IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO.CAV 4 OF 2013
(Court of Appeal AAU 43 of 2005)

BETWEEN	:	**PITA TOKONIYAROI** **SAMUELA ROGOIVALU** *Petitioners*
AND	:	**THE STATE** *Respondent*

Coram	:	**The Honourable Mr Justice Suresh Chandra** **Justice of the Supreme Court** **The Honourable Mr Justice Calanchini** **Justice of the Supreme Court** **The Honourable Mr Justice Kumararatnam** **Justice of the Supreme Court**
Counsel	:	First Petitioner in person Ms N. Nawasaitoga for the Second Petitioner Mr V. Perera for the Respondent
Date of Hearing	:	2 and 9 April 2014
Date of Judgment	:	9 May 2014

JUDGMENT

Chandra JA

[1] I agree with the reasons and the conclusion of Calanchini JA.

Calanchini JA

[2] This is a petition for special leave to appeal from a judgment of the Court of Appeal delivered on 29 September 2011 dismissing the Petitioners' appeal against their conviction for murder and robbery with violence. Following a trial by judge sitting with 3 assessors the petitioners together with one other (John Miller) were each convicted on one count of murder contrary to sections 199 and 200 of the Penal Code Cap 17 and on one count of robbery with violence contrary to section 293 (1) (a) of the Penal Code on 5 May 2005 in the High Court at Lautoka. They were each sentenced to a term of life imprisonment in respect of the murder convictions and the learned trial Judge ordered that they each serve a minimum term of imprisonment of 12 years to be served concurrently with any existing sentence. In respect of the robbery convictions the Defendants were each sentenced to a term of imprisonment of four years to be served concurrently with any existing sentence and with the sentence for the first offence of murder.

[3] The Respondent alleged that the three accused had planned to rob the deceased and in the early morning of 14 September 2000 they attacked him by striking him with a stone. When he fell to the ground they tied him up and robbed him. The victim subsequently died as a result of the actions of the accused. At the trial certain facts were agreed. It was agreed that the death of the deceased was caused by suffocation. The medical post mortem report revealed that a towel was lightly tied around the mouth which was open with his tongue protruding backwards. The towel was heavily blood stained. It was also agreed that the deceased's body was found in his shop lying on his back with hands and legs tied. The medical report listed a number of other injuries suffered by the deceased.

[4] The trial proceedings commenced on 18 May 2004. The State was represented by Counsel. The first accused (Miller) and the third accused (Rogoivalu) were also represented by Counsel. The record indicates that Counsel for Rogoivalu informed the Court that the second accused (Tokoniyaroi) had been granted legal aid but the Commission was *"unable to brief."* The same Counsel indicated that Tokoniyaroi requested a voir dire. The Court then remarked that Counsel could act for

Tokoniyaroi for the purposes of the voir dire. Neither Miller nor Rogoivalu sought to challenge their caution interviews by way of a voir dire.

[5] The record then indicates that the assessors were assembled in court. The charges were put to the accused and each indicated that they understood the charges and each pleaded not guilty to both charges. The assessors were then sworn after which they retired. The learned trial Judge (Govind J) then informed Counsel and the three accused that *"witness D. Elisha known to me and also father of victim. Known many years ago."* Both Counsel for the accused indicated that they had *"no problem."* The learned Judge then indicated *"Also Mr Ash."* Again both Counsel for the Accused indicated *"No problem."*

[6] The record shows that Counsel for Miller was excused for the voir dire proceedings. When the Court resumed the next day on 19 May 2004 Mr J Nair entered an appearance for Tokoniyaroi for the voir dire which then commenced later that same day. On the following day Counsel for the State informed the Court that the doctor was on a tour of duty in Macuata. Counsel for Tokoniyaroi indicated to the Court that he wasn't insisting on the doctor and that the voir dire could proceed. The medical report was then tendered, apparently by consent. On 20 May 2004 the learned trial judge ruled on the voir dire that all the disputed statements and admissions were admissible as evidence.

[7] It would appear from the record that the learned Judge attempted to arrange legal representation for Tokoniyaroi for the trial but was unsuccessful. The first petitioner requested a copy of **Archbold** with his papers and further time to prepare his defence. The proceedings were adjourned to 30 August 2004.

[8] On 30 August 2004 the parties appeared before a different High Court Judge (Connors J). It would appear that at a pre-trial mention on 3 June 2004 the parties had been informed that the trial proper would commence on 30 August 2004 before Connors J. No objection was taken on 3 June 2004 to that proposed course of action. However, 30 August 2004 Counsel for Miller objected to the trial proceedings before Connors J on the basis that the proceedings were part heard before Govind J. The objection was supported by Counsel who appeared on behalf of Tokoniyaroi. It would appear that

Counsel and the accused wanted the trial to proceed before Govind J. Neither Counsel expressed any concern about the disclosures made by Govind J that the witnesses D Elisha and Mr Ash were known to him or that the father of the victim was known to him many years ago.

[9] The trial proper eventually commenced before Govind J on 13 April 2005 sitting with 3 assessors. Miller and Rogoivalu were represented. Tokoniyaroi appeared in person having previously informed the Court on 18 March 2005 that he was happy to defend himself. At no stage during the course of the many pre-trial conferences before the judge did either Tokoniyaroi or Rogoivalu or his Counsel raise any objection to Govind J presiding over the trial.

[10] At the commencement of the trial the charges were again put to the three accused. Each pleaded not guilty to both charges. However shortly after Counsel for the State had commenced his opening address to the assessors and the judge, Counsel for Miller and Rogoivalu applied to the Judge for the robbery charge to be put again to them. The two then pleaded guilty to the robbery with violence charge. Tokoniyaroi maintained his plea of not guilty to both charges.

[11] At the conclusion of the evidence the learned Judge delivered his summing up on 3 May 2005 (see pages 74 – 79 of the record). The three assessors then returned a unanimous opinion of guilty on the first charge of murder for all three accused and a unanimous opinion of guilty on the robbery charge for Tokoniyaroi. The learned Judge agreed with the opinions of the assessors and found that the guilty pleas by Miller and Rogoivalu had been correctly entered. He convicted each accused on both counts as charged. The accused were subsequently sentenced on 5 May 2005.

[12] The three convicted prisoners all appealed to the Court of Appeal. It would appear that the appeals were filed within time. Tokoniyaroi and Miller applied for leave to appeal against sentence and Rogoivalu sought leave to appeal against conviction and sentence. On the basis that leave was granted the appeal came on for hearing on 3 April 2009. The only ground of appeal on which the Court of Appeal heard submissions was that the learned Judge should have recused himself given his knowledge of the father of the victim and the witness Mr Ash.

[13] It is not apparent from the files that have been made available how it was that the Court came to consider appeals against convictions by all three appellants on a ground that was raised only informally by Tokoniyaroi. The Court of Appeal held that the learned Judge should have disqualified himself on the basis that a fair-minded and informed member of the public would entertain a reasonable apprehension that the Judge would not discharge his duty impartially. The Court ordered a re-trial of the Appellants.

[14] The Respondent lodged a petition for special leave to appeal to the Supreme Court against that decision of the Court of Appeal. For reasons that are not relevant to the present petition and which do not relate to the substantive issues presently before this Court, the Supreme Court ordered that the decision of the Court of Appeal be quashed together with the order for the re-trial. The Supreme Court also ordered that the appeal before the Court of Appeal be re-heard before a different panel of three Justices of Appeal. The Supreme Court was constituted by a bench of three Justices of the Supreme Court including Marshall JA.

[15] Prior to the re-hearing of the appeal on 5 September 2011, Miller withdrew his appeal which was subsequently dismissed under Rule 39 of the Court of Appeal Rules. At the second appeal hearing the Court of Appeal was constituted by a bench of three Justices of Appeal including Marshall JA.

[16] The grounds of appeal that were considered by the Court of Appeal at the second hearing were restricted to four. The first was that the proceedings, the convictions and the sentences were unsafe when the judge failed to recuse himself from hearing the case given the conflict arising from his disclosure that he knew the victim's father long ago and the witness Mr Ash. The second ground was that the learned Judge erred by admitting into evidence the confession of Tokoniyaroi which he alleged was unlawfully obtained by Police. The third ground was that the learned Judge erred by admitting into evidence the medical report of Tokoniyaroi because the doctor was not called for cross-examination and because its admission into evidence was objected to by Tokoniyaroi. The fourth ground was that there was no evidence of malice aforethought to convict Rogoivalu of murder.

[17] The Court of Appeal (per Sriskandarajah JA with whose judgment Chitrasiri JA agreed) applied the approach adopted by the Supreme Court in **Koya –v- The State** (unreported CAV 2 of 1997; 26 March 1998). The Court noted that as in the **Koya** (supra) appeal, this was an appeal where the allegation of bias was raised at the appeal stage and not during the course of the trial. Therefore the Court had the benefit of looking into the record to see how the learned Judge conducted the trial. The Court concluded that there was no material in the record to indicate that the decision was affected or coloured by personal interest or a *"built-in tendency to support, albeit unwittingly the prosecution."* In the absence of any semblance of bias in the conduct of the proceedings or in the summing up, the Appellants' complaint that the failure of the judge to recuse himself had denied the Appellants their right to a fair trial had no merit and the ground of appeal failed.

[18] The Court of Appeal declined to interfere with the trial judge's ruling on the voir dire as the Petitioner had not established any basis for disturbing the various findings of fact made by the Judge that resulted in his admitting the confession into evidence.

[19] The Court of Appeal rejected the third ground on the basis that upon the objection of the First Petitioner the medical report had been removed from the material to be considered by the assessors. The report was not read to the assessors, they had not read the report and nor was any reference made to it by the learned Judge during his summing-up to the assessors.

[20] For reasons that are not relevant to the present petition the Court rejected the fourth ground of appeal concerning proof of malice aforethought against Rogoivalu.

[21] This application for special leave was filed on behalf of the petitioners on 14 August 2012 although the handwritten original document signed by the petitioners was dated 24 July 2012. The Court of Appeal judgment was delivered on 29 September 2011. The petition for special leave was required to be lodged within 42 days of the date of the Court of Appeal decision pursuant to Rule 6 of the Supreme Court Rules. In this case the petition should have been filed in the Supreme Court Registry by 10 November 2011 and is as a result at the very least some 8½ months out of time.

[22] The basis upon which this Court exercises a jurisdiction to determine an application for the enlargement of time for lodging a petition for special leave is section 14 of the Supreme Court Act 1998 (the Act) and Rule 46 of the Supreme Court Rules (the Rules). Section 14 of the Act provides that *"the Supreme Court has, in relation to matters that come before it, all the power and authority of the Court of Appeal."* Section 26 of the Court of Appeal Act provides the statutory basis for that Court to enlarge time. Rule 46 of the Rules provides that the High Court Rules and the Court of Appeal Rules apply with necessary modifications to the practice and procedure of the Supreme Court. Though the High Court Rules do not apply to the criminal jurisdiction, this Court has concluded that the High Court's power to enlarge time provides the basis for the Supreme Court to extend time (see **Raitamata –v- The State** (CAV 2 of 2007; 25 February 2008)). There is amply authority from decisions of this Court to conclude that the Supreme Court possess jurisdiction to grant an application for an enlargement of time in an appropriate case. (**Rasaku and Another –v- The State** (CAV 9 and 13 of 2012; 24 April 2013)).

[23] The determination of an application for enlargement of time involves the exercise of a discretion by the Court for the purpose of excusing non-compliance with the Rules of the Court. Special leave to appeal may be granted to allow a late appeal to proceed in cases that meet the leave criteria of section 7(2) of the Act (per Gates CJ in **Kumar – v- The State** (CAV 1 of 2009; 21 August 2012). In deciding whether to exercise its discretion in favour of a late petition, the Court usually examines the following factors: (i) the length of the delay, (ii) the reason for the failure to file within time, (iii) where there has been substantial delay, is there a ground of appeal that will probably succeed and (iv) if time is enlarged, will the Respondent be unfairly prejudiced?: **Kumar –v- The State** (supra).

[24] In this case the length of the delay is about 8½ months and is considerable and inordinate. In a case where the delay is of such duration it is necessary for the Petitioners to establish exceptional circumstances before the Court would consider granting an enlargement of time. In such a case not only must the Petitioner satisfy

the criteria set out in section 7(2) of the Act they must also satisfy this Court that the merits are such that the appeal will probably succeed.

[25] As for the reasons for failing to lodge the petition within time, Tokoniyaroi in his written submissions asked the Court to consider that he is a lay person without any legal training or experience, that he did not have access to any legal text to enable him to lodge his petition on time and that this Court has on a number of occasions allowed a petitioner an enlargement of time. He also claimed that he had prepared a first petition within time but it had been misplaced by either the Suva Corrections Centre or the Court of Appeal Registry. Of course, if the latter submission were true, then the reasons for not being able to lodge a petition within time would not have any relevance. There is no material in the file to indicate that the Registry had received a petition within time. There was no material presented by Tokoniyaroi to substantiate his claim that his first petition had been misplaced by officials at the Suva Corrections Centre.

[26] In written submissions filed on behalf of Rogoivalu similar reasons were put forward by way of explanation for the delay.

[27] At this stage I am compelled to comment on one aspect of the submissions filed by Rogoivalu on this point. In paragraph 2.8 it is stated that:

> *"Obviously, the Court of Appeal has heard the appeals twice and on respective occasion the respective full bench of the Court of Appeal has given differing judgments."*

[28] The two judgments were first the judgment delivered on 3 April 2009 and the second was delivered on 5 September 2011. However it must be recalled that the first appeal was heard before a panel of two judges only on 3 April 2009. On that day an oral indication was given by the Court that the appeal would be allowed with written reasons to follow. On 10 April 2009 the Constitution was abrogated as a result of which all judicial appointments were revoked. Only one of the two judges who heard the appeal was subsequently re-appointed. That Judge purported to deliver on 24 June 2009 a judgment written and signed by him alone. In a judgment delivered on 15 April 2011, following an appeal by the State, the Supreme Court held (1) that the

Court of Appeal was not properly constituted for the hearing of the appeal on 3 April 2009 and (2) that the written judgment, consisting of reasons for the oral orders, of only one of the panel who heard the appeal was a nullity and was to be disregarded. The Supreme Court concluded that since the published reasons were a nullity and the hearing court wrongly constituted, the appellate orders must be quashed and the matter returned to the Court of Appeal for a re-hearing. It is therefore not correct for Counsel for Rogoivalu to submit that there were two conflicting decisions of the Court of Appeal on the same grounds of appeal. This is because it is as if the first decision of the Court of Appeal had never existed. It is to be disregarded absolutely as a nullity.

[29] The approach adopted by this Court to an application for an enlargement of time where the delay was considerable and where the explanations for that delay were similar to the explanations put forward by the petitioners in this application was clearly explained in **Raitamata –v- The State** (unreported CAV 2 of 2007; 25 February 2008). At paragraph 12 the Court stated:

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

[30] Whilst I accept that incarceration has presented the petitioners with obvious difficulties, the previous decisions of this Court clearly indicate that such explanations for a delay that can rightly be described as considerable are not sufficient alone to warrant the Court exercising its discretion to enlarge time.

[31] The material filed by the Petitioners identified three principal grounds of appeal against conviction in the event that special leave was granted. Those grounds may be summarised as bias, unfair trial and miscarriage of justice. In relation to bias, the petitioners rely on the disclosure by the trial judge that he knew the father of the victim and two witnesses, namely Mr D Elisha and Mr Ash. In addition, the petitioners claim that bias resulted from the fact that Marshall JA was a member of the panel that heard the Supreme Court appeal from the first Court of Appeal decision and then also sat on the Court of Appeal panel for the second appeal.

[32] The second principal ground concerns the claim that the trial in the High Court was unfair. The petitioners claim that the trial Judge did not provide the opportunity for the medical practitioner to be cross-examined. They also claim that the trial Judge proceeded to conduct the trial without the alibi witnesses.

[33] In relation to the third principal ground, the petitioners claim that there has been a miscarriage of justice because their rights were prejudiced as a result of John Millar withdrawing his appeal by letter addressed to the Court of Appeal which resulted in their appeal being dismissed.

[34] There was also a further ground raised by the petitioners that the Court of Appeal erred in adopting the test for bias that was established by the Supreme Court in **Kova –v- The State** (unreported CAV 2 of 1997, 26 March 1998).

[35] It is at this stage necessary to recall section 7(2) of the Supreme Court Act 1998 which provides that:

"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."

[36] The delay of about 8½ months together with their unsatisfactory explanations requires the petitioners to show a compelling case that the criteria for leave set out in section 7(2) of the Supreme Court Act are met. To put the position more precisely, this is a case where the petitioners are required to establish what may be described as an irremediable injustice which otherwise compels the intervention of the Court. **Cama –v- The State** (CAV 3 of 2009; 1 May 2012) and **Kumar –v- The State** (supra).

[37] Even without the burden of having to overcome a considerable delay without satisfactory explanations, the petitioners face the inherently difficult task of satisfying the criteria set out in section 7(2) in order to obtain special leave. The central issue

for the Court is generally to determine whether petitioners have established that substantial injustice has been done. The Supreme Court is not a court of criminal appeal. It exercises a jurisdiction that was formerly exercised by the Judicial Committee of the Privy Council. It is only in the exceptional circumstances specified in section 7(2) that special leave to appeal a final decision of the Court of Appeal will be given.

[38] It is convenient to consider first the ground relating to bias with the ground that claims that the Court of Appeal erred in applying the test propounded by the Supreme Court in **Koya –v- The State** (supra).

[39] The judgment of the Court of Appeal was delivered on 29 September 2011 following a hearing on 5 September 2011. Pursuant to section 8(4) of the Administration of Justice Decree 2009, decisions of the Supreme Court are binding on the courts of the State. An identical provision appeared in section 122(4) of the 1997 Constitution and an almost identical provisions appears in section 98(6) of the 2013 Constitution. The Court of Appeal was obliged to follow and apply the decision of the Supreme Court in Koya (supra).

[40] The only basis upon which the Court of Appeal could have taken a different approach from the Supreme Court decision was if the facts in the appeal under consideration could be distinguished from the facts in the Koya decision of the Supreme Court. It was presumably on this basis that the petitioners, in the written submissions, submitted that the decision in **Koya** (supra) should not have been followed by the Court of Appeal.

[41] As Marshall JA noted in paragraph 50 of the Court of Appeal decision (AAU 43 of 2005; 29 September 2011) the principal point in **Koya –v- The State** (supra) was:

> *"whether the trial judge should have recused himself. Mr Justice Lyons who presided over the criminal trial of Ms Amina Koya, while practising in Brisbane as a barrister prior to his appointment in Fiji, had been consulted in the cause of Ms Amina Koya by her barrister Mr I.Q. A. Khan. Mr Lyons had advised on the disclosures with a view to a "no case" submission in the*

Magistrates Court. He had suggested authorities that should be and were cited by Mr Khan."

[42] It would appear that at no stage during the Koya trial did the trial Judge disclose to the parties that he had been previously consulted by Koya's former legal practitioner. The matter was raised for the first time by motion in the Court of Appeal whereby the Appellant Koya applied to add an additional ground, namely that the trial Judge was biased or alternatively that there was a likelihood of bias against the petitioner. The Court of Appeal granted leave. The Court of Appeal subsequently rejected the case of bias on the basis that the fair minded observer in Fiji would not think that Lyons J might be biased against the petitioner by reason of his discussions with Mr Khan.

[43] There is one notable difference between the facts in the Koya case (supra) and the present case. In Koya the trial judge did not raise the issue of his involvement with the parties at the beginning of or during the trial. In the present case the trial judge did disclose his interest at the commencement of trial. At no stage during the period between the disclosure and the date on which the trial actually commenced did either petitioner seek to have the trial judge recuse himself on account of bias.

[44] The two cases are indistinguishable on the basis that the issue of bias has been raised on appeal after the trial. It is on this basis that the decision of the Supreme Court in Koya was binding on the Court of Appeal in the present case. The Supreme Court decided that when a trial in the High Court has taken place and an appellate court is determining an appeal where bias is raised, the appellate court looks at the record of the trial showing how it was conducted by the trial Judge. If the record demonstrates that the trial judge conducted the trial impeccably, it would be difficult to establish that there was a miscarriage of justice arising from non-recusal.

[45] Applying this principle the Court of Appeal in the present case examined the record of the proceedings from the voir dire to the conclusion of the substantive trial. The Court of Appeal could not fault the manner in which the proceedings were conducted by the trial judge. The petitioners have failed to identify any material in the record that would indicate the presence of bias. They have failed to demonstrate that the Court of Appeal erred in concluding that there had been no miscarriage of justice on

the ground of bias as was required by section 23(1) (a) of the Court of Appeal Act. The Court has correctly applied the Supreme Court decision and there is no error that would meet the criteria set out in section 7(2) of the Supreme Court Act.

[46] The other issue relating to bias raised by the petitioners concerns the presence of Marshall JA on the Supreme Court panel hearing the State's appeal against the first Court of Appeal decision and his presence on the panel hearing the second appeal by the petitioners.

[47] The Supreme Court was considering the issue of compliance with the Court of Appeal Act. In issue was the proper constitution of the panel at the first appeal hearing and whether the requirements for the delivery of a valid judgment were satisfied. The merits of the case were not raised in the Supreme Court. When the Supreme Court ordered a re-hearing of the appeal in the Court of appeal before a different panel, the reference to a different panel was a reference to the first hearing in the Court of appeal, not a reference to the Supreme Court panel. This ground has no merit whatsoever.

[48] The second principal ground of appeal concerns the claim that the petitioners' were not afforded a fair trial. In particular the petition alleges that the right to cross-examine the medical practitioner was denied and that the trial proceeded without alibi witnesses.

[49] This issue was raised in the Court of Appeal and considered at paragraphs 77 to 80 of the Court's judgment. From the record it would appear that in the course of the voir dire proceedings the medical report relating to Tokoniyaroi was by consent considered by the Judge although the doctor was not available for cross-examination. At the trial proper Tokoniyaroi represented himself and at the conclusion of the prosecution case indicated that he wanted to give unsworn evidence and cross-examine the doctor whose medical report had by consent been ruled admissible.

[50] He was informed by the Court that the doctor was not available for cross-examination. He then asked the Judge to exclude the medical report. The judge agreed. The medical report was not placed before the assessors nor read out to them. The judge

did not refer to the medical report in his summing-up. The medical report did not support his claim that he had been beaten by police at the time of his caution interview. There was as a result no prejudice to Tokoniyaroi. There was nothing unfair in the manner in which the trial Judge had conducted this aspect of the trial. The Court of Appeal had quite rightly concluded that Tokoniyaroi's complaint about the medical evidence was unfounded. There is in my opinion no issue raised by this ground that meets the criteria set out in section 7(2) of the Supreme Court Act.

[51] The second issue raised by the petitioners under this ground of appeal is the complaint that the learned trial Judge allowed the trial to proceed and conclude without the alibi witnesses. It must first be noted that this issue was not raised in the Court of Appeal. However that fact alone does not necessarily prevent this Court from considering the issue. In **Raitamata –v- The State** (supra) this Court observed in paragraph 12 that:

> *"This will not preclude this Court, in a case which raises questions of the type necessary to warrant the grant of special leave under section 7(2) of the Supreme Court Act from entertaining an application which, for good cause shown, raises such a question for the first time."*

[52] The petitioners have not established any good cause why this Court should consider this issue for the first time when it was not raised in the Court of Appeal. As the issue does not fall into the category contemplated by the Court, it is not proposed to consider the issue any further other than to note page 71 of the Record. On 18 April 2005 the learned trial Judge was informed by Counsel for the Respondent, in the presence of Counsel for Rogoivalu and Tokoniyaroi in person that the alibi witnesses could not be located. The learned trial Judge indicated to the parties that if they were not located by 26 April 2005, the trial would continue. There was no objection from the petitioners. When the trial resumed on 26 April 2005 there was no reference in the Record to the alibi witnesses nor was there any application by the petitioners in relation to alibi witnesses. There is no issue raised by this ground that meets the criteria set out in section 7(2) of the Supreme Court Act.

[53] The third principal ground raised by the petition relates to the withdrawal of his appeal by John Miller shortly before the second Court of Appeal hearing. It is

claimed that the letter written to the Court of Appeal Registry prejudiced the petitioners' rights and resulted in the dismissal of their appeal by the Court of Appeal. By writing to the Court of Appeal Registry seeking to withdraw his appeal, John Miller was doing no more than complying with Rule 39 of the Court of Appeal Rules. Miller was acting within his rights when he decided that he wanted to abandon his appeal. The petitioners have not identified any basis for claiming that their rights were prejudiced as a result of Miller abandoning his appeal in accordance with Rule 39. There is no material in the Record that would indicate that the judgment of the Court of Appeal was in any way influenced by Miller's decision. The ground has no merit and at the very least is vexatious and frivolous.

[54] In Tokoniyaroi's written submissions, there are a number of issues raised that were not raised in the Court of Appeal nor were they raised as grounds of appeal in the petition. These are issues which cannot be considered at this stage of the proceedings. It is sufficient to say that in so far as they are raised by him to demonstrate bias on the part of the trial judge, they were matters upon which the trial Judge was not at any stage called upon to rule since neither Counsel nor Tokoniyaroi in person made any application in relation to any of those issues. There has not been any good reason put forward by the petitioners to warrant this Court considering those matters for the first time at this late stage of the proceedings.

[55] I have concluded that the delay in lodging the petition is considerable and the reasons for that delay unsatisfactory. The petitioners' grounds of appeal to this Court do not meet the criteria set out in section 7(2) of the Supreme Court Act and furthermore there is no ground that would probably succeed.

[56] The application for an enlargement of time to lodge the petition for special leave to appeal is dismissed.

Kumararatnam JA

[57] I also agree with the reasons and conclusion of Calanchini JA.

Orders:

Application for an enlargement of time to lodge a petition for special leave to appeal against convictions is dismissed.

HON. MR JUSTICE CHANDRA
JUSTICE OF THE SUPREME COURT

HON. MR JUSTICE CALANCHINI
JUSTICE OF THE SUPREME COURT

HON. MR JUSTICE KUMARARATNAM
JUSTICE OF THE SUPREME COURT