioner sought enlargement of time to apply for special leave to appeal against the decision of the Single Judge of the Court of Appeal. The “two in one” application of the Petitioner for enlargement of time and leave to appeal was dismissed by the Supreme Court (Gates P, Hettige J and Ekanayake J) on 19th August 2014.

- [7] The Petitioner then applied for a Review of the decision by the Supreme Court under section 98(7) of the Constitution of Fiji. The Supreme Court [Keith J, Dep J and Calanchini J] by its decision dated 23rd October 2015, granted the Petitioner relief by remitting to the Court of Appeal for determination as provided in section 35 (3) of the Court of Appeal Act, the question raised by the Petitioner as ground (iii) in his letter dated 25th February 2013 on which the Supreme Court had refused special leave to appeal by its decision dated 19th August 2014. Ground (iii) raised in the said letter was that the Petitioner was denied a fair trial by the trial judge when on 30th July 2008 he was refused an adjournment of trial in order to prepare his defence when his disclosures were returned and the request for legal assistance was refused by the Legal Aid Commission.
- [8] Accordingly, a fuller bench of the Court of Appeal [Calanchini P, A. Fernando JA and Rajasinghe JA] constituted as provided in section 35(3) of the Court of Appeal Act, considered the question so remitted for determination by the Court of Appeal on 12th September 2016. Having examined the matter in great detail, the Court of Appeal concluded in paragraph 15 of its unanimous judgment dated 30th September 2016 that the Petitioner “had not been denied a fair trial” and went on to dismiss the Petitioner’s appeal.
- [9] Aggrieved by the said decision of the Court of Appeal, the Petitioner has, with the assistance of the Legal Aid Commission, lodged in the Registry of this Court a letter dated 30th September 2016, which reads as follows:-

“I am dissatisfied with the decision of the Fiji Court of Appeal in dismissing my appeal against conviction and wish to appeal it on the following petition of appeal:-

GROUND

I did not receive a fair trial by reason of the failure of the trial judge not exercising his judicial discretion (sic) to adjourn the proceedings in order to

read, study and familiarise myself with the bundle of disclosures returned by the Legal Aid Commission on the day of the trial.”

- [10] It will be seen that only one ground of appeal against conviction is set out in the said letter which is somewhat lacking in clarity, and it is obvious from the letter that the Petitioner did not say what he meant and mean what he said. In order to bring greater clarity to the said ground, I would formulate the question on which the Petitioner would want to seek special leave to appeal of this Court as follows:-

“Was the Petitioner deprived of a fair trial by reason of the failure of the trial judge to exercise his judicial discretion to adjourn the proceedings to enable the Petitioner to read, study and familiarise himself with the bundle of disclosures returned by the Legal Aid Commission on the day of the trial.”

- [11] The Petitioner has by his letter dated 30th September 2016 sought to appeal to this Court against the decision of the Court of Appeal dated 30th September 2016, as he is entitled to do in terms of Section 98(3)(b) of the Constitution of the Republic of Fiji, which confers on the Supreme Court the exclusive jurisdiction, "subject to such requirements as prescribed by law", to hear and determine appeals from all final judgments of the Court of Appeal.

- [12] However, as provided in Section 98(4) of the Constitution, no appeal may be brought to the Supreme Court from a final judgment of the Court of Appeal “unless the Supreme Court grants leave to appeal.” Section 7(2) of the Supreme Court Act No. 14 of 1998, sets out stringent criteria for the grant of special leave to appeal. I would therefore treat the Petitioner’s letter of 30th September 2016 as an application to this Court for special leave to appeal against the judgment of the Court of Appeal dated 30th September 2016.

- [13] I also note that the written submissions filed on behalf of the Petitioner with the assistance of the Legal Aid Commission in support of this application on 8th March 2017 is captioned “PETITIONER’S SUBMISSION IN HIS PETITION FOR REVIEW AGAINST CONVICTION”. I shall have regard to the said written

submissions as being in support of the Petitioner's application for special leave to appeal against the said decision of the Court of Appeal.

[14] In the said written submissions, the learned Counsel for the Petitioner has submitted that the refusal of an adjournment of trial on his application on 30th July 2008, to enable him "to read, study and familiarise himself with the *bundle of disclosures* returned by the Legal Aid Commission" on that very day was a violation of his right to a fair trial. He has submitted further that the Petitioner is aggrieved by the impugned judgment of the Court of Appeal which has dismissed his appeal against the decision of the trial judge to deny the Petitioner an adjournment. Learned Counsel has submitted that the Petitioner's right to a fair trial was guaranteed by section 28(1(c) of the Constitution of Fiji of 1997, which was in force on that day, and the decision to deny an adjournment violated that constitutional right.

[15] Section 28(1)(a) to (k) of the Constitution of Fiji, 1997 seeks to protect the right of any person to a fair trial, but for the purpose of this application, it would suffice to reproduce only subsections (a) to (d) of that very salutary provision, of which the Petitioner relies only on sub paragraph (c)-

"(1) Every person charged with an offence has the right-

- (a) to be presumed innocent until proven guilty according to law;
- (b) to be given details in legible writing, in a language that he or she understands, of the nature of and reasons for the charge;
- (c) to be given adequate time and facilities to prepare a defence, including, if he or she so requests, a right of access to witness statements;
- (d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid."

- [16] It is noteworthy that Section 14(2) of the Constitution of the Republic of Fiji, which is currently in force, contains substantively similar provisions, and section 28(1)(c) of the Constitution of 1997 on which the Petitioner placed reliance for the purposes of this application, is identical to section 14(2)(c) of the Constitution of the Republic of Fiji. It is the contention of learned Counsel for the Petitioner that the constitutional right of an accused to a fair trial under section 28(1)(c) of the Constitution of 1997 encompassed, *inter alia*, the right “to be given adequate time and facilities to prepare a defence, including, if he or she so requests, a right of access to witness statements”.
- [17] Learned Counsel has invited the attention of Court to its decision in *Chand v The State* [2009] FJSC 11; CAV0018.2008s (6 March 2009), in which the accused’s right to a fair trial enshrined in section 28(1)(d) of the Constitution of 1997 was successfully invoked. Learned Counsel for the Petitioner has stated in paragraph 22 of his written submissions that the accused in that case “encountered the same situation a bit better than the situation of your Petitioner in this matter” and has relied on several passages of the judgment of this Court in that case which will be adverted to later in this judgment.
- [18] In his written submissions, the learned Counsel for the Petitioner has submitted that during the time the Petitioner’s “application for legal aid was with the Legal Aid Commission, the Petitioner did not have his disclosures” (paragraph 18), and the Court was informed by Ms. Lekenaua, Duty Solicitor of the Legal Aid Commission only on 30th July 2008 that “the application for legal representation by the Petitioner had been refused and the disclosures had been given back to the Petitioner” (paragraph 17). It is contended that in these circumstances, the refusal of an adjournment of the trial, on that date violated the Petitioner’s right to a “fair trial”, and that the decision of the Court of Appeal in its impugned judgment was erroneous.
- [19] The learned Counsel for the Respondent submitted that the Court of Appeal had properly complied with the decision of this Court dated 23rd October 2015 in the Review application filed by the Petitioner. He submitted that the Petitioner of the instant case was well aware of his defence and had no difficulty in putting his case to the police officers who recorded his caution interview and charge statement. He

further submitted that the Petitioner did not need his disclosures to prepare for the case and to challenge his caution interview and charge statement, and in those circumstances, the decision in *Chand v The State* was clearly distinguishable.

- [20] He further submitted that since that the Court of Appeal had, after a thorough perusal of the case record, concluded that the Petitioner was accorded a fair trial and suffered no prejudice even through the disclosures were handed over to him on the date of the trial, there had been no contravention of his constitutional right to a fair hearing, and the standards set in *Maya v The State* [2015] FJSC 30; CAV (23 October 2015) had been met. Learned Counsel for the Respondent submitted that the single ground set out in the Petitioner's application for special leave to appeal lacks merit.

Special Leave to Appeal

- [21] As already noted, section 7(2) of the Supreme Court Act No. 14 of 1998, sets out stringent criteria for the grant of special leave to appeal. It provides that-

“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.”

- [22] The right to a fair trial is vital to any accused charged with a criminal offence, and though initially recognized by the common law, it has acquired the status of a constitutional right in Fiji. In my considered opinion, this case involves a substantial question of principle affecting the administration of criminal justice, and not to grant special leave to appeal in this case could give rise to substantial and grave injustice. I accordingly grant special leave to appeal in terms of section 7(2)(b) and (c) of the Supreme Court Act.

[23] The Court of Appeal in paragraph 7 of its impugned judgment dated 30th September 2016, examined three issues that would arise in answering the question which was directed by judgment of the Supreme Court dated 23rd October 2015 to be determined by the Court of Appeal in terms of section 35(3) of the Court of Appeal Act. In my opinion, for the purpose of the disposal of this appeal, it would be necessary for this Court to consider the substantively the same issues with some minor paraphrasing I would take the liberty of making, to bring it in line with the matter that this Court had by its judgment of 23rd October 2015, remitted to the Court of Appeal to determine. The paraphrased issues on which I propose to grant special leave to appeal are as follows:-

- (i) Is there material on the court record to substantiate the allegation that the Petitioner could not read, study and familiarise himself with the '*bundle of disclosures*' returned by the Legal Aid Commission on the day of the trial?
- (ii) If that is the case, do the proceedings of the case and the manner the Petitioner had conducted his defence indicate that *he had been prejudiced* in his defence?
- (iii) Had the Petitioner at any stage of the trial *complained to the trial judge that his defence had been prejudiced as a result of the late disclosure?*

(i) Return of the Bundle of Disclosures to the Petitioner by LAC

[24] The first issue to be addressed in this appeal is whether there is any material on the court record to substantiate the allegation that the Petitioner could not read, study and familiarise himself with the '*bundle of disclosures*' returned to him by the Legal Aid Commission on the day of the trial? As the Court of Appeal rightly observed in paragraph 8 of its impugned judgment, this issue has to be clarified from a perusal of the Court Record.

- [25] It is important to note that the Court of Appeal has in paragraph 8 of its judgement provided a chronology of events as far as it relates to the Petitioner based on the case record. It is not in my opinion necessary to reproduce the entire chronology for the purpose of the question on which the Petitioner has sought special leave to appeal, but it is necessary to refer to the material facts.
- [26] After being first produced in court in connection with the offence that resulted in his conviction on 8th August 2007, until the conclusion of the trial at the end of which he was convicted and sentenced, the Petitioner had sought to defend himself without assistance of Counsel, despite the fact that he was repeatedly made aware of his right to legal representation. On 8th August 2007, he did inform court that he will seek the services of a private lawyer, but he chose not to.
- [27] When the case was called in court on 15th October 2007, the Petitioner appeared in person and was granted bail.
- [28] On 14th November 2007, when the case was taken up before Goundar J, the Petitioner and the other 3 accused pleaded not guilty to the charge. *It is significant to note that while on that date the Petitioner stated that he will represent himself*, the other 3 accused persons had indicated that they will seek legal representation either from Legal Aid or private Counsel. Bail for all accused was extended, and it is evident from the court record (CAR) Vol 2 page 414 that “*Additional Evidence*” was served on the accused on that date.
- [29] There is no reference here to a “*bundle of disclosures*”, but as the Court of Appeal observed under the last bullet point of paragraph 8 of its impugned judgment –

“Thus it is clear that ‘*additional evidence*’ had been served on the Appellant on the 14th of November 2007. Up to this time the Appellant had appeared in person since he was first produced in Court. *Therefore whatever evidence that was available prior to the 14th of November 2007 would also have been served on him.*” (Emphasis added)

- [30] In my opinion, this is how the *bundle of disclosures* began to be made up. This becomes apparent from what transpired on 23rd January 2008, but before getting to that date, it is also significant to note that while the Petitioner appeared in person on 21st and 29th November 2007, on 11th January 2008 only the 1st and 4th accused appeared in person, but the Petitioner and the 3rd accused were absent and unrepresented. The court fixed the case for pre-trial conference on 23rd January 2008 and for trial on 28th January 2008, and ordered all “*disclosures to be served*” [CAR Vol 2 page 416].
- [31] There is nothing in the case record or the Petitioner’s pleadings or written submissions to suggest that *those disclosures, that is whatever were directed to be served by court on 23rd January 2008*, were not served on the Petitioner prior to 23rd January 2008 as directed by court. Neither the Petitioner nor any other accused charged with him had complained of non-receipt of disclosures. So, assuming that more disclosures were served on the Petitioner in terms of the order of court dated 11th January 2008, it is probable that the *bundle of disclosures* the Petitioner had in his hands became bulkier.
- [32] It is necessary to look at the sequence of events that took place after 23rd January 2008 to not only to unravel the mystery of the *bundle of disclosures*, but also understand how the Petitioner had conducted his defence. Although the court record for 11th January 2008 does not reveal any reason for the non-appearance of the Petitioner and the 3rd accused in court on that day, it appears from the proceedings of 23rd January 2008 that Ms. Tabete appearing for the State informed court that *the Petitioner and the 3rd accused “have been arrested and are in the remand centre”*. Though the case was for trial on 28th January 2008, that trial date was vacated on a motion by the Respondent to have the case of some of the other accused alleged to have been involved in the same incident of robbery with violence transferred from the Magistrates’ Court to the High Court. The case was adjourned to 1st February to be mentioned.
- [33] When the case was mentioned on 1st February 2008, the Petitioner was absent and unrepresented, and the *court ordered the revocation of the Petitioner’s bail and issued a Bench Warrant against him* to be returnable on 4th February 2008, on which date the

case was to be mentioned. On 4th February 2008, the Petitioner did not appear in court, and Ms. Tabete informed court that *the Petitioner “escaped from custody on his last appearance in Navua Magistrates Court on 28/1/08”*. The case was adjourned for 8th February to check on the Bench Warrant. On 8th February, the case was adjourned to 15th February once again to check on the Bench Warrant against the Petitioner. On 15th February 2008, the Petitioner was not in court, and Ms. Tabete stated to court that the Petitioner “may be in remand, need to check on that.” Court directed that the case be mentioned on 3rd March 2008, once again. When the case was mentioned on 3rd March, Ms. Tabete confirmed that the Petitioner is in remand.

[34] Fresh information was filed when the case was mentioned again on 18th March 2008, which resulted in two more accused persons being charged for the same offence. The case was adjourned to 28th March 2008 for plea. On 28th March the plea could not be taken, as some of the serving prisoners had been taken back to the prison, and on 11th April 2008, the Petitioner pleaded not guilty along with his 5 co-accused. Goundar J. after explaining the rights of the accused inquired from them about legal representation, and on that date *the Petitioner stated that he “will apply to the Legal Aid Commission (LAC) this week. I am on bail.”* It is important to note as observed by the Court of Appeal in paragraph 8 of its impugned judgment, although the Petitioner indicated that he will apply to the Legal Aid Commission for legal aid “there is no record of when in fact he applied for legal aid”

[35] On 11th April 2008, the case was adjourned to 19th May 2008. For many reasons, the proceedings of 19th May 2008 are significant for the disposal of this application. Firstly, it is evident from CAR Vol 2 page 424 that Ms. Tabete informed court on that date that the caution interviews of the 1st accused, the Petitioner and the 3rd and 4th accused contain admissions, and that they have filed their objections. Secondly, *Mr. Tukai, one of the two accused who was brought into the trial by the fresh information filed on 18th March 2008, made an application for “additional disclosures as I have misplaced mine”*, to which Ms. Tabete responded favourably and said that “will do at a cost of \$ 22.00 for 2nd set”. Thirdly, the court made order as follows:-

“Trial within the trial procedure explained to the accused persons. Objections to be filed by 29/5/08. All accused to seek legal representation. Bail and P.O extended. Adjourned to 29.5.08 for mention.”

- [36] Since some of the accused had not filed objections to caution interview by 29th May 2008, further time was granted for this purpose, and the case was to be mentioned again on 11th June 2008. On that day it was noted that only the Petitioner had filed objections, and the others needed more time. The 5th and 6th accused, who were the 2 accused person added to the original 4 by the fresh information filed on 18th March 2008, moved for separate trials, and the case went down thereafter for a few dates for the court to decide on this matter. The record shows that on 25th July 2008, fresh information was filed, and the cases against the 5th and 6th accused were directed to be mentioned on 1st September 2008, and court made order that the trial against the original 4 accused persons including the Petitioner shall commence on 28th July 2008.
- [37] On 28th July 2008, the 4th accused moved for a separate trial, but court delivered a Ruling refusing that application. The trial was then adjourned to 30th July 2008.
- [38] This brings me to the crucial date, 30th July 2008, when the Petitioner states that his right to a fair trial was infringed. The record of court [CAR Vol 2 page 429] shows that the Petitioner had appeared in person, and had informed court at 9.30 am that he is awaiting the Legal Aid Commission to process his application and thus sought an adjournment. The 3rd accused also informed Court that he is awaiting the Legal Aid Commission to process his application *and that his disclosures are with the Legal Aid Commission*. It is significant that the Petitioner did not make such a statement. The trial judge stood down the case till 10.45 am “for the State to consider whether if they want severing the 4th accused. LAC to be present”
- [39] When the court resumed at 10.50 am, Ms. Lekenaua of the Legal Aid Commission informed court as follows: “2nd and 3rd Accused persons’ legal aid applications were refused. They have been informed. *The disclosures have been returned to them.*” It is noteworthy that the Petitioner is the 2nd accused in the case, and although an application was made by the 4th accused, Mr. Kean for an adjournment on the basis

that he is not feeling well, significantly, the Petitioner did not move at this stage for an adjournment. The trial judge responded to co-accused Mr Kean's application for an adjournment as follows:

"Court – LAC has rejected the applications of 2nd (*the Petitioner*), 3rd & 4th Accused persons. Two accused persons are in remand pending trial. The accused persons have been given ample opportunity to secure legal representation. Since their legal aid applications have been refused, I would ensure they get a fair trial and that they understand the proceedings. Adjournment is refused. Trial will proceed."

[40] It is important to note that at the time the court made the aforesaid order, there was no application made by the Petitioner for an adjournment. The court record bears out that after the assessors had been selected except for Assessor 1 who was objected to and ordered to be replaced, the court adjourned till 2.15 pm.

[41] The court proceedings when resumed at 2.15 pm, as reflected at CAR Vol 2 page 430 to 431 read as follows:-

"At 2.15 pm

Ms. H. Tabete for State

1st, 2nd, 3rd and 4th Accused in person.

Clerk - Replacement Assessor found.

2nd Accused: Need more time to prepare.

Court: Will give 2nd Accused time to prepare cross examination"

[42] In this state of the evidence, in answering issue (i) set out in paragraph 21 of this judgment, I find that there is insufficient material on the court record to substantiate the allegation of the Petitioner that the Petitioner could not read, study and familiarise himself with the '*bundle of disclosures*' returned to him by the Legal Aid Commission *on the day of the trial*.

- [43] The fact that what was served on the accused on 14th November 2007 was described as “additional evidence” makes it plausible that other disclosures may have been made available to the accused even prior to that date. Furthermore, on 11th January 2008, when the case was fixed for trial on 28th January 2008, with a pre-trial conference scheduled for 23rd January 2008, the court ordered “all disclosures to be served on the accused”. The Petitioner, who had indicated to court on 14th November 2007 that he would defend himself at the trial, had the opportunity of reading, studying and familiarizing himself with what might by then have become a *bundle of disclosures*. However, on 23rd January 2008, on the date fixed for pre-trial conference, the trial date of 28th January 2008 was vacated.
- [44] There was nothing, except for his own misdemeanor of escaping from custody on 28th January 2008 and absconding until he was arrested towards the end of February 2008, to prevent the Petitioner from reading, studying and familiarising himself with the *bundle of disclosures* that would have been with him till at least 11th April 2008, on which date the Petitioner informed court that he would apply for legal aid. There is also nothing on the record to establish when the Petitioner did apply to the Legal Aid Commission for legal aid, and neither Mr. Waqainabete nor the Petitioner could assist Court with the exact date on which the Petitioner applied for legal aid and / or handed over the bundle of disclosures to the Commission.
- [45] Be that as it may, on 19th May 2008, it is on record that one of the co-accused Tukai in open court asked for an additional set of disclosures to file objection to his caution interview as he had misplaced what had been served on him, but the Petitioner who was in court did not make any application for disclosures but filed his objections on 11th June 2008. Furthermore, on 30th July 2008, Ms. Lekenaua of the Legal Aid Commission informed court that the Petitioner’s and the 3rd accused’s legal aid applications were refused and “they have been informed. *The disclosures have been returned to them.*” From this statement one thing is clear, and that is that the Petitioner is certainly not truthful in saying that the disclosures were returned to him on the day of the trial, namely 30th July 2008, though again, neither the Petitioner nor Mr. Waqainabete could tell court exactly when the disclosures were actually returned to the Petitioner.

[46] In these circumstances, I am convinced that there is insufficient material on the court record to substantiate the allegation that the Petitioner could not read, study and familiarise himself with the ‘bundle of disclosures’ returned by the Legal Aid Commission on the day of the trial. In my view, the Petitioner had sufficient opportunity to read, study and familiarise himself of the disclosures prior to the handing over of the bundle of disclosures by him to the Legal Aid Commission, and in the absence of any evidence in regard to the date on which the bundle of disclosures were returned to the Petitioner, even after the return of the disclosure until the date of trial, which in fact was the date on which ‘the Trial within Trial’ (*voir dire*) commenced.

(ii) *Prejudice to the Petitioner*

[47] In view of my findings against the Petitioner in regard to issue (i) set out in paragraph 23 of this judgement, issue (ii) and (iii) would not arise. Issue (ii) as formulated by me, is simply whether in the event that this Court finds that the bundle of disclosures were referred to the Petitioner only on the date of the trial, the proceedings of the case and the manner in which the Petitioner conducted his defence indicate that he had been prejudiced in his defence.

[48] The Court of Appeal, has in its impugned judgment, fairly exhaustively, dealt with the question whether there was material on the record to show that the Petitioner was prejudiced in the manner in which he conducted his defence, and has in paragraphs 10 to 12 of judgment, observed as follows:-

“10. The Court Record bears out that the ‘Trial within a Trial’ hearing which commenced on the 30th of July 2008 had been concluded on the 8th of August 2008. The police officers who were involved in the recording of the caution statement were called on the 6th of August 2008. Thus, even if the Appellant’s position that he had received the disclosure documents on the 30th of July 2008 is to be accepted as true, he would have had 7 days to prepare his cross-

examination of the witnesses involved in the recording of the caution statement.

11. The trial proper started on the 14th of August 2008 after the Trial Judge had ruled that the Appellant's confession statement was admissible in the trial and could be placed before the Assessors for their consideration. There was no further application by the Appellant and by this time, the Appellant would have had his disclosure documents which he claims he got on the 30th of July 2008, for two weeks. The trial was completed on 10th September 2008 and the trial Judge accepted the majority opinion of guilty by the Assessors.

12. The Appellant's position that he was never involved in the robbery, the case against him is a total fabrication and that his signature had been forged does not go along with the personal information about the Appellant found in the caution statement which at the hearing before us he admitted was elicited from him. He had in his caution statement stated where he is originally from, where he is presently staying, his father's name, where he is working, his mother's name, from where his mother comes from, whether she is working, how many siblings he has, their names, what each of them are doing, that he is schooling at FIT since 2006, and that he was studying electronics."

- [49] I have no reasons to disagree with the Court of Appeal. However, I would like to observe that when the Petitioner applied for leave to appeal his conviction and sentence to the Court of Appeal, his original grounds of appeal to the Court of Appeal did not include any complaint by the Petitioner about the learned trial judge's refusal to adjourn the trial to enable the Petitioner to familiarise himself with the bundle of disclosures and prepare for the trial. Even in his amended application for leave to appeal to the Court of Appeal, the Petitioner did not make any complaint about him not being able to prepare for his defence by reading, studying and familiarising himself with the disclosures. His complaint was that the "the learned trial judge erred in law and in fact when his lordship denied an adjournment for time for appellant to find counsel of choice."

[50] The fact is, the court record shows that the Petitioner never made an application in the High Court for time to retain a Counsel of choice. He took up the question of non-availability of disclosures for the first time only when he sought leave to appeal from the Supreme Court, advancing as ground (iii) a complaint that he was denied a fair trial due to the failure of the learned trial judge to provide him with sufficient time to read, study and familiarise himself with the disclosures. This Court refused leave to appeal on this question by its judgment of 19th August 2014. In my opinion, had the Petitioner been genuinely prejudiced by insufficiency of time to study the disclosures, he would have made that a ground of appeal, if not the first ground of appeal, in his very first application seeking leave to appeal to the Court of Appeal.

(iii) *Did the Petitioner complain to the trial judge that his defence had been prejudiced due to late receipt of disclosures?*

[51] Issue (iii) is my own paraphrased version of item (iii) raised by the Court of Appeal in paragraph 7 of its judgment, which is whether the Petitioner had, at any stage of the trial, complained to the trial judge that his defence had been prejudiced as a result of the late disclosure which led to his inability to point out any inconsistencies in the evidence of the police officers by comparing them with their witness statements or by his inability to show whether there was a marked similarity in the confessional statements of the accused. In paragraph 14 of its impugned judgment, A. Fernando J, with whom the other two Justices concurred, observed that-

“As regards the (iii) issue raised therein I do not find anything on record to even assume that the Appellant had at any stage of the trial been prejudiced as a result of the late disclosure.”

[52] In my view, the Court of Appeal has missed the focus of the issue formulated by it, as the issue raised is whether the Petitioner had ever *complained to the trial judge* that he was prejudiced by the disclosures not being made available to him in sufficient time to study the same and prepare his defence. Since the Court of Appeal has not specifically answered the said issue, I took time to peruse the entire record, and I find

that at no time had the Petitioner complained to the trial judge about the failure to make disclosures available to him in a timely manner.

[53] Learned Counsel for the Petitioner has referred us to the decision of this Court in *Chand v The State* [2009] FJSC 11, *supra*, which learned Counsel for the Respondent has submitted is distinguishable from the instant case. That was a case in which the petitioner had invoked his constitutional right under section 28(1)(d) of the Constitution of Fiji, 1997, which guaranteed to every individual, a right to “defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice” in legal proceedings.

[54] In this case, Mr. Naivalu, whom the petitioner had retained as his Counsel about 10 weeks before, informed court on 13 June 2006 that his instructions were withdrawn. In considering the complaint that section 28(1)(d) was violated by the trial judge’s refusal to grant an adjournment to retain another Counsel, this Court observed at paragraph 24 and 25 of its judgment that-

“24. Nevertheless, the petitioner is still entitled to argue that his qualified right to legal representation under s.28(1)(d) of the Constitution was infringed when Govind J required him to proceed with the trial without legal representation on 13 June 2006; that is when, on the first day of the trial, he discharged Mr Naivalu.

25. The petitioner had retained Mr Naivalu for more than 10 weeks prior to the trial. His decision to discharge Mr Naivalu prior to the commencement of the trial was his voluntary act, neither explained to the trial judge nor the Court of Appeal. The termination of Mr Naivalu’s mandate at that particular stage was a serious matter. An adjournment of the trial would have led to considerable inconvenience and expense and would have prejudiced the due administration of justice. In the absence of any credible reasonable explanation for such an act, Govind J was entirely justified, in accordance with the criteria discussed in *Attorney-General v Silatolu* [2003] FJCA 12, to refuse to grant an adjournment on the ground that the petitioner was not represented.”

[55] The instant case is distinguishable from the *Chand* case. The Petitioner in the instant case, from the very commencement was determined to defend himself at the trial. Had the trial commenced on 28th January 2008 as previously scheduled, there was no question of any Counsel appearing for the Petitioner as he had chosen not to apply for legal aid. In fact, even on 30th July 2008 at 10.50 am, when Ms. Lekenaua of the Legal Aid Commission informed court that the Petitioner's application for legal aid had been refused and *that he had been informed and the disclosures have been returned to him*, the Petitioner did not make an application for an adjournment to enable him to retain another Counsel. There was no evidence in this case as to when the Legal Aid Commission had informed the Petitioner of its refusal to grant legal aid, and how much time he had to retain the services of another lawyer, if he had wished to do so.

[56] In the *Chand* case, it is noteworthy that having held that there was no violation of the rights of the petitioner guaranteed by section 28(1)(d) of the Constitution of 1997, this Court in fact went on to consider whether the petitioner in that case was prejudiced by not being allowed sufficient time to read the disclosures, a matter that falls within the ambit of section 28(1)(c) of the Constitution of 1997. This is what this Court observed in paragraph 31 to 34 of its judgment about this aspect of the case-

“31. We have noted that it is likely that Mr Naivalu received the disclosures on 7 April 2006. There is no evidence that the petitioner read the disclosures while Mr Naivalu was acting for him and there was no compelling reason for him to have done so.

32. On 13 June 2006, Mr Naivalu informed Govind J that his instructions were withdrawn. We have observed that after further discussion the petitioner said he wanted another lawyer to represent him. The record says nothing about what then happened to the disclosures. There are a number of possibilities. Mr Naivalu may, unthinkingly, have walked off with the disclosures, or left them on the bar table, or given them to the petitioner. What is significant is that the record shows that on 14 June the next day, after the petitioner asked for an

adjournment of two weeks to study the disclosures, Govind J asked him: "Did you have it earlier" and the petitioner said, "No". Also, the record shows that Govind J simply gave the petitioner "till 10:30am to read evidence of witnesses for *voir dire*."

33. The statement by the petitioner that he did not have the disclosures earlier does not appear to have been challenged by the prosecution or questioned by the Judge. On its face, its natural meaning is that the petitioner did not have the disclosures in his possession until shortly before making that statement. The record of the exchange that we have quoted was made by the judge. In our view, the natural meaning of the words has to be accepted. The inference that flows from the natural meaning is reinforced by the Judge's statement, without any qualification, that he gave the petitioner till 10.30 am to read the evidence. It is reasonable to infer that, had Govind J considered that the petitioner had had more time, prior to 14 June 2006, to read the disclosures, he would have said so.

34. It must be assumed that Govind J gave the petitioner only one hour to read some 125 pages to find what material was relevant and then to prepare to deal with the *voir dire*. This would have been a daunting task for a skilled and experienced advocate; it was an impossible task for an uneducated layman.

35. The *voir dire* was of critical importance. The confessional material was the principal evidence against the petitioner. It was unfair to require him, unrepresented as he was, to proceed after one hour's adjournment."

- [57] Here again, there are distinguishing features which have already been noted. As already noted, the Petitioner in this case was not too keen to have Counsel assist him, and in fact would have defended himself on 28th January 2008, if the case had been taken up for trial on that date. Only on 28th March 2008 did he indicate to court that he "will apply to LAC this week." There is no evidence as to when he did apply to the Legal Aid Commission for legal aid and as to when he handed over his bundle of disclosures to LAC. He filed objections to the caution interview on his own on 11th

June 2008, and there is no evidence as to whether at the time he prepared his objections, he had with him the set of disclosures he says he had handed over to LAC or had obtained an additional set of disclosures for this purpose. As Mr. Tabete informed Mr. Tukai on 19th May 2008, an additional set of disclosures would have cost only \$22.00. There is also no evidence as to when the Petitioner got back the set of disclosures handed over to LAC. Ms. Lekenaua of LAC did not explain these matters to court when she intimated to court that the disclosures had been returned. Nor did the Petitioner explain these matters to court when he informed court that he needs “more time to prepare” when the *voir dire* was about to commence on 30th July 2008 at 2.30 pm.

- [58] I am therefore of the opinion that the ground on which the Petitioner had sought special leave to appeal to this Court, and the issues on which I proposed to grant special leave to appeal as formulated in paragraph 23 of this judgment, have to be answered in the negative and against the Petitioner.

Conclusions

- [59] For all the above reasons, I am of the opinion that the appeal of the Petitioner has to be dismissed.

Aluwihare, J

- [60] I have read in draft the judgment of Marsoof J, and I agree with his reasoning and conclusions.

Jayawardena, J

- [61] I too am in agreement with the judgment of Marsoof J, which I had the advantage of perusing in draft.

Orders of Court

- (1) Application for special leave to appeal is allowed.
- (2) Appeal of the Petitioner is dismissed.
- (3) The conviction and sentence of the Petitioner is affirmed.



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



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



.....
Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Solicitors

The Legal Aid Commission for the Petitioner

The Office of the Director of Public Prosecutions for the Respondent