IN THE SUPREME COURT OF FIJI
AT SUVA

APPELLATE JURISDICTION

CRIMINAL PETITION NO: CAV0004/11
On Appeal from Court of Appeal No. AAU0019/10

BETWEEN : **NIONI TAGICI**

PETITIONER

AND : **THE STATE**

RESPONDENT

CORAM : Hon. Justice Sathyaa Hettige, Justice of the Supreme Court
Hon. Justice Suresh Chandra, Justice of the Supreme Court
Hon. Justice William Calanchini, Justice of the Supreme Court

COUNSEL : Ms. N. Nawasaitoga for the Petitioner

Mr. V. Perera for the Respondent

DATE OF HEARING: 1st April 2014

DATE OF JUDGMENT: 15 April 2014

JUDGMENT OF THE COURT

SATHYAA HETTIGE, JA

[1] The petitioner was charged with the offence of murder of Jurgen Alfred Mierke on 9th February 2009 at Korotogo, Sigatoka in the Western Division , contrary to Section 199 of the Penal Code, Cap.17 and was convicted of murder following a unanimous verdict of guilt in the High Court at Lautoka on 11th March 2010.

[2] The petitioner was sentenced to life imprisonment with an Order that she serve a minimum term of 12 years in which the petitioner was not eligible to be released on parole, on 11th March 2010 under section 18 (1) of the Sentencing and Penalties Decree 2009.

LEAVE TO APPEAL BEFORE THE COURT OF APPEAL

[3] Being aggrieved by the decision of the High Court the petitioner filed an application for leave to appeal to the Court of Appeal against the conviction which was based on the following grounds:

1. *That the verdict and findings of the learned Trial Judge and the assessors were unreasonable and against the weight of the evidence adduced at the trial / or that it could not be supported on the totality of the evidence.*

2. *That under all the circumstances and in consideration of all the evidence of the case the finding of the learned Trial Judge is unsafe and unreasonable.*

3. *That the learned Trial Judge erred in law and in fact in failing to consider the conflicting and inconsistent evidence of the State witnesses.*

4. *That the learned trial Judge erred in law and in fact by failing to adequately summarize and evaluate the*

evidence of the prosecution witnesses in relation to the issues of causation and malice afterthought.

5. *That the learned trial Judge erred in law and in fact by failing to adequately give due emphasis to the petitioner's defence of accident in evaluating the evidence in its totality.*

6. *That the learned trial Judge misdirected himself and the assessors on the issue of motive by failing to identify evidence that is admissible as motive.*

[4] The petitioner filed an application in the Court of Appeal on 12th April 2010 against the decision of the High Court only against the conviction. The appeal of the petitioner had been filed two days out of time. On 23rd of May 2010 **Marshall JA**, even though the single Judge of the Court of Appeal was not expected to conduct an examination or assessment of evidence , having considered the merits of the application refused the application for leave to appeal and dismissed the application under section 35 (2) of the Court of Appeal Act as the grounds of appeal were frivolous and vexatious. The Court of Appeal further found that there was no chance of success in the petitioner's grounds of appeal contained in the application for leave to appeal.

[5] The petitioner did not canvass the sentence imposed by the High Court on the non-parole period of 12 years in the said Leave to Appeal application in the Court of Appeal which appear to have been made under section 21(1) (b) of the Court of Appeal Act.

[6] It should be stated that the decision given by the single Judge under section 35 (2) of the Court of Appeal Act is a final judgment of the Court of Appeal.

PROCEEDINGS BEFORE THE SUPREME COURT

[7] The petitioner thereafter filed a letter dated 1st August 2011 addressed to the Chief Justice from the Women's Correction Centre canvassing and seeking a further appeal on her sentence in the Supreme Court on the basis of the following reasons: In the said letter she states:

> 1. *"I was given an unfair judgment and I strongly believe and feel that there are still some mitigating factors not taken into consideration when my sentencing was given which I would like to re-submit again on my re-appeal.*
>
> 2. *I have learnt a lot of things on my duration of being here in prison and would be a contribution factor of her being a good and responsible mother to my children.*
>
> 3. *My judgment in which my appeal was dismissed was given to me without the presence of my lawyer, Mr. Tunidau.*
>
> 4. *I am fully remorse of my actions and being totally changed to a new person which I regret everything that happened and promised that nothing would happened again in future."*

[8] The letter dated 1st August 2011 seeking a further appeal against the sentence was considered by the single judge of the Supreme Court as an application for enlargement of time. It appears that the application seeking a further appeal dated 1st August 2011 against the sentence was apparently out of time by 27 days. Furthermore it must be stated that this ground of appeal was not a part of the appeal in the Court of Appeal and the single Judge of the Supreme Court having considered the matter dismissed the application for enlargement of time on 10th July 2012.

[9] The petitioner being dissatisfied with the decision of the single Judge of the Supreme Court wrote a letter dated 13th June 2013 which was received by the Registry of the Supreme Court on 19th June 2013 and stated that she was not happy with the decision by the single Judge of the Supreme Court and requested that her application be heard by the Full Court.

FULL COURT OF THE SUPREME COURT

[10] When this matter was heard by the Full Court of the Supreme Court it transpired that the grounds of appeal for leave to appeal to the Supreme Court filed by the letter dated 1st August 2011 do not appear to be the same as in the Court of Appeal. However, it should be noted that leave to appeal against the sentence is a new matter raised in the leave to appeal application to the Supreme Court. Counsel for the petitioner conceded that the issue of sentence was never raised in the Court of Appeal.

[11] Before we deal with the issue to be determined by this court as to whether this court can go in to this matter in order to grant any relief to the petitioner it is important to consider the factual matrix in this case.

Brief Factual Matrix

[12] The petitioner and the deceased lived in a de-facto relationship in 2004 and they got married in 2007. They lived with the two children of the petitioner from a previous marriage at the matrimonial home at Korotogo, Sigatoka.

[13] The petitioner, in her evidence in court had stated that she had thrown a candleholder towards the deceased when he was seated inside the sitting room and the candlestick had struck his head causing head injuries. This had been after a dispute regarding the keys of the motor car and the key of the house. It appears from the evidence that the petitioner had been arguing with the deceased over money and that she was fed up with him. The pathologist had testified explaining the cause of death that the deceased had two fractures of the skull caused by a blunt instrument. After the incident the petitioner kept the deceased's body in the bed room for nearly one month until the body was found due to the smell of the decomposition.

[14] After the recovery of the dead body, the petitioner stabbed herself a number of times causing injury to her chest and stomach. On 09th March 2009 the petitioner, when questioned under caution by the police officer while she was warded in the Sigatoka hospital for her injuries, said that she was fed up with the husband the deceased, and that he did not like the petitioner using his money. After an exchange of words the petitioner took the heavy candle holder and hit on the deceased's head twice causing head injuries. Thereafter the petitioner hid the deceased's body in the bed room for nearly one month until the smell of the decomposition caused it to be found. The two women police officers who visited the Sigatoka hospital when the petitioner was being treated for her injuries testified in court to this effect.

[15] The pathologist who examined the deceased's body which was recovered after one month lying in the bed room has described the injuries under "external injuries" at page 88 of the brief that,

> 1. *"Left tempero parietal circular depressed skull fracture with average diameter of 5cm.*

2. *Left occipital area with depressed skull fracture -1.5 cm in length"*

[16] It appears that the pathologist's evidence shows that the deceased had two fractures of the skull caused by a blunt instrument as disclosed in evidence in court.

EXTENT ON SECTION 35(2) OF THE COURT OF APPEAL ACT

[17] On 23rd May 2010 Martiall JA dismissed the petitioner's application for leave to appeal against the conviction under section 35 (2) of the Court of Appeal Act on the ground that the grounds of appeal were frivolous and vexatious and no chance of success. It is also relevant to consider the extent of section 35(2) of the Court of Appeal Act at this stage. The following judgment decided in Fiji has considered and explained the extent of section 35(2) of the Court of Appeal Act.

In **Simione Raura** CAV0010.2005 decided on 4th May 2006 it was held as follows:

> *"In our opinion the power given by this sub- section is one generally intended to be exercised in a summary way on a consideration of the notice of appeal. It is a power exercisable only where and when it appears from the notice of appeal 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. These are the pre-conditions for the exercise of the power. The power enables a judge to terminate an appeal without a hearing and without prior notice to the petitioner, and for this reason it is a power that should be used sparingly and only in cases where one of the pre-conditions is plainly met. In* ***Sashi Suresh Singh v. Reginam*** *(1983) 29 FLR 86 at 88 a like view expressed by the Court of Appeal about a similar statutory provision. That decision also demonstrates that an appeal may lie from an Order of dismissal if one of the pre-conditions for the exercise of the power is not met."*

DELAY

[18] Before we deal with the question as to whether petitioner has satisfied the threshold criteria in section 7(2) of the Supreme Court Act it is relevant to examine the reason as to why the single judge of the Supreme Court dismissed the petitioner's appeal by the Ruling of His Lordship the Chief Justice.

By referring to some of the authorities both local and other jurisdictions it can be explained that how the courts have considered the length of delay when filing appeals.

[19] It appears on a perusal of the Ruling of the single Judge that the petitioner's application was one seeking enlargement of time within which to bring a petition for leave to appeal. The letter dated 1st August 2011 initiating an appeal against the sentence was filed 27 days out of time.

[20] The single Judge of the Supreme Court derives power to deal with leave to appeal applications and determine under section 11 of the Supreme Court Act 1998.

[21] Section 11 of the Supreme Court Act reads as follows:

> *"A single Judge of the Supreme Court may exercise any power vested in the Supreme Court not involving the decision of an appeal or reference , except that –*
>
> *In criminal matters, if a single Judge refuses or grants an application a person affected may have the application determined by the Supreme Court constituted by 3 Judges, who may include the Judge who made or gave the Order;"*

[22] It has been held that "*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 there is question which justifies serious consideration. But, whilst that is so, petitioners are expected to act promptly*". (see page 191 in **Queen v Brown** (1963) SASR (Napier CJ, Millhouse and Hogarth JJ)

Enlargement of Time Application

[23] The letter dated 1st August 2011 seeking a further appeal against the sentence is filed in the Supreme Court 27 days out of time. The petitioner has failed to explain the delay. Rule 6 of the Supreme Court Rules Cap.13 has not been complied with. Rule 6 (a) reads that a petition and affidavit in support must be lodged at the registry within 42 days of the date of the decision from which special leave to appeal is sought.

[24] Section 20(4) of the Supreme Court Rules Cap.13 has clearly provided that the Supreme Court may grant extension of time subject to any condition the Court imposes, ***for good and sufficient*** cause which reads thus:

> "*Notwithstanding the preceding provisions of this Rule, an applicant 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 condition the Court imposes.*"
> (emphasis added)

[25] However, the Rule 20(4) of the Supreme Court Rules does not extend to cover enlargement of time applications as the said Rule refers to non-compliance with conditions of appeals or petitions imposed by the Rules. Therefore this court

does not derive power to deal with enlargement of time applications under the said Rule 20(4) of the Rules.

[26] In **Josua Raitamata** v **The State CAV0002 of 2007** decided on 25th February 2008, the court said that Rule 46 of the Supreme Court Rules can be used to derive the necessary jurisdiction to consider enlargement of time applications.

Rule 46 of the Supreme Court Rules provide as follows:
"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."

[27] In Josua Raitamata case (supra) *the court said that " The High Court Rules do provide for that court to enlarge the time prescribed by any provision of those Rules for taking any step. On that basis it may be accepted that there is a general power in the Supreme Court to extend time limited for filing a petition for special leave to appeal against a decision of the Court of Appeal*". The general power of the Supreme Court under Rule 46 can be exercised only if the petitioner has shown a good cause for this court to consider in entertaining an application for enlargement of time.

[28] In dealing with appeals filed out of time certain factors have been laid down for consideration by appellate courts in the case of **Kamalesh Kumar –v- State** Criminal Appeal No.CAV0001/2009 FJSC which 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?

[29] His Lordship the President of the Supreme Court in Kamlesh Kumar case (supra) by referring to the case of **Villiame Caubati AAU0022.03s** said that the rights of appeal are granted by statute within a frame work of Rules. Enlargement normally can be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance , the courts can only exercise a limited discretion. (see paragraph 7 of the Kamlesh Kumar case.)

[30] It is relevant to consider what Justice Byrne said in **Julian Miller –v- State** Criminal Appeal No.AAU0076 of 2007 in regard to the importance of the compliance with statutory requirements when filing appeals in the appellate courts which is quoted as follows:

> *"The courts have said time and again that the rules and time limits must be obeyed, otherwise the lists of the courts would be in a state of chaos. The law expects litigants and would be petitioners to exercise their rights promptly and certainly, as far as notices of appeal are concerned , within the time prescribed by the relevant legislation."*

[31] It has been observed time and again in several judgments in enlargement of time applications that the difficulties encountered by a litigant without legal advice to formulate the grounds of appeal should not be a basis to set aside the statutory requirements and the Rules of court. (see **Josua Raitamata –v- State** (2008) FJSC 32: CAV0002.2007) and if it is a slight and short delay of few days namely one or two days or even a week can be considered by court as negligible and excused. (see **The Queen -v- Brown** (supra).

[32] "When the time prescribed by the Act has expired the party convicted has lost his right of appeal, and it is for the court to say whether, taking all the circumstances into account ,it is in the interests of justice he should be permitted to institute and pursue his appeal. This .....is the rule and practice of the Court of Criminal Appeal in England." (See **R.** v **Rhodes** (1910) 5 Crim. App.R.35 p. and **R** v **Cullum** (1942) Crim. App. R. .150 p.

[33] In the present case before this court the delay is 27 days which has not been explained and no reasonable explanation was forthcoming with regard to the delay. Therefore this court is unable to accept the submissions of the learned counsel for the Petitioner for enlargement of time.

[34] The threshold criteria as encapsulated in Section 7 (2) of the Supreme Court Act provide for the need to be complied with in order to be entitled to leave to appeal.

Section 7(2) of the Supreme Court Act reads as follows:

> *"In relation to a criminal matter , Supreme Court must not grant special leave 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 could otherwise occur."*

[35] The above provisions in section 7(2) requires this court to be satisfied that one or more of the criteria set out therein is made out before special leave to appeal is granted. In **Dip Chand -v- State** CAV 0014/2012 (9th May 2012) the Supreme Court held in paragraph 34 that:

> *"Given that 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 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 .. the threshold requirements for special leave even more difficult."*

[36] In paragraph 36 of the judgment in Dip Chand case (supra) Supreme Court further said that :

> *"The Supreme Court has been even more stringent in considering the applications for special leave to appeal on the basis of grounds of appeal not taken up or argued in the Court of Appeal. In **Josateki Solinakoroi –v- The State** Criminal Appeal No.CAV0005 of 2005 the Supreme Court of Fiji in an exceptional case took into consideration the principles developed by (the) Privy Council in similar situations and in particular relied on the following observation In **Kwaku Mensah –v- the King** (1946) AC 83:*
>
> > *"Where a substantial and grave injustice might otherwise occur the Privy Council would allow a new point to be taken which had not been raised below even when it was not raised in the petitioner's printed case."*

[37] It can be seen that in the grounds of appeal for enlargement of time there is no question of law which justifies any serious consideration by the Supreme

Court. It was apparently clear that the letter initiating the appeal dealt only with the sentence. It must be stated in fact, the learned counsel of the legal Aid Commission who represented the petitioner conceded in answering the question posed by the court the present appeal before Supreme Court was only in regard to the sentence which was never raised in the Court of Appeal. The learned counsel further conceded that the petitioner did not seek permission and move to amend the petition in order to include the further ground of appeal on sentence in the Court of Appeal. We strongly observe that the petitioner has completely disregarded the appellate process contained in the Supreme Court Rules when filing Appeal papers. The failure to observe the rules of the Supreme Court is fatal and cannot be permitted by Court.

[38] We also observe that there does not seem to be any legal issue other than the extent of the non-parole period for ventilation on the petition and the quantum of sentence would rarely meet the threshold criteria in section 7 (2) of the Supreme Court Act. In the petitioner's case the grounds of appeal urged have not met the criteria laid down in section 7(2) of the Supreme Court Act 1998.

CONCLUSION

[39] Therefore, this court is inclined to conclude that there is no question of general legal importance involved in the matter. Nor is there any substantial question of principle affecting the administration of criminal justice. We also conclude that there is no substantial or grave injustice that would otherwise occur.

[40] It is manifest to state that the petitioner's letter initiating an appeal against the sentence seems to be an attempt to have this court to reconsider her non-parole period of 12 years sentence before the Full Court.

[41] We are inclined to state that the petitioner has failed to establish any grounds which would come within Section 7(2) (a) (b) and (c) of the Supreme Court Act 1998.

[42] In the circumstances we are of the considered view that the application for enlargement of time should be dismissed.

[43] Accordingly, for the reasons set out above we dismiss the application.

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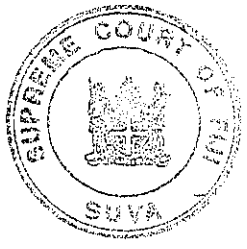
Hon. Justice Sathyaa Hettige
Justice of the Supreme Court



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Hon. Justice Suresh Chandra
Justice of the Supreme Court

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Hon. Justice William Calanchini
Justice of the Supreme Court

Solicitors:

Office of the Legal Aid Commission for the Petitioner.
Office of the Director of Public Prosecutions for the Respondent.