IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. CAV0025 of 2015
[On Appeal from the Court of Appeal No. AAU0109 of 2007]

BETWEEN: **MOHAMMED SAHID**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Chief Justice Anthony Gates**
President of the Supreme Court
The Hon. Mr. Justice Sathyaa Hettige PC
Judge of the Supreme Court
The Hon Mr. Justice Brian Keith
Judge of the Supreme Court

Counsel: **Mr. M. Yunus for the Petitioner**
Ms S. Puamau for the Respondent

Date of Hearing: **Wednesday 6th April 2016**

Date of Judgment: **Thursday 21st April 2016**

JUDGMENT

Gates P

[1] The Petitioner seeks to appeal the decision of the single judge delivered on 23rd May 2011. Marshall J dismissed the appeal pursuant to section 35(2) of the Court of Appeal Act on the basis that it was "vexatious" in the sense that it was unarguable and without hope of success. The dismissal of the appeal at the leave stage meant that any further challenge could only be heard if special leave were granted on a petition to the Supreme Court.

[2] At the outset of the hearing of the petition for special leave to this court, the petitioner's counsel informed the court that the grounds against sentence were being abandoned and would not therefore be argued.

Factual Background

[3] On the night of 27th and 28th November 2005 the petitioner and his partner and co-Accused Ms Selina Vosavakatini came to the flat of Sarwan Kumar in Nadera. They had met earlier at a nightclub in Suva. Arising out of that visit, Mr. Kumar was stabbed 38 times by the petitioner. These wounds penetrated the heart and lungs of the victim, from which wounds he soon succumbed. Ms Vosavakatini had tied up the victim's legs beforehand and fetched a second knife both acts of assistance at the petitioner's request. The first knife apparently had become less effective during the frenzied attack on the victim.

[4] The petitioner said he had drunk 4 mixes of methylated spirits, then met up with the deceased at the nightclub. He shared with the others 8 bottles of beer at Kumar's flat. When Kumar tried to have sex with the co-Accused Ms Vosavakatini, the petitioner objected. There was an exchange of punches with the deceased and the petitioner reached for the kitchen knife and stabbed the deceased with it. Prior to that Kumar's legs had been tied.

[5] The petitioner said afterwards they had run away to Ms Vosavakatini's aunt's place in Koronubu, Ba. The caution interview and charge statements allegedly made to police were, according to the petitioner, false. They did not complain to the JP about police misconduct because he said they were frightened.

[6] In the trial both Accused gave unsworn statements. They were not therefore subjected to any cross-examination on their account of the incident.

[7] The prosecution said the statements of what had happened in the flat made by the petitioner were true. He had stabbed Kumar 38 times because he intended to kill him.

The ferocity of the attack rebutted any suggestion of self-defence. They had gone to Kumar's house to sell Ms Vosavakatini for sex, and to steal what they could.

[8] The defence had argued that the petitioner was provoked by the attempted rape, and he had either been provoked to use the knife or was acting in self-defence. Also he was so intoxicated he could not form the intention to kill.

[9] Both Accused were convicted of murder under the Penal Code. The petitioner was sentenced to life imprisonment and a minimum term, prior to being eligible for parole, was fixed by the judge at 18 years. The minimum term for Ms Vosavakatini was fixed at 13 years.

Enlargement of Time Application

[10] The petitioner made a timely appeal to the Court of Appeal. Amended grounds were later filed by counsel, who is not before us today. The two grounds against conviction were:

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.

[11] Neither of these grounds were drafted satisfactorily. They did not alert the Respondent or the Court of Appeal as to the nature of complaint about the trial proceedings in the High Court. It has been said many times by appellate courts that grounds are too often filed which do not assist the appeal process. They are too wide and too vague. It is not good practice to illuminate errors in the trial proceedings, only at the stage where written submissions are filed in support of the grounds of appeal. At the outset grounds should pinpoint accurately where the court and the Respondent need to focus their attention. These should appear in the Notice of

Appeal [Court of Appeal] or the Petition [Supreme Court]. Straightaway and unquestionably the Respondent will then know what the appeal is about.

[12] Appellate courts have been more indulgent of the papers, sometimes mere letters, filed by incarcerated indigent unrepresented appellants. But when counsel intervene to assist and draft grounds, they must do so to make clear the issues of complaint. In this case, counsel intervenes to assist only with argument in a case where the petitioner himself has filed an unsophisticated informal petition in letter form. I make no criticism of counsel for the petitioner in this regard who has conducted himself properly.

[13] It was only on 22 September 2015 that the petitioner applied to the Supreme Court for special leave. That lodgment was late by 4 years 2 months and 18 days.

[14] The courts in these circumstances possess a discretion to enlarge time so as to hear a meritorious appeal or petition. Several cases in this jurisdiction have dealt with the way the courts should evaluate these applications. Though the courts will not be rigid in examining certain factors, it has been established that fairness is best observed by following a principled approach: **Kumar v. The State**; **Sinu v. The State** CAV0001/09, CAV0001/10 21st August 2012.

[15] In his affidavit in support of his application to seek enlargement of time, the petitioner says:

> "4. I am not that well educated as such this affected my ability to seek further legal aid assistance from the Legal Aid Commission and/or any other private lawyers.
>
> 5. Since my appeal against conviction and sentence was dismissed by the Court of Appeal as hopeless, vexatious and frivolous, I thought that was the end of proceeding unless last year when I was told by inmates that I can appeal against the decision of the Court of Appeal in the Supreme Court."

[16] The delay period is considerable. Such a lengthy period weighs against the exercise of a discretion in a petitioner's favour. But even the need for finality in a justice

system, including that of criminal justice, can be displaced by a case with an appeal point that must be addressed.

[17] The petitioner's explanation that it was only after 4 years or so, that he discovered he could appeal further is unsatisfactory. Even those who are not well educated or articulate appear before us in the appellate courts, unassisted by lawyers, yet bring searching and up to date points of law to be argued. Some of these arguments could not have come from the inarticulate petitioners. But clearly there are in the prisons persons capable of alerting an inmate of his or her appellate rights. The petitioner's explanation for the delay is not acceptable.

[18] There are 2 amended grounds proposed accompanying this application for enlargement of time for the appeal. I have already set out the grounds argued before the single judge. To this court, it is now said that the single judge:

> (a) erred in dismissing the appeal at that stage as "vexatious" under section 35(2) of the Court of Appeal Act, thus preventing the matter proceeding to the full court; and
>
> (b) that the second ground, that the trial judge had "failed to properly direct the assessors on the areas of reasonable doubt raised by the defence"."

[19] In considering the enlargement application, the court looks to see whether:

> (a) there is a ground of merit justifying the appellate court's consideration, and
>
> (b) where there has been substantial delay [as here] nonetheless is there a ground of appeal that will probably succeed.

[20] The answer to both of these questions, must be "no."

[21] The issue referred to in Ground 1 is that of the 2nd knife or the bunch of keys not having been found by the police. However this was covered by the trial judge in her summing up. It was a matter, not greatly significant to the main issues, though the assessors had been reminded of it by the judge. It was not necessary to do more. This

ground had no chance of succeeding and the single judge was correct in so assessing its worth.

[22] The defences of intoxication, provocation and self-defence were all explained clearly in the summing up. The questions on those issue were put in simple form to the assessors so that they could decide each one of them. In many ways this was a model summing up. It covered all of the relevant issues, succinctly, yet fully and accurately, both on facts and law.

[23] The single judge in the Court of Appeal was right therefore to conclude that he needed to exercise his powers of dismissal at that stage. He did so, and he did so correctly.

Conclusion

[24] There is no compelling injustice here. After a delay of over 4 years in lodging the appeal, without a worthy or acceptable explanation, and with no error in the trial indicated demanding further scrutiny, this court is unwilling to grant an extension of time for the petition.

[25] In the result, the orders of the Court are:

[1] Enlargement of time for lodging the petition is refused.

[2] Special leave to appeal is declined.

[3] The order of the single justice of the Court of Appeal dismissing the appeal to the Court of Appeal is affirmed.

Hettige J

[26] I concur with the Judgment of His Lordship, Gates P and the reasoning and conclusions that special leave must be refused.

Keith J

[27] I have read a draft of the judgment of the Chief Justice. I agree with it, and there is nothing which I can usefully add.

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Hon. Justice Anthony Gates
President of the Supreme Court

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Hon. Justice Sathyaa Hettige PC
Justice of the Supreme Court

SUPREME COURT OF FIJI
SUVA

.....
Hon. Justice Brian Keith
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

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