IN THE SUPREME COURT OF FIJI
AT SUVA

[APPELLATE CRIMINAL JURISDICTION]

Petition No. CAV 0011/13
for Special Leave to Appeal
(On appeal from Court of Appeal
No.AAU026/10)

BETWEEN : **TIMOCI RAVURABOTA**

Petitioner

AND : **THE STATE**

Respondent

CORAM : **Hon. Chief Justice Anthony Gates, President of the Supreme Court**
Hon. Mr. Justice Suresh Chandra, Justice of the Supreme Court
Hon. Madam Justice Chandra Ekanayake, Justice of the Supreme Court

COUNSEL : **Mr. S. Waqainabete for the Petitioner**
Mr. M. Korovou for the Respondent

DATE OF HEARING : **12 and 14 November 2013**

DATE OF JUDGMENT : **19 November 2013**

JUDGMENT OF THE COURT

Chandra Ekanayake JA

[1] The petitioner (Timoci Ravurabota) by his letter dated 30/01/2013 addressed to the Registrar of this Court has applied for a reduction of the minimum sentence of 12 years imposed on him by the Justices of the Court of Appeal – Fiji. Following had been urged by the said letter:

> *(i) He was a juvenile at the time of the offending;*
>
> *(ii) He was naïve and did not quite understand the value of life until now;*
>
> *(iii) The aggravation leading to the one transaction of assault to murder was misconceived on my part having the delusion at that time that I can get away with murder.*

[2] As the petitioner has made this application after a lapse of about 14 months from the date of the impugned judgment of the Court of Appeal, this Court has to first consider whether enlargement of time should be allowed or not for the petitioner to seek special leave to appeal from this Court.

[3] The petitioner was convicted on his guilty plea for the count of murder contrary to Sections 199 and Section 200 of the Penal Code (Chapter 17) – Particulars of Offence –

> *'TIMOCI RAVURABOTA', on the 29th day of April, 2005 at Matacula, Tailevu, in the Central Division, murdered NAVNEET KUMAR SINGH s/o SEET KUMAR SINGH.'*

After granting several opportunities to the petitioner to respond to the charge, on 12/02/2010 he had entered a plea of guilt and the Judge had found the petitioner guilty of

the offence of murder and had convicted him accordingly. Then the case was adjourned for 16/02/2010 for mitigation and sentence. As evidenced by the proceedings of 18/02/2010 (appearing at page 36 of the High Court record) when he entered the plea he had been represented by Counsel.

[4] As per the proceedings of 16/02/2010 before the learned High Court Judge, the petitioner's counsel had admitted the following facts on behalf of the Petitioner:-

> *"(i) that he committed multiple unlawful acts when he punched and stabbed the victim on the neck, upper chest, hands and head, and later drowned him in a river by holding his head under water, until the victim stopped breathing (see post mortem report).*
>
> *(ii) that the above unlawful acts caused the victim's death (see post mortem report).*
>
> *(iii) that at the time the accused committed the unlawful acts, he had the intent to kill the victim. We admit that all the ingredients of murder are satisfied".*

[5] It is observed that on 17/02/2010 being the date for consideration of the plea in mitigation, it has been recorded that at the time of the offence he was 17 years and 4 months. On this day after calling a witness by his counsel, his sentencing had been postponed for 26/02/2010.

[6] The learned High Court Judge by his order of 26/2/2010 had sentenced the petitioner. The concluding paragraph of the said order is reproduced below:

> *"Considering the above mitigating and aggravating factors, I sentence you to life imprisonment for murder, and pursuant to Section 33 of the Penal Code, I fix 20 years as the minimum term to be served."*

[7] The Petitioner's above letter of 30/1/2013 appears to have been received by this Court on 05/02/2013. The judgment of the Court of Appeal was pronounced on 16/11/2011. That

appears to be after a period of about 14 months and 19 days from the date of the impugned judgment. In view of the above, what should be considered by this Court first is whether an enlargement of time could be allowed to the petitioner.

[8] In an enlargement of time application, to determine whether the interests of justice require allowing extension of time certain factors have to be examined. Those factors as laid down in the case of Kamlesh Kumar vs State; Criminal Appeal - No. CAV 001/2009; by His Lordship the Chief Justice Gates are as follows:

(i) The reason for the failure to file within time;

(ii) The length of the delay;

(iii) Whether there is a ground of merit justifying the appellate court's consideration;

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

Failure to comply within time

[9] On a careful consideration of oral submissions made by the petitioner's counsel and written submissions filed on his behalf the only conclusion that has to be arrived upon by this Court is that no reasonable and/or acceptable explanation was forthcoming with regard to the long delay.

Length of the Delay

[10] When considering the length of the delay it would be of importance to consider the pronouncement in the case of Edwin Rhodes 5 Cr.App. R.35 at p36. This being a case where an application for extension of time for leave to appeal was made by an applicant who was convicted for manslaughter, it was decided as follows:

"a short delay may be disregarded by the court if it thinks fit, but where a substantial interval of time – a month or more – elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."

[11] Further in a Full Court decision of New South Wales namely – R. v Albert Sunderland [1927] 28 SR (NSW) 26; which being a case involving an application for extension of time made 6 months after the conviction, the court held as follows:

"(1) – that want of means was not a sufficient ground on which to base the application, and

(2) – that in view of the delay in applying "very exceptional circumstances would have to be established before the court would be justified in granting the application."

[12] However if any reasonable explanation is forthcoming for the delay and the delay is relatively slight then it would be reasonable and/or just for the Court to allow the same. In this regard assistance could be derived from the decision in The Queen v. Brown [1963] SASR 190 at 191:

"The practice is that, if any reasonable explanation is forth coming, and if the delay is, relatively, slight, say for a few days or even a week or two, the court will readily extend the time, provided that there is a question which justifies serious consideration."

[13] The line of authorities here would amply demonstrate that if the delay is a very short one generally the discretion of the court could be exercised in favour of the petitioner. In enlargement applications the length of the delay has been extensively dealt with, in some of the recent Fiji Supreme Court decisions. In the case of Eddie McCaig v Abhi Manu: CBV 002/2012 (27th August 2012); Gates, P observed as follows:

"[22] The delay here was very short, a mere 2 days. In C M Stillevoldt BV v EL Carriers (1983) 1 WLR 207 it was 2 weeks, and the discretion was exercised in favour of the appellant. In Palata it was 3 days and Ackner CJ said at p.521b;

> .... *"we expressed the opinion that, in cases where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case."*

[14] Despite the fact that the above observations were made in an enlargement application in a civil case, yet if the delay was very short and there was an acceptable excuse for the same, as a general rule the appellant should not be deprived of his right of appeal. Therefore necessity would arise to consider all the facts and circumstances in each case when exercising the discretion of the court in granting an enlargement of time.

Any Grounds of Merit Justifying the Consideration of the Appellate Court

[15] (a) What has to be examined now is whether any grounds of merit justifying consideration of the Appellate Court exist. In this case the petitioner had preferred an appeal to the Court of Appeal against the sentence imposed on him mainly on the basis that 20 years non parole period was harsh and excessive.

(b) Perusal of the judgment of the Court of Appeal would amply demonstrate that the learned Justices having carefully considered all the background facts and circumstances of this case had concluded that the petitioner should serve 12 ½ years before being eligible for parole. In paragraph 15 of the judgment after considering his guilty plea, 1 year had been deducted on account of the same. Paragraph 16 shows that not only due consideration was paid to the exceptional and almost unique mitigating circumstances in this case, but proceeded to observe the significant impact of the same on the term of imprisonment as well.

(c) As evidenced by paragraph 17 of the said judgment, the Judges of the Court of Appeal had considered even the contents of the record of the interview by the petitioner. The said paragraph 17 is reproduced below:-

> *"17. In this signed record of interview Timoci Ravurabota said:*

> *"I wish to say that I, alone murdered Navneet Kumar. ....Rupeni Naisoro and Sainivalati did not know anything about the murder and they are innocent. ... Rupeni and Sainivalati were arrested and convicted for Navneet Kumar's murder. I also wish to request the High Court Judge for the release of Rupeni and Sainivalati from prison. I am willingly ready to face the punishment of what I did, but no innocent person (should have) to carry the punishment of what I have done."*

[16] Undoubtedly the delay in this case is a substantial one. What needs consideration then is whether still there is a ground of appeal that will probably succeed? When the circumstances of this case are considered there appears to be no such grounds of appeal.

[17] It is amply clear from paragraph 14 of the impugned judgment the Court of Appeal whilst observing that the killing was well towards the aggravated end of the spectrum for murder, had been mindful of the fact that the petitioner was a very young person with no previous convictions. Having had due regard to all the circumstances peculiar to this case it was decided to start with a term of 17 years as the starting point for sentencing. In my view this needs careful consideration.

[18] A recently decided case in the High Court of Fiji - State v Yang Xiu Qi and Another; HAC 139 of 2012S - that too being a case of murder with aggravating factors the Court had decided to start with a minimum term of 16 years imprisonment. In the case at hand there had been serious aggravating circumstances such as punching and stabbing the deceased causing numerous injuries on the neck, upper chest, hands and head, throwing him to the river, forcefully holding his head under water until he died and thereafter hiding the body of the deceased in the river under the roots of nearby trees. All these had happened after robbing the deceased's money. In view of the above factors the judges of the Court of Appeal cannot be faulted for deciding to pick a term of 17 years as the starting point for sentencing.

[19] In the Court of Appeal, 1 year had been deducted for the guilty plea and a deduction of 3 ½ years was made in view of the mitigation for serving the community by freeing the two innocent people who were wrongly charged, convicted and also partly served their sentences - namely: Sainivalati Ramuwai and Rupeni Naisoro. Paragraph 18 of the judgment bears ample testimony to the fact that they had even addressed their mind to the evidence with regard to the fact that the petitioner was a person who is capable of rehabilitation.

Will the Respondent be unfairly Prejudiced if Time is Enlarged

[20] In a criminal case the respondent being the State what kind of prejudice could be caused to the respondent? When considering this, the guilty plea tendered by the petitioner also would be of great importance. The guilty plea has not been challenged by the Petitioner throughout the proceedings had before any court up to now. Further it is evident that the plea was tendered by the petitioner through his counsel. Absolutely there had been no complaints by the petitioner of an unfair trial. In those circumstances I am persuaded to conclude that if an enlargement is granted some prejudice would be caused to the State.

Special Leave to Appeal

[21] The jurisdiction of the Supreme Court with respect to Special leave to appeal is embodied in Section 7 of the Supreme Court Act No.14 of 1998.

> "Section 7(1) of the Supreme Court Act No. 14 of 1998 provides as follows:-
>
> > *In exercising its jurisdiction under Article 122 of the Constitution with respect to Special Leave to Appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case –*
> >
> > *(a) Refuse to grant special leave to appeal*

(b) Grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or

(c) Grant special leave and allow the appeal make such other orders as the circumstances of the case require".

Section 7(2) thereof sets out as follows:

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 administrator of criminal justice is involved ; or

(c) substantial and grave injustice may otherwise occur.

Section 7(3) ....."

[22] A plain reading of the above Section 7(2) which relates to criminal matters would show that the Supreme Court must not grant special leave to appeal in a criminal matter unless the court is satisfied that a question of general legal importance is involved, or a substantial question of principle affecting the administration of criminal justice is involved or substantial or grave injustice may otherwise occur.

[23] In the present case the main concern of the petitioner (according to his letter of 30/12/13) appears to be that he was a juvenile at the time of offending. At page 38 of the Court of Appeal record on 17/2/2010, the petitioner's counsel had submitted that the petitioner was 21 years old as at that date and at the time of the offence he was 17 years and 4 months. However at the stage of hearing before this Court on 14/11/2013 petitioner's counsel submitted that he was not pursuing the said issue that is, the petitioner was a juvenile at the time of the offence. Thus this needs no consideration.

[24] It has to be stressed here that when dealing with Special Leave applications always we should be mindful of the observations made by this Court in Dip Chand vs State CAV 004 of 2010 (9 May 2012) which were to the following effect:

> *"....Given that the criteria is 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 to appeal have not been raised in the Court of Appeal makes the task of the Petitioner of crossing satisfying (sic) the threshold requirements for special leave even more difficult."*

[25] In other words 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 should not be granted as a matter of course.

[26] Whether special leave should be granted or not is a matter that lies solely with the Court and at this final level this Court being the final Appellate Court, special leave could be granted in cases which fulfill the required leave criteria enumerated in Section 7(2) of the Supreme Court Act or in a rare case where there is an irremediable injustice compelling the intervention of the Supreme Court.

[27] Perusal of the Court of Appeal judgment further reveals that at the time of the hearing before the High Court the new Sentencing and Penalties Decree 2009 was already in force and it had been the firm view of the Court of Appeal that the earlier legislation had been used inadvertently to fix the non parole period of 20 years.

[28] According to Section 18(1) of the Sentencing and Penalties Decree 2009 when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole. Thus the above Section 18(1) reads as follows:-

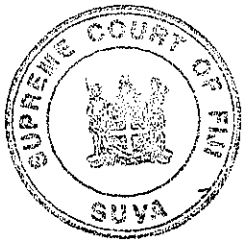
> *"18.(1) Subject to subsection 2, when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole."*

[29] In view of the provisions in the above section when sentencing an accused convicted for murder, the court must fix a non parole period. The conclusion made by the Court of Appeal to the effect that earlier legislation was inadvertently used to fix the non parole period of 20 years, appears to be correct. As such I am hesitant to conclude that any question of general legal importance is involved in this matter or any substantial or grave injustice would otherwise occur.

[30] In view of the above analysis the application for enlargement of time lacks merit and same is refused. On a careful examination of the facts and circumstances of this case and the submissions made at the hearing, we are unable to conclude that the grounds adduced meet the criteria for special leave enumerated in Section 7(2) of the Supreme Court Act of 1998. Hence the application for special leave to appeal too should fail.

[31] Accordingly whilst affirming the impugned judgment of the Court of Appeal dated 16/11/2011 the application for special leave to appeal is hereby dismissed.

Hon. Chief Justice Anthony Gates
President of the Supreme Court



Hon. Mr. Justice Suresh Chandra
Justice of the Supreme Court

Hon. Madam. Justice Chandra Ekanayake
Justice of the Supreme Court

Solicitors:

Office of the Legal Aid Commission for the Petitioner

Office of the Director of the Public Prosecutions for the Respondent