IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO. CAV 7 OF 2013
(Court of Appeal AAU 34 of 2006)
(High Court HAC 35 of 2005)

BETWEEN	:	**ISOA CODROKADROKA**
		Petitioner
AND	:	**THE STATE**
		Respondent

Coram	:	**The Honourable Chief Justice Anthony Gates** **President of the Supreme Court** **The Honourable Madam Justice Chandra Ekanayake** **Justice of the Supreme Court** **The Honourable Mr Justice William Calanchini** **Justice of the Supreme Court**
Counsel	:	**Mr J. Savou for the Petitioner.** **Mr M Korovou for the Respondent**
Date of Hearing	:	**7 November 2013**
Date of Judgment	:	**20 November 2013**

JUDGMENT

[1] This is a petition to extend time within which to seek special leave to appeal from a judgment of the Court of Appeal delivered on 25 March 2008. The petitioner was convicted of murder by the High Court at Suva on 8 May 2006 and was sentenced to

life imprisonment. He appealed to the Court of Appeal against conviction and sentence. His main ground of appeal against conviction was that the issue of provocation should have been left to the assessors. The Court of Appeal dismissed the appeal against conviction and varied the sentence by including a minimum recommended term of 15 years imprisonment.

[2] The present application was not filed until 29 May 2013. The Petitioner's letter was dated 24 May 2013. The time by which a petition must be lodged at the Court registry is 42 days under Rule 6 of the Supreme Court Rules. At the latest the petition should have been filed by 7 May 2008. It is therefore five years out of time.

[3] The basis upon which this Court exercises a jurisdiction to enlarge the time for lodging a petition for special leave to appeal is Rule 46 of the Supreme Court Rules which provides that:

> *"The High Court Rules and the Court of Appeal Rules and the forms prescribed in them apply with necessary modifications to the practice and procedure of the Supreme Court."*

[4] In **Raitamata –v- The State** (unreported CAV 2 of 2007; 25 February 2008) this Court considered that although the High Court Rules do not apply to the criminal jurisdiction of the High Court, the High Court's power to enlarge time where time limitations apply provides a basis for a general power for the Supreme Court to extend time.

[5] One of the factors that is usually considered by an appellate court in an application such as the present is the reason for the failure to file within time. In his letter dated 24 May 2013 the petitioner stated that the reason for the delay in filing his application was that he is a serving prisoner *"and all alone have been an inmate and was deprived of any legal representation and advice."*

[6] The written submissions filed by the petitioner do not refer to any further explanation for the delay. Counsel for the petitioner submitted that incarceration was one explanation for the delay. He also submitted that the petitioner claimed that prison

officials had misplaced or lost documents prepared by the petitioner for filing. There was however no material to substantiate that claim.

[7] In **Raitamata –v- The State** (supra) this Court noted at paragraph 12:

> *"The difficulties facing a person without legal advice in formulating grounds of appeal on questions of law are not to be underestimated. Those difficulties, however, are not a basis for setting aside the requirements of the Act and the Rules _ _ _."*

[8] Certainly we accept that incarceration does present an unrepresented petitioner with obvious difficulties but that explanation alone does not justify a delay of five years. The petitioner has not explained satisfactorily or sufficiently the failure to proceed to this Court in a timely manner.

[9] The petitioner's document filed on 18 October 2013 identified six grounds of appeal against conviction and 2 grounds of appeal against sentence if special leave were granted. The grounds are reproduced from the petitioner's submission as follows:

> *"2.1 That the supreme Court on the basis of a miscarriage of Justice allow a late appeal and to review the issues raised above by the Court of Appeal [see Josateki Solinakoroi (2005) AV 005/05]*
>
> *2.2 That the Court rejected admissions of more than one sexual advance by the accused as recent invention. Its not true that there was only one sexual advance, and the court of Appeal erred in fact and law as to treat such statement as evidence in a court of law as a recent invention.*
>
> *2.3 Because of intoxication, sexual advances accusation of stealing and assault the Court of Appeal erred in law and fact to disregard the cumulative provocation as not relevant to be placed before the assessors.*
>
> *2.4 That Courts below erred in law and fact to say that retaliation must be proportional and there was no evidence of loss of self control.*
>
> *2.5 That the Fiji Court of Appeal erred in law and facts by calling the supreme judgment of the supreme court in Josateki Solinakoro [2005] (AV 0005/05) case with regards to facts of*

provocation be placed before assessors as merely obiter or opinions of the Supreme Court of the land.

2.6 That the Fiji Court of Appeal had by its ruling on my case had usurped the Judgment of how provocation and facts or narrative of provocation be put for the assessors to deliberate on thus there is a miscarriage of Judgment by the Court of Appeal.

3.1 That the appellant submits that the non-parole period is too harsh and excessive for 22 years old first offender that was drunk and incapable, provoked and assaulted which caused loss of self control.

3.2 That section 33 of the Penal code was amended in 2003 and the Court can fix a period which this prisoner can serve as the minimum term."

[10] In order to obtain special leave to appeal the petitioner must establish that his petition meets the criteria set out in section 7(2) of the Supreme Court Act 1998 which states:

> *"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."*

[11] The delay of about five years together with the wholly unsatisfactory explanation for that delay requires the petitioner to show a compelling case that the criteria for leave set out in section 7(2) of the Supreme Court Act are met. This is a case where the petitioner is required to establish what may be described as an irremediable injustice which otherwise compels the interventions of this Court: **Cama –v- The State** (unreported CAV 3 of 2009; 1 May 2012) and **Kumar –v- The State** (unreported CAV 1 of 2009; 21 August 2012).

[12] At the trial in the High Court the petitioner was represented by Counsel. As the Court of Appeal noted both State and defence Counsel addressed the assessors on the basis that the petitioner had raised self-defence. The relevance of an alleged homosexual advance by the deceased was presented as a factor showing a *"cultural*

misunderstanding" leading to an initial attack on the petitioner by the deceased. The defence at the trial suggested that it showed the petitioner's naivety and that his conduct that night should be seen in the light of a misled, confused and drunk village boy. (see para. 16).

[13] In his summing up the learned trial Judge addressed the assessors on the definition of murder, malice aforethought and self-defence. He also gave directions on the issue of intoxication. He did not raise the issue of provocation and nor was he subsequently requested to do so by Counsel for the petitioner at the conclusion of his summing-up.

[14] Although the issue of provocation had not been taken up by the petitioner at the trial in the High Court, the petitioner's substantive complaint in the Court of Appeal was that provocation was not put to the assessors when it should have been since the deceased's alleged homosexual advance had caused the petitioner to act as a result of a sudden loss of self-control.

[15] As the Court of Appeal noted the law on provocation in Fiji was governed (at the time of the commission of the offence) by sections 203 and 204 of the Penal Code Cap 17. To a very large extent those statutory provisions were based on the common law. The statutory definition replaced the words *"reasonable man"* with the words *"ordinary person."* Section 203 provided that where murder might otherwise be established, if the act which causes death is done by the accused in the heat of passion caused by the sudden provocation (as defined in section 204) of the deceased and before that passion has cooled, then the offence is one of manslaughter only. Section 204 defined provocation as including any wrongful act or insult of such a nature as to be likely when done to an ordinary person (amongst others) to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person doing the act or offering the insult.

[16] The Court of Appeal summarised at paragraph 38 the judicial approach that should be taken in relation to provocation as follows:

"1 The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.

2 There should be a credible narrative on the evidence of provocation words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.

3 There should be credible narrative of a resulting loss of self control by the accused.

4 There should be a credible narrative of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.

5 The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However accumulative provocation is in principle relevant and admissible.

6 There must be an evidential link between the provocation offered and the assault inflicted."

[17] We would adopt these propositions as accurately reflecting the approach that should be taken by a trial judge to the issue of provocation. We also adopt the approach taken by the Court of Appeal to the issue of the relevance of ethnicity and gender in assessing what the ordinary person would do in the situation in which an accused found himself or herself. The Court of Appeal adopted the approach taken by the Privy Council in **Attorney-General for Jersey –v- Holley** [2005] 2 AC 580. The starting point is that the assessors and the judge should take the accused exactly as they find him. When considering the gravity of the provocation offered, the standard of self control by which the accused should be judged is that of a person of the accused's age and gender exercising the ordinary powers of self control to be expected of an ordinary person of that age and gender. Furthermore, specific characteristics of an accused (e.g. homosexuality, alcoholism or disability) are relevant but only if they are related to the provocation offered. It follows that ethnicity and cultural background will be relevant if the words spoken or deeds done are aimed at the culture or ethnicity of the accused.

[18] The Court of Appeal concluded that taking the most favourable view of the evidence there was no evidence and certainly no credible narrative of an actual loss of self control, nor of proportionality when the nature of the attack by the petitioner on the deceased is considered. In addition the petitioner's behaviour after the attack was inconsistent with a loss of self control. The petitioner removed the deceased's watch, his shoes and his money and left the hotel room after washing his hands and sitting on the bed for 15 to 20 minutes.

[19] Counsel for the petitioner submitted that the test for determining what the ordinary man would do in the situation in which the petitioner found himself should have taken into account the ethnicity and cultural customs of the petitioner and as such raised a substantial question of principle affecting the administration of criminal justice. However, this issue was discussed by the Court of Appeal and resolved on the basis that the issue has been considered and well settled by persuasive authority in both England and Australia.

[20] The grounds of appeal raise issues concerning the nature of the alleged homosexual advance by the deceased (that is, if the assessors and the learned trial judge had accepted such evidence), the effect of intoxication and the accusations of stealing. These matters had all been discussed at length by the Court of Appeal. The essential aspects of the petitioner's evidence have been reproduced in the Court of Appeal's judgment. The Court's conclusions were based on the evidence and we see no error in the application of the law to the evidence. We agree that there was no basis for the learned trial judge to give directions to the assessors on the question of provocation.

[21] The petitioner is in effect seeking to re-argue the issues that were argued in the Court of Appeal and upon which that Court has given judgment. We find no errors of law in that judgment and having considered the material in the record and the submissions made by Counsel, we are in complete agreement with the conclusions of the Court of Appeal. It is correct that this Court will intervene to ensure that an irremediable miscarriage of justice does not occur. However in this petition we are not satisfied that the petitioner has put forward any ground of appeal that meets the threshold criteria set out in section 7(2) of the Supreme Court Act. We are not satisfied that in refusing special leave to appeal against conviction an irremediable miscarriage of

justice will result. The application for the enlargement of time to seek special leave to appeal against conviction is dismissed.

[22] The application for special leave to appeal against sentence is dismissed as it is quite apparent that the grounds raised by the petitioner do not meet the criteria set out in Section 7 (2) of the Supreme Court Act. There were no written submission filed on this aspect of the application and Counsel did not address the Court on the issue of sentence. The purpose of fixing a minimum term is to ensure that a convicted person is not released until he has served that term. A minimum term of 15 years, although at the higher end of the range, is not wrong in law.

[23] We therefore order that the petitioner's application for an enlargement of time to seek special leave to appeal against conviction and sentence be dismissed.

HON. CHIEF JUSTICE ANTHONY GATES
PRESIDENT OF THE SUPREME COURT

HON. MADAM JUSTICE CHANDRA EKANAYAKE
JUSTICE OF THE SUPREME COURT

HON. MR JUSTICE WILLIAM CALANCHINI
JUSTICE OF THE SUPREME COURT