IN THE SUPREME COURT OF FIJI
AT SUVA

PETITIONS NO. CAV 0009 AND & CAV0013 OF 2012
(On an appeal from the Court of Appeal Criminal Appeal No. ABU0008 of 2001)

BETWEEN: **KALIOVA RASAKU and NETANI MOMOIVALU**

PETITIONERS

AND:

THE STATE

RESPONDENT

Coram: Hon. Chief Justice Anthony Gates, President of the Supreme Court
Hon. Justice Saleem Marsoof, Justice of the Supreme Court
Hon. Justice Paul Madigan, Justice of the Supreme Court

Date of Hearing: Friday, 12th April, 2013, Suva

Counsel: Petitioners in Person

Mr. M.Korovou for the Respondent

Date of Judgment: Wednesday, 24th April 2013, Suva

JUDGMENT OF THE COURT

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[1] Petitioners, are seeking special leave to appeal against the judgment of the Court of Appeal dated 18th November 2011, by which their convictions for murder of one Sukamanu Kitione were affirmed, while the fixed minimum period they would have to serve in prison on the life sentences imposed on them by the High Court, were increased. Although two separate petitions have been filed by the two petitioners in this Court, they were tried together by the High Court, and their appeals against conviction were dealt with separately, while their appeals against sentences were considered together in the judgment of the Court of Appeal, which was pronounced by Salesi Temo, JA, with whom William Marshall, JA., and Anjala Wati, JA., concurred.

[2] Sukamanu Kitione died of serious bodily injuries sustained by him in the course of an altercation that took place early in the morning of 19th August 2007, at about 3 am close to the bus shelter at Tomuka junction. It is common ground that both petitioners, who were convicted for the murder of Sukamanu Kitione, were under the influence of liquor, and they had been drinking from about 8.30 pm on the previous day.

[3] Since the Petitioners have failed to lodge their petition at the Registry of this Court within forty-two days of the decision of the Court of Appeal, it is necessary at the outset to consider whether in the circumstances of this case, the Petitioners ought to be granted enlargement of time for this purpose, or whether their late lodgment of application may be excused.

Time limit for filing applications seeking leave to appeal

[4] The exclusive jurisdiction of this Court to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 8(1) of the Administration of Justice Decree No. 9 of 2009. It is noteworthy that the aforesaid provision follows *verbatim* the language used in the corresponding provisions of the Constitution (Amendment) Act of 1997, which Act has been repealed by section 2 of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009.

[5] Section 8(2) of the said Decree provides that-

> An appeal may not be brought from a final judgment of the Court of Appeal unless:
>
> (a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or
>
> (b) the Supreme Court gives special leave to appeal.

Since the Petitioners have not obtained leave to appeal against the impugned decision of the Court of Appeal dated 18th November 2011, the Petitioners have sought from this Court, special leave to appeal against the impugned judgment, in terms of Section 8(2) of the Administration of Justice Decree No. 9 of 2009.

[6] While there is no provision in the Administration of Justice Decree No. 9 of 2009 or the Supreme Court Act No. 14 of 1998 providing for any time limit for bringing an application seeking special leave to appeal from this Court, it is provided in Rule 6(a) of the Supreme Court Rules of 1998, that such an application must "be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought."

[7] Admittedly, neither Petitioner has lodged his application for special leave to appeal within 42 days of the date of the decision of the Court of Appeal as contemplated by Rule 6(a) of the Supreme Court Rules. This makes it necessary to consider in the first instance, the applications made by the petitioners for enlargement of time.

Jurisdiction of this Court to grant enlargement of time

[8] Before considering the individual circumstances in which the Petitioners have sought relief from this Court for extension of time, it is necessary to deal with a question of fundamental importance that has been raised in the Ruling of Chief Justice Anthony Gates in

paragraphs 5 to 10 of his ruling in *McCaig v Manu* [2012] FJSC 18; CBV0002.2012 (27 August 2012).

[9] Chief Justice Gates considered in paragraphs 5 to 10 of his ruling in *McCaig's* case, the jurisdiction of this Court to grant enlargement of time. His Lordship observed that in *Josua Raitamata v State* [2008] FJSC 32; CAV0002.2007 (25 February 2008), this Court had taken note of the fact that Rule 46 of the Supreme Court Rules provides that the High Court Rules and Court of Appeal Rules and forms prescribed therein, apply with necessary modifications to the practice and procedure of the Supreme Court. His Lordship emphasized that although Rule 46 of the Supreme Court Rules provides the necessary jurisdiction for the Supreme Court to permit enlargement of time, this "indulgence appears to be confined however to non-compliance with conditions of appeal or petition post lodging, and not to enlargement of time applications."

[10] By way of contrast, his Lordship noted that it is section 26 of the Court of Appeal Act that grants the statutory power for that court to enlarge time, and stressed that the Supreme Court has not been conferred the power to enlarge time by any similar Act of Parliament or Decree. He observed further as follows:-

> [5] Hitherto powers to enlarge time for the lodging of petitions have been found to exist in Rule 20(4) of the Supreme Court Rules. However such powers are usually granted through Acts of Parliament or Decrees, not Rules. Appellate courts for the most part are confined to functions within a restricted jurisdiction. Section 20(1) of the Court of Appeal Act Cap 12 (as amended) for instance grants powers to a single judge of the court in civil appeals: "to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done."
>
> [6] No such statutory power is given to the Supreme Court. This may be because of the even greater restriction placed on gaining access to the court than to the Court of Appeal....

[11] In our respectful view, there could be other explanations as to why no express statutory provision exists expressly conferring jurisdiction on this Court to grant enlargements of time. It is worth noting that there is no express provision in any Act of Parliament or a Decree having statutory force by which the time limit for filing an application for special leave to appeal in the Supreme Court has been prescribed. As has already been seen, the time limit of forty two days is set out in Rule 6(a) of the Supreme Court Rules of 1998, and Rule 20(4) of the said Rules provides that –

> *Notwithstanding the preceding provisions of this rule*, an appellant or petitioner may apply to the Court for an extension of time in which *to fulfill the conditions of appeal or petition imposed by these Rules* and the Court may, for good and sufficient cause, grant an extension of time subject to any conditions the Court imposes (*emphasis added*).

[12] In our considered view, the time limit prescribed by Rule 6(a) is a condition of appeal or petition with respect to which Rule 20(4) confers this Court with powers of enlargement. In our opinion, the absence of a statutory provision for enlargement of time by the Supreme Court *per se* should not lead to any restriction of Rule 20(4) of the Supreme Court Rules, which expressly empowers this Court to grant an enlargement of time. No comparison with

the power of the Court of Appeal to grant extensions of time can be useful in this regard, as in regard to that Court the necessity for the legislature to provide for enlargement of time by a statutory provision, namely section 20(1) of the Court of Appeal Act, arose because the time limit of thirty days for filing appeals and applications for leave to appeal was also statutorily imposed by Section 26(1) of the said Act.

[13] In any event, even if the jurisdiction of the Supreme Court was in any way deficient, it is possible to invoke section 14 of the Supreme Court Act, which expressly provides that, "the Supreme Court has, in relation to matters that come before it, all the power and authority of the Court of Appeal". The Supreme Court is the apex court of the nation, and it necessarily possesses an inherent power to remedy any injustice, and make any order to avoid a miscarriage of justice in any case.

[14] It is remarkable that this Court has in the generality of cases assumed that it possessed jurisdiction to grant enlargement of time in appropriate cases, but had shown considerable reluctance to grant relief to petitioners seeking enlargement of time for making belated applications for special leave to appeal. See, *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002); *Enele Cama v The State,* [2012] FJSC 4; CAV0003.09 (1 May 2012); *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012); and *Native Land Trust Board v Khan* [2013] FJSC 1; CBV0002.2013 (15 March 2013).

[15] Even in the Ruling of Chief Justice Anthony Gates in *McCaig v Manu* [2012] FJSC 18; CBV0002.2012 (27 August 2012), despite the doubts His Lordship had expressed in regard to the question of jurisdiction, the fact that the Court did consider the merits of the application in that case before refusing enlargement of time, shows that the Court did assume that it had jurisdiction. As his Lordship the Chief Justice observed in paragraph 3 of his judgment in *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012)-

> The decision to grant special leave to hear an appeal, *whether timely or not*, lies with the court. *At this final level, special leave could allow a late appeal in cases meeting the leave criteria of section 7(2) of the Supreme Court Act or where in a rare case there is irremediable injustice otherwise compelling the intervention of the Supreme Court:* see *The State v Eliki Mototabua* CAV0005.09 (9th May 2012); *Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70.(*Emphasis added*)

[16] We therefore have no difficulty in holding that this Court is indeed possessed of jurisdiction to grant enlargements of time in appropriate cases for the late lodgment of applications for special leave to appeal.

Factors that need to be considered for granting enlargement of time

[17] Before examining in greater detail the individual applications of the Petitioners for enlargement of time, it may be useful to take a brief look at the criteria adopted by this Court in granting relief in this category of applications.

[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period

for lodging his application. As the Judicial Committee of the Privy Council emphasised in *Ratnam v Cumarasamy* [1964] 3 All ER 933 at 935 at 935:

> The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.

Similar sentiments were expressed in *Revici v Prentice Hall Incorporated and Others* [1969] All ER 772 by Edmund Davis LJ at page 774 –

> …..the rules are there to be observed; and if there is non compliance (other than of a minimal kind), that is something which has to be explained away. *Prima facie*, if no excuse is offered, no indulgence should be granted.

[19] Enlargement of time has generally been permitted by courts only exceptionally, and only in an endeavor to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court. As McHugh J observed In *Gallo v Dawson* [1990] HCA 30; (1990) 93 ALR 479 at 480 to 481-

> The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the court or justice to do justice between the parties: see *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194-5; 70 ALR 185. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes*, at 263 4; *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has "a vested right to retain the judgment" unless the application is granted: *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice.

[20] In *R v Knight* [1998] 1 NZLR 583, at 589 the New Zealand court considered the following factors to be relevant considerations-

> ... the strength of the proposed appeal and the practical utility of the remedy sought, the length of delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown.

[21] In paragraph 4 of his judgment in *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), Chief Justice Anthony Gates has summarized the factors that will be considered by a court in Fiji for granting enlargement of time 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?

These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.

Reasons for the failure to comply

[22] It is noteworthy that, though out of time, the Petitioner in Application No. CAV0009, Kaliova Rasaku, had not expressly applied for enlargement of time in his petition before this Court. In his petition, he has simply applied for special leave to appeal, and appeared to be unaware that his petition was lodged in the Registry of this Court out of time.

[23] He submitted before this Court that he prepared his petition for special leave to appeal dated 21st November 2011 very promptly and within three days of the impugned decision of the Court of Appeal. In the said petition, he moved that this Court be pleased to reassess the conviction and revert the minimum term imposed by the High Court. However, from the original docket in this case, we have been able to ascertain that the hand written and signed original version of the said petition, along with an unsigned typed copy of it, had been received in the Registry of the Supreme Court on 5th September 2012, although the seal placed on the typed copy of the letter on that date is that of the Court of Appeal.

[24] Rasaku has moved this Court in the course of his oral submissions, for enlargement of time on the basis that he had done the best a prisoner could do by handing his application dated 21st November 2011 to the Prison Authorities. He has submitted that since he was not capable of personally lodging his application in the Registry by reason of his incarceration, the delayed lodgment may be excused. In the course of his oral submissions before this Court, he has explained that his failure to apply specifically for enlargement of time occurred due to his belief that his application for special leave to appeal would be lodged in time by the Prison Authorities.

[25] He has also submitted that he is in no position to offer any further explanations as to the delayed lodgment of his application, or as to how it was received in the Registry of this Court only in September 2012.

[26] Netani Momoivalu, the Petitioner in Application No. CAV0009, has however made a more elaborate application dated 30th November 2012, which is prefaced by a motion for enlargement of time for stated reasons, in which eight grounds for seeking special leave to appeal against the conviction and sentence are also detailed. This petition, which has been received in the Registry of this Court on 13th December 2012 is out of time by almost an year.

[27] Momoivalu has set out at page 3 and 4 of his handwritten application, the following reasons for his delay in lodgment:-

(a) I did not know that there is another Court that I can appeal to till late last month (October 2012).
(b) I did not know the time frame that is required when applying for appeal to this Honourable Court.
(c) There was nothing mentioned regarding the time frame in the judgment passed by the Fiji Court of Appeal if I wanted to further appeal my case.
(d) I don't have access to Acts or laws at my current location that could have helped me to be aware of the time frames that is required when applying to appeal to this Honourable Court.
(e) I was also advised by a Legal Aid lawyer that I cannot appeal out of time to this Honourable court which led to the delay.
(f) I was recently informed by my co-accused that he has appealed his case to the Honourable Court and that I should also write or lodge my appeal application if I wanted to be heard.

Length of delay

[28] Although Rasaku's application for special leave to appeal is dated 21st November, 2011, which was only three days after the pronouncement of the impugned judgment of the Court of Appeal, it is now clear that the same was lodged in the Registry of this Court only on 5th September 2012. On the other hand, the application of Momoivalu has been lodged in the Registry of this Court on 13th December 2012, almost an year later. Technically, there has been substantial delay in lodging both applications.

[29] In assessing these applications for enlargement of time made by Rasaku and Momoivalu, it is necessary to note that Rasaku has made only an oral application for enlargement of time, and neither application has been supported by any affidavit or other material particulars.

[30] Strictly speaking, the application of Rasaku should have been lodged in the Registry of this Court within the period of time prescribed by Rule 6(a) of the Supreme Court Rules of 1998. Although there is nothing to rule out the possibility that the application may have been anti-dated in an attempt to overcome the delay, we are in all the circumstances of this case, inclined to believe that the Prison Authorities probably kept Rasaku's petition with them to await his co-accused Momoivalu's petition, which was not made till about one year later. In those circumstances, Rasaku's application for enlargement of time deserves to be considered with sympathy, as he has done the best he could as a prisoner undergoing a sentence of life

imprisonment. His subsequent conduct of lodging an amended petition dated 6th August 2012, which was received in the Registry of this Court on 7th August 2012, demonstrates his continued interest in pursuing his application for special leave to appeal.

[31] On the other hand, Momoivalu's explanations for his delay is less acceptable, as all men are presumed to know the law. His alleged ignorance of the law and its procedures cannot excuse his delay, which is substantial. In the High Court as well as in the Court of Appeal, he was represented by Counsel, and he could have obtained proper advice in regard to his appeal, if he so desired.

Grounds of merit justifying consideration

[32] Before embarking on a detailed assessment of the merits of the applications of Rasaku and Momoivalu, it is useful to mention that in the context of any application for special leave to appeal against a judgment of the Court of Appeal, this Court has to be mindful of the criteria that must be satisfied by the petitioner to succeed in his application for leave to appeal. Section 8(1) of the Administration of Justice Decree has expressly subjected the jurisdiction conferred on this Court to hear and determine appeals from all final judgments of the Court of Appeal to "such requirements as prescribed by law".

[33] The jurisdiction of this Court to grant special leave to appeal and thereafter act in appeal is subject to the stringent criteria contained in Section 7(2) of the Supreme Court Act No. 14 of 1998, in the following terms:-

> 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.

[34] In our opinion, grounds of appeal advanced by a party seeking enlargement of time in the context of an application for special leave to appeal to the Supreme Court, should necessarily satisfy one or more of these threshold requirements (See, *Kean v The State* [2011] FJSC 11 CAVOO15/2010 (12th August 2011).

[35] Having said that, we would like to consider first, the merits of the grounds of appeal advanced by Rasaku and Momoivalu against their convictions, and then, the merits of their grounds of appeal against the sentences imposed on them.

[36] The main ground on which Kaliova Rasaku, the petitioner in Application No. CAV0009, places reliance for seeking leave to appeal against his conviction for murder, is that the incident which resulted in the death of Sukamanu Kitione arose after an altercation and that he did not have the requisite malice to cause death, given his drunken state.

Substantially the same ground was taken up by Rasaku before the Court of Appeal as his primary ground of appeal, which was in the following terms:

> The learned Trial Judge erred in law and in fact in not properly directing the Assessors in respect of intoxication when he failed to inform the Assessors that the Prosecution had the burden of proving specific intent and knowledge.

[37] According to the undisputed evidence in this case, on the night of the incident, Rasaku and Momoivalu had consumed, along with two others, two bottles of rum and some beer. Being a case of voluntary intoxication, in terms of section 13(4) of the Penal Code, their state of intoxication has to be taken into account for the purpose of determining whether they "had formed any intention, specific or otherwise". The law in this regard has been examined by this Court exhaustively in *Tej Deo v The State* [2008] FJCA 23, and need not be repeated here.

[38] In paragraph 6 of the judgment dated 18th November 2011 pronounced by Salesi Temo, JA (with which William Marshall, JA and Anjala Wati, JA concurred), the Court of Appeal has considered whether the trial judge had in his summing up, adequately defined and explained to the assessors the meaning of "malice afterthought" in the context of the ingredients of murder which must be established by the prosecution, and in paragraph 7 of the said judgment, the Court has examined whether the trial judge properly directed the assessors on the effect the petitioner's intoxication could have had on his capacity to form the necessary intent to cause grievous bodily harm or knowledge that death or grievous harm may probably result.

[39] In our view, as the Court of Appeal has very correctly concluded that the trial judge has properly directed the assessors in regard to these questions, and the submission of Rasaku that in the context of a drunken brawl he could not form the requisite malice, is altogether lacking in merit.

[40] The petitioner in Application No. CAV00013/12 Netani Momoivalu has set out in his petition dated 30th November 2012, substantially the following grounds of appeal:-

(a) The trial judge erred in law and fact in not properly directing and explaining to the assessors on the issue of causation of death and medical evidence in relation to the action of the petitioner;

(b) The learned trial judge erred in law and in fact in not properly directing and explaining to the assessors on the issue that the action of the Petitioner to be seen separately from the action of the co-accused at all relevant time and thereby there was a miscarriage of justice;

(c) That the decision of the High Court is unreasonable and cannot be supported having regard to the evidence as a whole and the offence with which the Petitioner is charged.

(d) That the evidence did not substantiate beyond reasonable doubt the ingredients of the offence as charged having regards to the evidence as a whole.

(e) That the trial judge and the assessors erred in law and fact in taking irrelevant matter into account and not taking relevant matters into account in coming to their decision.

[41] It is noteworthy that all these grounds were taken up by learned Counsel who appeared for Momoivalu in the Court of Appeal. Ground (a) above was ground (3) argued before the Court of Appeal, and similarly, ground (b) was the same as ground (7), ground (c) was the same as ground (9), ground (d) was the same as ground (10) and ground (e) was the same as ground (11). It is manifest that Momoivalu is seeking to re-agitate in these proceedings the same grounds which were advanced by him before the Court of Appeal, and which have been dealt with fully and carefully by that Court.

[42] The issue of causation in relation to the medical evidence raised by Momoivalu as ground (a), has been considered by the Court of Appeal in paragraphs 16 and 17 of the impugned judgment dated 18th November 2011, in which reference was made to the observation of Dr. Boseiwaqa in her post-mortem report that the extensive injuries found on Kitione's face and body were "consistent with blunt trauma, which included punching, kicking, being hit with stone and falling on stones, and were caused by severe or moderate to severe trauma". The Court of Appeal has carefully examined the directions contained in the trial judge's summing up in regard to causation, and we find that the summing up in this respect was immaculate, and there is no merit in this ground urged by Momoivalu.

[43] In regard to ground (b) taken up by Momoivalu as to whether the action of the said petitioner was considered separately from the action of his co-accused Rasaku, it is noteworthy that in page 4 of the summing up, the trial Judge had directed the assessors as follows:-

> In this case there are two accused and therefore you must assess the evidence in respect of each accused separately. *There are in fact two trials, which as a matter of convenience are being conducted together.* The guilt or otherwise of one accused does not determine the guilt or otherwise of the other.
>
> Both accused have made statement to police, during their caution interview and charging stages. Let me warn you that what one accused has said in those statements is evidence only against himself.(*Emphasis added*)

[44] The position taken up consistently by Momoivalu that he dealt only four punches to the face of the deceased Kitione, which punches could not by themselves have caused the death of Kitione, has to be considered in the light of the evidence of the existence of a joint enterprise between him and his co-accused Rasaku, and we find that at page 7 of the summing up the trial Judge directed the assessors as follows:

> If two people jointly commit an unlawful act, each is equally liable no matter who did what. There does not have to be any prior agreement either written or oral. It can be spontaneous.

[45] The doctrine of common enterprise has been applied consistently in a large number of criminal cases in England and other common law jurisdictions, including those such as Fiji in which the Penal Code is structured on the foundations of the Common Law of England. The formation of a joint enterprise may be spontaneous, and the fact that the participants acted on the spur of the moment does not negative their criminal liability on the basis of joint enterprise. As Lord Lane CJ explained in *R v Hyde* [1991] 1 QB 134 at 135-136 -

> There are, broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where the primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause physical injury to any victim, but, for example, to commit burglary. The victim is assaulted and killed as a (possibly unwelcome) incident of the burglary. The latter type of case may pose more complicated questions that the former, but the principle in each is the same. A must be proved to have intended to kill or to do serious bodily harm at the time he killed. As we pointed out in *Slack* [1989] QB 775; at 781, B, to be guilty, must be proved to have lent himself to a criminal enterprise involving the infliction of serious harm or death, or to have an express or tacit understanding with A that such harm or death should, if necessary, be inflicted.

[46] While the decisions of *R v Lovesey and Peterson* (1969) 53 Cr App R 461; [1970] 1 QB 352 and *Kumar v R* [1987] FJCA 1; [1987] SPLR 131 (13 March 1987) fall within the second category of cases mentioned by Lord Lane CJ., the instant case belongs to the fist type of cases referred to by him. In this case, two witnesses, namely, Isei Levita, who lived in a house within 35 meters of the Tomuka Junction Bus Shelter, and Semisi Waqa, who passed the point of the incident in a taxi, have testified that they saw some part of the incident which led to the death of Sukamanu Kitione. The first of these witnesses testified that he saw "two boys punching a third, and he was lying on the ground". He also saw them dragging the man who was on the ground.

[47] The other witness, was in a moving taxi, which only permitted a fleeting glance, but that was sufficient for him to see "one man lying down, two standing". He said that he saw the "person lying down being punched." Neither of the witnesses were extensively-cross examined by Counsel for Momoivalu, and in particular, no questions were put in the lines of the matters that are being raised on appeal by Momoivalu. The evidence clearly indicates that Rasaku and Momoivalu had formed a joint enterprise to attack Kitione, and the injuries suffered by him were extensive, and the photographs admitted in evidence reveal the brutal nature of the attack jointly undertaken by these assailants. In our view, this is a clear case of joint enterprise to mutilate the deceased Kitione, and is clearly distinguishable from cases like *R v Gnango* [2011] UKSC 59, in which the specific intent to hurt the victim was lacking. This Court has shown a disinclination to grant special leave to appeal on the directions of the

trial judge on joint enterprise, (See, *Vulaca v State* [2012] FJSC 22; CAV0005.2011 (21 August 2012). This ground is lacking in merit and does not, in all the circumstances of this case, justify further consideration by this Court.

[48] Grounds (c), (d) and (e) raised by Momoivalu, were again repetitions of grounds (9), (10) and (11) taken up by him before the Court of Appeal. Matters raised by these grounds also have been so carefully and thoroughly examined by the Court of Appeal, and we do not consider that they deserve any further examination in this Court even in a petition that was lodged properly and in time as required by these rules. They simply lack merit.

[49] This brings us to the grounds urged by Rasaku and Momoivalu for the purpose of seeking special leave to appeal against the enhancement of their fixing minimum terms of imprisonment. Both were sentenced to life imprisonment by the trial judge, who fixed the minimum period to be served by Rasaku at 7½ years and Momoivalu at 5½. These fixed terms were increased by the Court of Appeal in the case of Rasaku, to 11 years from 24th July 2008, and in the case of Momoivalu to 8 years from 24th July 2008, primarily on the basis that the minimum terms fixed by the trial judge were grossly inadequate given the nature of the extremely serious injuries suffered by the deceased Kitione.

[50] The only ground urged by Rasaku before this Court to seek special leave to appeal against the sentence was that the Court of Appeal erred in increasing the sentence regarding parole although he "did not contest the head sentence as harsh and excessive." It has to be noted that the Court of Appeal had warned Rasaku that he would run the risk of his sentence being enhanced if he persists with his submissions on the sentence, but he had persisted nevertheless. He now contends that he had not appealed against the sentence in the Court of Appeal, but this position is not borne out by his own petition dated 23rd October 2010 filed in the Court of Appeal, where he had submitted as Ground A that the "sentence is harsh and excessive considering all the circumstances of this case."

[51] Momoivalu has sought special leave to appeal from this Court against the enhancement of his sentence on the following grounds:

(f) The sentence of 8 years as minimum term is harsh and excessive in regards to case HAC 36/2010 *State v Asheel Kumar*;
(g) I am rehabilitated at the current institution and the biological parents of the deceased have forgiven me;
(h) I have a contract ready for the Nadi Football Association and they have shown support to my football career if given a chance.

[52] Counsel who appeared from Momoivalu in the Court of Appeal had been warned that if he seeks to pursue Momoivalu's appeal against the sentence, the Court would be compelled to reconsider the whole question of sentence, with the likelihood of it being increased. Counsel had persisted with submissions on the sentence without heeding this warning, and the Court of Appeal, very rightly found that the fixed term imposed by the trial judge was too lenient for a case of this nature.

[53] 1n these circumstances, we are of the opinion that the applications of Rasaku as well as Momoivalu for special leave to appeal against the sentences imposed against them are clearly lacking in merit, and would not justify the grant of special leave to appeal even in an application lodged properly and within time.

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

[54] In view of our finding that Rasaku cannot be properly be said to be guilty of substantial delay, it is necessary to consider only the case of Momoivalu under this head. The question can be easily answered in his case as we have already found that his grounds for special leave to appeal against the conviction and sentence are altogether lacking in merit. In these circumstances, the question posed here has necessarily to be answered in the negative in relation to Momoivalu.

Possible prejudice against the Respondent

[55] The final question that has to be considered is whether the grant of enlargement of time will prejudice the respondent. The respondent in this case is the State, which would not be gravely prejudiced by the enlargement of time in a criminal case, as the public interest would require that not only offenders against the law are brought to justice, but also that justice is done in relation to those who are innocent or culpability is minimal.

Conclusions

[56] As has been noted in paragraphs 18 to 21 of this judgment, the grant of extension of time for a belated application for special leave to appeal is a matter for the discretion of Court. In exercising this discretion, the Court would look at the totality of the circumstances that led to the delay, the length of the delay, whether the grant of time would be futile due to the unmeritorious nature of the grounds of appeal advanced by the applicants and the possible prejudice to the Respondent, and balance these factors against the need to preserve the sanctity of the rules and the need to have finality in litigation.

[57] Our detailed assessment of the applications of Rasaku and Momoivalu for enlargement of time led us to the conclusion that while Rasaku had a plausible excuse for his delay, Momoivalu's delay was longer, and the reasons advanced by him for his delay cannot be regarded as acceptable. In any event, as has been seen, both their causes were altogether lacking in merit, and we are of the opinion that no useful purpose would be served by granting the enlargement of time sought by them.

[58] For all these reasons, we conclude that this Court would not be justified in granting the enlargement of time sought by the petitioners, nor for the same reasons, would this Court be justified in granting special leave to appeal on the substantive application before this Court. The applications of both petitioners are accordingly dismissed.

Hon. Chief Justice, Mr. Justice Anthony Gates

President of the Supreme Court

Hon. Mr. Justice Saleem Marsoof

Judge of the Supreme Court

Hon. Mr. Justice Paul Madigan

Judge of the Supreme Court

Solicitors:

Petitioners in Person

Office of the Director of Public Prosecutions for the Respondent.