IN THE SUPREME COURT
AT SUVA

CRIMINAL APPEAL CAV 9 OF 2014
(Court of Appeal AAU 9 of 2011)

BETWEEN	:	VILIAME ROGOSE TIRITIRI
		Petitioner
AND	:	THE STATE
		Respondent
Coram	:	The Honourable Mr Justice Chandra, Justice of the Supreme Court The Honourable Mr Justice Calanchini, Justice of the Supreme Court The Honourable Mr Justice Almeida Guneratne, Justice of the Supreme Court
Counsel	:	Mr M. Yunus for the Petitioner Mr V. Perera for the Respondent
Date of Hearing	:	5 November 2014
Date of Judgment	:	14 November 2014

JUDGMENT

Chandra JA

[1] I have read in draft the judgment of Calanchini JA and agree with his reasoning and conclusions.

Calanchini JA

[2] This is an application by the petitioner for an enlargement of time to apply for special leave to appeal the order of a justice of appeal dismissing his appeal against conviction and sentence under section 35 (2) of the Court of Appeal Act Cap 12 (the Act).

[3] The petitioner's contention is that the learned justice of appeal erred when he dismissed the appeal against conviction on the basis that the grounds of appeal were vexatious and frivolous and as a result had no chance of success. The petitioner does not challenge the decision dismissing the appeal against sentence on the same basis.

[4] The petitioner and one other were tried in the High Court at Lautoka before a judge sitting with three assessors. The petitioner was convicted of the offence of murder by the trial Judge who agreed with the unanimous opinion of the assessors. The co-accused was acquitted. The petitioner was sentenced to the mandatory sentence of life imprisonment with a non-parole term of 12 years from 12 October 2007.

[5] The relevant background facts were summarized in the sentencing judgment of the learned High Court Judge. The Judge noted that the deceased was Viliame Goneivalu who died on 1 April 2008 aged 45 as a result of serious head injuries. The post-mortem report revealed that he had suffered amongst other injuries *"diffused cerebral oedema."* Death was caused by *"intra-ventricular hemorrhage and diffused cerebral oedema due to blunt impact (on head) associated with systemic shock."*

[6] The evidence was that the petitioner had taken offence at the request made by the deceased that the petitioner should not drink, yell or misbehave whilst on the premises of Namaka Public School. Words were exchanged between the two and the learned trial judge described the incident as an *"argument and a quarrel."* It would appear that the petitioner was related through marriage to the headmaster of that school. The headmaster was the second accused at the trial and was acquitted by the trial judge. Both accused with others *"pursued the dispute with the deceased"* who was employed as security at the school. The learned trial Judge in his sentencing decision described what then occurred:

"6. *As the deceased fell on the ground in the course of the melee that ensued, you kicked and stomped on the body of the deceased. You furthered your attack by smashing a cement-block on the head of the deceased despite pleas from those around you. Evidence revealed that your attack with the cement-block that alighted right on the head of the deceased breaking the block into pieces, had caused serious head injuries.*

7. *The doctor, who gave evidence on the Post-Mortem, clearly disclosed the extent of head-injuries, which alone had caused the death of the deceased. Death eventually ensued after the deceased relentlessly fought for life for ten days from 21.03.2008, the date on which he [the deceased] received the injuries at your hands."*

[7] The notice of appeal that formed the basis of the petitioner's application in the Court of Appeal for leave to appeal against conviction raised the following grounds of appeal:

"a) ***THAT*** *the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubt that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.*

b) ***THAT*** *the Learned Trial Judge erred in law and in fact in not adequately directing the Assessors the significance of Prosecution witness conflicting evidence during the trial.*

c) ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors on previous inconsistent statements by Prosecution Witnesses.*

d) ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessor regarding identifying the Appellant in dock.*

e) ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors on the guidelines under* ***R v. Turnbull*** *principle on identification evidence. The Prosecution relied on two witnesses for identification and who evidences were conflicting and raised serious doubts about the identification of the Appellant. The Learned Trial Judge ought to have withdrawn the case from the Assessors in view of the evidence of identification against the Appellant was very poor.*

f) ***THAT*** *the Learned Trial Judge erred in law and in fact in commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whether the defence has had no opportunity of commenting upon it when he commented on pages 31 and 32 of the Summing Up that "In considering what to accept you must look at the evidence objectively and not to be swayed by emotion. This is indeed a tragic case,* ***and says more about the shortcomings of society*** *than it does about the accused."*

g) ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors to refer any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

h) ***THAT*** *the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing/putting the defence case to the Assessors."*

[8] The grounds of appeal against sentence have not been included since the petitioner does not challenge the dismissal of his sentence appeal in the petition.

[9] The application for leave to appeal against conviction and sentence came before the justice of appeal under section 35(1) of the Act. The learned justice of appeal concluded that there was no merit at all in the ground that raised identification. He also concluded that none of the grounds argued raised an arguable point that satisfied the test for granting leave to appeal. The learned Judge noted that the statutory framework included section 35(2) of the Act which enables a justice of appeal to consider whether *"the application for leave to appeal has no chance of success and is therefore frivolous or vexatious."* The learned justice of appeal, having reached that conclusion, dismissed the appeal under section 35(2).

[10] It is against that decision that the petitioner now seeks an extension of time to file a petition for special leave to appeal against the decision of the justice of appeal.

[11] The petition raises three issues. The first is whether this Court should exercise its discretion in favour of the petitioner and enlarge the time in which the petitioner may file his petition. The second is whether the learned justice of appeal erred in dismissing the petitioner's application for leave for appeal against conviction under

section 35(2) of the Court of Appeal Act. The third issue is whether the petitioner meets the jurisdictional threshold for granting special leave to appeal that is prescribed in section 7(2) of the Supreme Court Act 1998. The first issue will necessarily involve consideration of the second and third issues.

[12] However there are two preliminary issues raised by the Respondent that should be considered before the Court determines the substantive issues. The first preliminary issue concerns the jurisdiction of the Supreme Court to hear and determine an appeal against the decision of a justice of appeal dismissing an appeal under section 35(2) of the Act. It is the contention of the Respondent that the appropriate remedy for an appellant who is aggrieved by the dismissal of his appeal under section 35(2) of the Act is to have the matter determined by the Court of Appeal.

[13] Section 35(1) of the Act provides that a justice of appeal may exercise the power of the Court of Appeal to, amongst other things, give leave to appeal to the Court. The Court's jurisdiction to grant leave to appeal against a conviction on a ground of appeal involving a question of mixed law and fact or a question of fact alone is found in section 21 (1) (b) and (c) of the Act. The Court's power to grant leave to appeal against sentence is found in section 21(1) (c) of the Act.

[14] On the hearing of an application for leave to appeal against conviction and/or sentence, a justice of appeal may grant leave if the appeal raises an arguable ground.

[15] The issue becomes less certain when the justice of appeal has concluded that the material before the Court at that stage does not raise an arguable ground. Section 35 (3) provides that if the justice of appeal refuses the application for leave to appeal against either conviction and/or sentence, the application for leave to appeal may be renewed before the Full Court.

[16] There is a third option that is provided by section 35(2) which states:

> *"(2) If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right*

of appeal or no right to seek leave to appeal, the judge may dismiss the appeal."

[17] In my view and it has been the view of justices of appeal up to the present time, the jurisdiction given under section 35(2) may be exercised not only at that point in time when the papers are filed in the Registry, but at any time thereafter. In other words, section 35(2) provides that a justice of appeal upon hearing an application under section 35(1) may, if any of the criteria are satisfied, dismiss the appeal.

[18] The Respondent submitted that if an appellant does not raise an arguable ground then the appeal should be regarded as frivolous or vexatious. The submission is that the failure to raise an arguable ground has the same consequences and that since the appellant may renew his application before the Full Court under section 35(3) he should appeal to the Court of Appeal in the event of a dismissal under section 35(2).

[19] However that submission does not take account of the difference in language used in the two sections. Section 35(3) refers to the situation where the justice of appeal has refused the application for leave. The sub section leaves open the option of a renewed application before the Court of Appeal. An order made under section 35(3) does not necessarily bring the appeal to an end. It does not necessarily indicate finality.

[20] On the other hand, section 35(2) provides that if the justice of appeal determines that the appeal is (1) vexatious or frivolous or (2) is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal. The use of the words *"dismiss the appeal"* indicate a different outcome from the words *"refuses the application"* in section 35(3). The dismissal of the appeal indicates finality. The words indicate that the Court of Appeal is as a result of the order, *"functus."* Previous decisions of this Court do indicate that the jurisdiction should be exercised sparingly. It will always be difficult to distinguish between an appeal none of the grounds of which are arguable and an appeal that is frivolous or vexatious. Nevertheless, the sections require a justice of appeal to do just that. It is less difficult to envisage an appeal that should be dismissed where there is no right of appeal. This will usually be the position when an appellant does not meet the jurisdictional

requirement prescribed by section 22 of the Act in respect of an appeal from the High Court exercising its appellate jurisdiction.

[21] The Court of Appeal is strictly a creation of statute. There must be a statutory foundation upon which the Court may exercise jurisdiction in a particular matter. There is no provision in either the Court of Appeal Act or the Court of Appeal Rules that would enable the Court of Appeal to hear an appeal against an order made by a justice of appeal under section 35(2) of the Act.

[22] During the course of his oral submissions Counsel for the Respondent referred the Court to section 6 and section 36 of the Act. Section 6 makes provision for the proper constitution of the Court for the hearing and determination of appeals. Section 36 makes provision for the delivery of appeal judgments by the Court. Implicit in its terms is compliance with section 6 of the Act. Neither section makes any reference to section 35(2).

[23] However the existence of section 35(2) and the jurisdiction given by that section to a justice of appeal cannot be ignored. To the extent that it may appear to be inconsistent with sections 6 and 36 it must be regarded as an exception to the requirements specified in section 6 or falling outside the scope of section 6 as a special power conferred on a justice of appeal to be exercised in accordance with the criteria prescribed in the section. When a justice of appeal dismisses an appeal under section 35(2) he is exercising the power of the Court to dismiss an appeal for which provision is made in section 23(1) (a) of the Act.

[24] Furthermore, the Respondent's submission is at odds with a number of decisions of this Court. In particular reference is made to **Ralumu –v- The Commander Republic of Fiji Military Forces** (CBV 8 of 2003; 10 September 2004), **Raura –v- The State** (CAV 10 of 2005; 4 May 2006), **Tubuli –v- The State** (CAV 9 of 2006; 25 February 2008) and **Naisua –v- The State** (CAV 10 of 2013; 20 November 2013). The effect of these decisions is that for the purposes of determining the Supreme Court's jurisdiction in respect of final judgments of the Court of Appeal, a final judgment of the Court of Appeal is any judgment of the Court of Appeal which finally disposes of a proceeding in that Court. Consequently a final judgment of the Court of

Appeal is not only a judgment of the Court duly constituted by 2 or 3 justices of appeal, but also any decision of a justice of appeal exercising the power of the Court under section 20(1) or section 35(2) of the Court of Appeal Act that effectively disposes of the proceedings in the Court. That position was affirmed by this Court in its recent decision of **Dromodole –v- The State** (CAV 13 of 2013; 19 August 2014).

[25] Section 98(7) of the Constitution does provide that the Supreme Court may review any judgment, pronouncement or order made by it. That jurisdiction, which also existed under the 1997 Constitution and in the Administration of Justice Decree 2009, has hitherto, been applied in a restricted manner to applications for review of earlier decisions in the same proceedings. (See: **Vulaca –v- The State** (CAV 5 of 2011; 21 November 2013). The Respondent's submission does not make out a sufficient case for changing the present practice.

[26] The Respondent also raised a technical issue during the course of his oral submissions to which reference was not made in the State's written submissions. The point concerned the requirement in section 98(4) of the Constitution that an appeal from a final judgment of the Court of Appeal may not be brought unless the Supreme Court grants leave to appeal. Counsel for the Respondent pointed to the equivalent provision in the 1997 Constitution where special leave was required from the Supreme Court. Counsel also pointed out that the words *"special leave"* appear in section 7 of the Supreme Court Act in which the criteria for granting special leave are set out. Counsel submitted that as a result it may be argued that the use of the *"leave"* in section 98(4) of the present Constitution may lead to a conclusion that the same criteria applies in the Supreme Court as leave to appeal in the Court of Appeal.

[27] Whatever may have been the reason for the use of the word *"leave"* instead of *"special leave"* in section 98(4) it is clear from the constitutional and statutory framework that the role of the Supreme Court has not been altered. The requirement in section 3(2) of the Constitution that a Court in respect of an apparently inconsistent law must adopt a reasonable interpretation that is consistent with the provisions of the Constitution will ensure that section 7 of the Supreme Court Act is interpreted in a manner that is consistent with section 98(4) of the Constitution.

[28] The significance of section 98 (4) of the Constitution is that the Court of Appeal no longer has the constitutional jurisdiction to grant leave to appeal to the Supreme Court. The effect of section 98(4) is that Rules 65 and 66 of the Court of Appeal Rules are now of no effect.

[29] Turning to the substantive issues raised by the petition. The petitioner is seeking an enlargement of time in which to file his petition for special leave to appeal the decision of the justice of appeal. This Court's jurisdiction to hear and determine such an application was considered in **Rasaku and Momoivalu –v- The State** (CAV 9 and 13 of 2012; 24 April 2013). For the reasons stated in that decision the Court concluded at paragraph 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."*

[30] In determining an application for an enlargement of time the Court has a discretion which must be exercised judicially. In **Kumar –v- The State** and **Sinu –v- The State** (CAV 1 of 2009 and CAV 1 of 2010; 21 August 2012) the President of the Court (Gates CJ) when delivering the Court's judgment in relation to a similar application discussed five factors that are usually considered *"by way of a principled approach."* They are (a) the length of the delay; (b) the reason for the delay; (c) whether there is a ground of merit justifying the appellate court's consideration, (d) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (e) if time is enlarged, will the respondent be unfairly prejudiced. The purpose of the exercise is not the rigid application of a formula but to enable the Court to determine whether it would be just in all the circumstances to grant or refuse the application.

[31] In this petition the length of the delay is determined by calculating the length of time between the last day on which the petitioner was required to have lodged his petition and the date on which the application for an enlargement of time was lodged with the Supreme Court registry.

[32] The decision of the justice of appeal was delivered on and dated 30 January 2012. Pursuant to Rule 6 (a) of the Supreme Court Rules 1998 the petition and the accompanying affidavit in support were required to be lodged at the court registry within 42 days from the date of the decision from which special leave to appeal is sought. The effect of the Rule is that the petitioner was required to lodge his petition by 13 March 2012. The length of the delay in this case (putting aside the issue of service of the petition) is the period between 13 March 2012 and 6 December 2013 a period of almost 1 year and 9 months. The Respondent has properly conceded that the first correspondence dated 6 December 2013 from the Appellant indicating his intention to challenge the decision of the justice of appeal should be accepted as the relevant date for calculating the length of the delay.

[33] The explanation for that delay is set out in the affidavit sworn on 30 September 2014 by Viliame Ragose Tiritiri. The explanation revolves around what appears to be a misunderstanding between the petitioner and Counsel who appeared for the petitioner at the hearing before the justice of appeal. There was further delay on account of the difficulty in obtaining the papers necessary to prepare the petition. There were the usual disadvantages faced by an incarcerated petitioner.

[34] The explanation does not satisfactorily explain the delay that can quite properly be regarded as inordinate.

[35] The issue then becomes whether the petition is likely to succeed. As previously stated in this judgment the sole question raised by the petition which this Court must determine is whether the justice of appeal erred in dismissing the application for leave to appeal against conviction under section 35(2). In other words, should the petitioner have been permitted to renew his leave application before the Court of Appeal. Counsel for the Respondent conceded that if this Court concludes that the petitioner's application for leave to appeal did raise an arguable ground, then special leave should be granted on the basis that a substantial and grave injustice may occur if the petitioner's appeal is not heard. Once an arguable ground of appeal has been established there is a statutory right to have the appeal heard by the Court of Appeal. However, in my judgment, the petitioner's task is simply to establish that his appeal was not vexatious or frivolous.

[36] The test that is applied by a justice of appeal to determine whether an appellant should be granted leave to appeal against conviction is a low threshold and has nothing to do with the merits of the grounds of appeal. A justice of appeal does not have to determine whether the ground is likely to succeed, only whether it is arguable. Once that is accepted as the test it is difficult to clearly define the difference between an appeal that may be vexatious or frivolous and liable to be dismissed under section 35(2) of the Act and one where the appellant has failed to raise an arguable ground and where the application for leave is refused but where the application may be renewed before the Court of Appeal under section 35(3).

[37] In this case, it is clear from the summing up, the grounds of appeal and the decision of the justice of appeal that this application for leave was one that should have been refused under section 35(3) with the option available to the petitioner to renew his leave application before the Court of Appeal. It was not a vexatious or frivolous appeal in the sense that it should have been dismissed under section 35(2) of the Act.

[38] It was open to the justice of appeal to conclude that the appeal did not raise an arguable ground. It followed that the justice of appeal should have refused the application for leave to appeal. It did not follow that he should have dismissed the appeal as frivolous and/or vexatious. This was not an appeal where a justice of appeal could properly conclude on the papers that the appeal was frivolous or vexatious. That is the test to be applied under section 35(2). It does not matter whether the test is applied when the papers are filed or at some time after filing or even on the hearing of the leave to appeal application. If the appeal is one that would not be dismissed on the papers as vexatious or frivolous, then when an appellant has failed to establish an arguable ground at the leave hearing, the application for leave should be refused under section 35(3) with the option remaining for the Appellant to renew his application to the Court.

[39] On the basis of what has been stated above a case for special leave has been made out. Although the Respondent has raised the issue of prejudice, it appears not to be sufficiently significant to outweigh the unfairness to the petitioner in this case if the

enlargement of time were to be refused. As a result an enlargement of time should be allowed.

[40] The result is that the petitioner's applications for an enlargement of time and special leave are granted. The dismissal of the appeal by the justice of appeal is set aside. The petitioner's renewed application for leave to appeal against conviction is to be heard by the Court of Appeal. The application is to be listed before the Court of Appeal upon direction from the President of the Court of Appeal.

Guneratne JA

[41] I agree with the reasons given and the conclusion reached by Calanchini JA.

Orders:

(1) Application for enlargement of time is granted.

(2) Petition for special leave to appeal is granted.

(3) Appeal is allowed and the order of the Justice of Appeal is set aside.

(4) The petitioner's renewed application for leave to appeal is to be heard by the Court of Appeal.

Hon. Mr Justice S. Chandra
JUSTICE OF THE SUPREME COURT

SUPREME COURT OF FIJI
SUVA

Hon. Mr Justice W. D. Calanchini
JUSTICE OF THE SUPREME COURT

Hon. Mr Justice Almeida Guneratne
JUSTICE OF THE SUPREME COURT