IN THE SUPREME COURT OF FIJI
APPELLATE CRIMINAL JURISDICTION

CRIMINAL PETITION NO. CAV0011 OF 2016

BETWEEN	:	**SELINA VOSAVAKATINI**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice Priyantha Fernando, Acting President of the Supreme Court** **The Hon. Justice Saleem Marsoof, Justice of the Supreme Court** **The Hon. Justice Sathyaa Hettige, Justice of the Supreme Court**
Counsel	:	**Mr. J. Savou for the Petitioner** **Ms. S. Puamau for the Respondent**
Date of Hearing	:	**13th June 2016**
Date of Judgment	:	**22nd June 2016**

JUDGMENT

Fernando AP

[1] The Petitioner and Mohammed Sahid were charged in the High Court with one count of Murder contrary to Sections 199 and 200 of the Penal Code (Cap 17). Both were convicted and sentenced to imprisonment for life. The Petitioner was ordered to serve a minimum term of 13 years.

[2] The Petitioner and the other accused Mohammed Sahid in the High Court made an application for leave to appeal against the conviction and sentence to Court of Appeal. A single judge of Court of Appeal on 23/05/2011 dismissed their applications to leave to appeal in terms of Section 35 (2) of the Court of Appeal Act on the basis that the appeal was vexatious or frivolous. The petitioner seeks to appeal the said decision of the single judge.

[3] Section 35 (2) of the Court of Appeal Act reads:

> *"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."*

Section 35 (2) of the Court of Appeal Act empowers a single judge of Appeal to dismiss the appeal if the judge 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.

[4] A decision of dismissal pursuant to Section 35 (2) of the Court of Appeal Act is a final decision of the Court of Appeal. (***Raura v. The State*** CAV 10 of 2005, ***Tubuli v. The State*** CAV 9 of 2006, ***Naisua v. The State*** CAV 10 of 2013).

[5] This court is provided with mandate to hear and determine appeals from all final judgments of the Court of Appeal by Section 98 (3) (b) of the Constitution of Fiji. As a result this court is empowered to hear this application for special leave to appeal against the said order of dismissal by the singled Judge of Appeal.

Factual Background

[6] On 27th November 2005 the petitioner and her partner Mohammed Sahid met deceased Sarwan Kumar at a nightclub and then they came to Sarwan Kumar's flat in Nadera on the invitation of the deceased Sarwan Kumar. It was undisputed that there was an incident in the flat and that Mohammed Sahid stabbed the deceased 38 times and the deceased Sarwan Kumar died from his injuries. His body was discovered by his wife the next morning.

[7] In her caution interview statement that was admitted in evidence, the petitioner had said that Mohammed Sahid introduced the deceased to her at the Purple Haze nightclub. She had been trying to find a man to sell herself so that they could have money for a room. While

she was having sexual intercourse with the deceased, Mohammed Sahid had come and stabbed the deceased several times, asking for his wallet and the mobile phone. After Sahid got the phone and the wallet of the deceased, he had kept on stabbing the deceased asking for his till. Then deceased got hold of Sahid's hand. Sahid had wanted the petitioner to look for another knife. Then the petitioner had brought another knife from the kitchen and had given to Sahid. Sahid had started stabbing the deceased until he became unconscious.

Enlargement of time

[8] However, the petitioner Selina Vosavakatini has filed the instant application for leave to appeal in this court on 03/02/2016. In terms of Rule 6 of the Supreme Court Rules, such petition and affidavit will have to be filed within 42 days of the date of the ruling of the Justice of Appeal. Therefore petitioner was required to file the petition by 04/07/2011. Hence, the petitioner was out of time by 4 years and 8 months.

[9] The petitioner has not made a formal application before this court for enlargement of time to seek special leave to appeal. Counsel for petitioner Mr. Savou informed Court, that he could not make submissions on enlargement of time as no affidavit was filed by the petitioner explaining the delay. However, the question before this court is to determine whether it would be just in all the circumstances to grant or refuse the application.

[10] The factors that should be taken into consideration when deciding on enlargement of time were summarized in ***Kumar*** *and* ***Sinu v. The State*** (CAV 1 of 2009, CAV0001 of 2010; 21 August 2012). They are:

(i) the length of delay
(ii) the reasons for delay
(iii) whether there is a ground of merit justifying the appellate court's consideration
(iv) where there has been substantive delay, nonetheless is there a ground of appeal that will probably succeed
(v) if time is enlarged, will the respondent be unfairly prejudiced.

[11] His lordship the Chief Justice Gates in ***Kamlesh Kumar v. State*** Criminal Appeal CAV 001/09 (21 August 2012) referring to the reasons for delay –

> [7] The Rights of appeal are granted by statute within a framework of rules. Enlargement normally can only 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. *Viliame Caubati* AAU0022.03S 14th November 2003 at p.5.
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> [8] In *Rhodes* 5 Cr. App. R 35 at 36 it was said:
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> > "A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time – a month or more – elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."
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> [9] The approach was explained shortly in *The Queen v Brown* (1963) SASR 190 at 191:
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> > "The practice is that, if any reasonable explanation is forthcoming, and 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 that there is a question which justifies serious consideration."

[12] In *Brown* (supra at page 191) Court further said that 2 months delay was substantial and extension of time would not be granted unless the Court is satisfied that there were such merits that the appeal would probably succeed.

[13] In the instant case the length of delay in filing this application is 4 years and 8 months which is substantial. No reasons were submitted for the delay.

[14] The grounds pursued by the petitioner in the Court of Appeal before the single judge was against the conviction. These grounds are as follows:

1. That the learned Judge erred in fact when she failed to properly put the defence case to the assessors in terms of physical evidence lifted from the scene not corroborating the caution interview accounts.
2. That the learned Judge erred in law when she failed to properly direct the assessors on the areas of reasonable doubt raised by the defence.

[15] The above grounds were covered by the learned trial judge in her summing up. It was evident that the petitioner actively participated in committing the crime, in that she brought

the second knife from the kitchen and gave it to Mohammed Sahid when he asked for another knife. It was also evident that the petitioner tied the deceased's legs up, on the instructions of Sahid, with a piece of cloth.

[16] Learned trial judge properly and adequately directed the assessors of all the defences taken by the defence including intoxication, provocation, self-defence, and the unsworn statement given by the petitioner. The trial judge also adequately directed the assessors on the evaluation of the caution interview statement.

[17] The petitioner was found guilty of Murder, in that she knowingly aided and abetted Sahid who was the 1st accused in the offence of murder. The single judge in the Court of Appeal therefore was correct when he exercised his powers of dismissal at that stage.

[18] The petitioner in her application to this court dated 03/02/2016 has said that she had no intention to kill the deceased, and the learned Justice of Appeal erred when he said that it was a hopeless appeal. She submits that the deceased died due to the injuries inflicted by Sahid.

[19] The grounds of appeal set out in the petitioner's application in this case do not meet the stringent threshold criteria set out in section 7(2) of the Supreme Court Act No. 14 of 1998.

[20] Although in this court she has submitted against the sentence, no grounds were pursued against the sentence in Court of Appeal by the petitioner

Conclusion

[21] The single judge in the Court of Appeal was right when he concluded that the appeal was hopeless and that it was vexatious or frivolous. There is no basis for this court to grant enlargement of time. Therefore the court will not grant an extension of time for the petitioner to make his application for special leave to appeal.

Marsoof J

I agree with the reasons and the conclusion reached by Fernando AP.

Hettige J

I also agree with the reasons and the conclusion of Fernando AP.

Orders of the Court

1. *Enlargement of time for lodging the petition is refused.*

2. *The application for Special leave to appeal is refused.*

3. *Order of the single judge of the Court of Appeal dismissing the appeal is affirmed.*

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Hon. Justice Priyantha Fernando
Acting President of the Supreme Court

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Hon. Justice Saleem Marsoof
Justice of the Supreme Court

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Hon. Justice Sathyaa Hettige
Justice of the Supreme Court

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