IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 003 OF 2005
[Court of Appeal No: AAU 003 of 2002]

BETWEEN	:	**ASAELI LESU**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Mr. Justice Saleem Marsoof, Justice of the Supreme Court**
		The Hon. Mr. Justice Suresh Chandra, Justice of the Supreme Court
		The Hon. Mr. Justice Priyantha Jayawardena Justice of the Supreme Court
Counsel	:	**Ms. L. Vateitei for the Petitioner** **Mr. M. Korovou for the Respondent**
Date of Hearing	:	**11 April 2017**
Date of Judgment	:	**20 April 2017**

JUDGMENT

Marsoof J

[1] I am in agreement with the judgment of Hon. Chandra J, which I had the opportunity to read in draft. I also agree with the proposed orders of Court.

Chandra J

[2] The Petitioner seeks special leave to appeal against the judgment of the Court of Appeal dated 14 February 2003.

[3] The Petitioner was charged with one count of murder contrary to section 199 and 200 of the repealed Penal Code (Cap.17). One of the three Assessors found the Petitioner not guilty of murder but guilty of manslaughter, the other two found him guilty of murder. The learned Judge accepted the opinion of the majority and he was convicted on 29 November 2001 and sentenced to life imprisonment.

[4] The Petitioner appealed the decision of the Court of Appeal and the Court of Appeal dismissed the appeal by judgment dated 14 February 2003.

[5] The Petitioner had by letter dated 15 August 2003 sent to the Registrar of the Supreme Court sought leave to appeal out of time against the judgment of the Court of Appeal.

[6] There is nothing in the record of the case to indicate as to the outcome of the said application seeking leave to appeal and therefore it is uncertain whether that application was withdrawn or abandoned or heard and dismissed.

[7] The Petitioner by notice dated 14 December 2016 sought special leave to appeal out of time against his conviction and by notice dated 16 December 2016 filed the grounds of appeal that he was relying on.

[8] In his notice seeking leave to appeal out of time he has set out the following:

> "That the principal ground for appeal out of time is the poor and insufficient legal advice he had received after the imposing of life sentence. That he is totally relying on the grounds of appeal to justify his application seeking leave to appeal out of time. "

[9] The grounds of appeal set out in his notice are:

1. That the learned trial Judge erred in law by failing to effectively canvass the defence case before the assessors during the summing up thereby encumbering the petitioners right to a fair trial.

2. That the learned trial Judge erred in law by failing to direct the Assessors on Section 203 of the Penal Code in respect to the issues of provocation in dealing with the defence case.

3. That the learned trial Judge erred in law by failing to direct the Assessors about the contradictory and inconsistent evidence of witnesses.

4. That the learned trial Judge erred in law by failing to leave the issues of voluntariness of the confession to the Assessors to decide during summing up.

5. The learned trial Judge erred in failing to rectify the deficiencies in the summing up regarding the issue of provocation.

6. That the Court of Appeal erred in their analysis about the failure of the prosecution to establish beyond reasonable doubt that the Petitioner had acted with malice aforethought as required by section 199 of the Penal Code.

Consideration of the present application

[10] In seeking special leave to appeal, a Petitioner has to meet the threshold set out in section 7(2) of the Supreme Court act, 1998 which provides:

> "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 could otherwise occur."

[11] This provision has been considered in several decisions of the Supreme Court and it is well settled that the threshold is very high when considering applications for special leave to appeal to the Supreme Court and that such leave is not granted as a matter of course.

[12] In the present case the burden on the Petitioner is even higher as his application seeking leave to appeal is out of time by almost 14 years. The Petitioner has to justify his application for leave to appeal out of time as well as meet the threshold set by s.7(2) of the Supreme Court Act.

[13] In **Kumar v State**; **Sinua v State** [2012] FJSC 17; 2 CAV 0001.2009 (21 August 2012) the Supreme Court in dealing with the question of extension of time to appeal set down the following five factors that have to be considered :

(i) the length of the delay;

(ii) The reason for the failure to file within time;

(iii) Whether there is a ground of merit justifying the appellate courts 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?

[14] In the present case the delay is almost 14 years as the Court of Appeal judgment was delivered on 14 February 2003 which by all means is a substantial delay.

[15] The reasons given for the delay has been stated by the Petitioner to be the insufficient advice he had received after he was convicted. His life sentence was handed down by the High Court and he had appealed against his conviction to the Court of Appeal and had Counsel to represent him at the hearing of the appeal who had argued his appeal. After the Court of Appeal judgment had been delivered on 14 December 2003, he had on his own filed a notice of appeal by way of writing dated 15 August 2003 to the Registrar of the Supreme Court indicating his intention to seek leave to appeal to the Supreme Court. He had followed up that notice with supplementary notices from time to time up until 2005 but it is not clear as to what the final outcome of that application was. Although his notice dated 15 August 2003 was late in terms of the Court of Appeal judgment of 14 February 2003, there was no substantial delay as in the present application.

[16] The reasons for the delay are not convincing as he apparently was aware that he could appeal against the Court of Appeal judgment and he had in fact taken steps towards same, the outcome of which is not known.

[17] Although the delay is substantial and the reasons for the delay are not convincing, it is necessary to see whether there is a ground of merit justifying consideration. This brings about the consideration of the grounds of appeal set out by the Petitioner.

[18] Although the Petitioner had set out 5 grounds of appeal, Counsel appearing for the Petitioner at the hearing stated that she was relying only on the grounds relating to provocation.

[19] A brief consideration of the facts would be relevant in determining whether the grounds relating to provocation have merit.

[20] The facts set out in the judgment of the Court of Appeal are adopted herein. The Petitioner was married to Kolora Lewatu in 1994, but the couple had separated in 1996, and thereafter lived separately. Since 1996 Kolora was living with the deceased, Peter

Shaw, in a defacto relationship and had a child by him. The couple lived with Kolora's mother in Sabeto village. The Petitioner lived nearby. At about 3.30 a.m. on 11 July 1999, the Petitioner returned from Nadi Town. He had spent time drinking at a night club with fiends. He then went to his house, armed himself with a kitchen knife, and went straight to Kolora's mother's house. The Petitioner first broke some window louvre blades in the house, gained entry into the house through the door, and stabbed the deceased, who was inside, four times with the kitchen knife., thereby causing serious injuries which resulted in his death. One of the four stab wounds to the abdomen was so serious that it exposed the deceased's intestine. According to the pathologist who conducted the autopsy on the deceased, death resulted from excessive loss of blood from the stab wounds. After hearing the sound of breaking glass, Luke Toroca, a villager, ran to Kolora's mother's house, which was some 22 metres away from the house he was in. He saw the Petitioner enter the house, even as he tried to pull him back, and stab the deceased four times with the kitchen knife. He held the Appellant's knife-wielding hand, pulled it down, and asked Penioni Dawai, who had by now arrived at the scene, to take the knife away from the Petitioner which the latter did. According to Luke Toroca, the deceased punched the Petitioner after he was stabbed the first time; when cross examined, he denied that the deceased struck the Petitioner first, and insisted that the deceased struck the Petitioner only once. Penioni Dawai gave the knife to the Police later that day. Penioni Dawai punched the Petitioner before taking the knife away. After he was injured the deceased ran to Penioni Dawai's house, clutching his stomach and crying "I am hurt," "I am hurt". He was bleeding profusely and crying in pain. Later that morning he was taken to Lautoka Hospital where he died.

[21] Later that day, the Petitioner had gone to the Sabeto Police Station, where he was questioned and in his recorded interview he had told that he had arrived at the house of Siteri Dawai, he had knocked at the window and was surprised when the deceased had spoken out, and then he had punched the louvre blades and broken them. He had still beeen standing when he had seen the deceased running towards the front door and opening it. The deceased had thrown a punch at him, that they had an open fight inside the house and he took the kitchen knife and stabbed the deceased.

[22] When formally charged, the Petitioner had stated that he took the knife from his home and gone to the house of Kolora and that he was planning to frighten the deceased. He admitted that it was the same knife that he had brought with him that he had used to stab the deceased and that he had not meant to kill the deceased.

[23] At the trial, at the close of the prosecution case, the Petitioner chose to make an unsworn statement.

[24] Before the Court of Appeal the main ground of contention advanced on behalf of the petitioner was that the learned trial judge misdirected the assessors by not adequately explaining the defence of provocation during the course of his summing up thereby leading to a verdict inconsistent with that which would have been reached had an adequate explanation been given.

[25] The Court of Appeal having considered the said ground in detail and having considered the relevant authorities concluded thus:

> "We have reviewed the facts of this case. We do not think there was credible evidence capable of supporting a finding of provocation, and the issue should not have been left to the assessors. There was no evidence of any "wrongful act or insult" offered by the deceased to the appellant to induce him to commit the kind of assault that he did non the deceased. The deceased was unarmed, and came out of his bedroom after the appellant broke the louvre blades. He did not say or do anything that be called provocative. True, the appellant was still married to Kolora, but they had separated three years earlier. The fact that the deceased lived in defacto relationship with Kolora and had a child by him was known to the appellant. The appellant had accepted the situation. He went to the house where the deceased lived in the early hours of the morning when mostpeople are in bed, sleeping. He was armed. There is no rational explanation why the appellant took the knife with him, unless he intended to use it on the deceased, in the way he did. The deceased did not punch the appellant until he was struck the first blow with the knife, a perfectly natural and predictable

> response. Mr. O'Driscoll, Counsel for the appellant, submitted that finding his wife with the appellant in bed when he had earlier arranged to spend the night with her constituted "such wrongful act or insult" as to constitute provocation. We cannot agree. We do not think in the circumstances of this case that the circumstances of this case that the alleged provocation was such as would deprive a reasonable man of the power of self-control such as to induce him to commit the kind of violence which the appellant inflicted on the deceased. There was a large element of premeditation in what the appellant did. There was some evidence that the appellant had attacked the deceased on two previous occasions. The Appellant stabbed the deceased four times causing serious injuries.
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> Having decided to leave the issue with the assessors, the learned Judge failed to direct them that it was not for the appellant to prove that he was provoked, but for the prosecution to prove beyond reasonable doubt that there was no provocation. To that extent the summing up was deficient. Furthermore, although the learned Judge read section 2014 of the Penal Code to the Assessors, he did not either read or explain section 203 to them.
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> Neither of these omissions have caused any injustice to the appellant. The Learned Judge quite unnecessarily left the issue of provocation to the assessors The deficiencies in the summing up are irrelevant."

[26] Counsel for the Petitioner argued the same ground relating to provocation before us and placed the argument that the learned trial Judge had failed to direct the assessors on section 203 of the Penal Code as the Petitioner raised the issue of provocation during the trial.

[27] In the written submissions filed by the Petitioner it was submitted that the critical issue was whether there was evidence fit for the consideration of the deceased in the Petitioner's wife's house and their sexual activities were done "in the presence of the petitioner" and whether Kolora was a person under his immediate care or to whom he stands in a fraternal self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act of insult is done or offered.

[28] Counsel for the State in his submissions drew our attention to the summing up of the trial judge on the issue of provocation. The learned trial Judge (at p.97 of the Record) in his summing up to the Assessors stated :

> "I must direct you on the law of provocation. Before you consider whether the accused acted under provocation you must first be satisfied beyond reasonable doubt that the accused killed Peter Shaw with malice aforethought. If you are so satisfied then you must consider whether he was provoked into doing what he did. If he was provoked then he is not guilty of murder but guilty to a reduced charge of manslaughter.
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> According to our Penal Code section 204, provides for the basic elements of a defence of provocation. (Read Section 204). It arises when the act causing death is done in the heat of passion caused by sudden provocation and before there is time for passion to coll. It therefore consists of 3 things:
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> a) An act of provocation
> b) The loss of self control and
> c) Retaliation proportionate to the provocation.
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> It is available as a defense only in cases of a sudden and temporary loss of self-control of such a kind as to make the accused for the moment not in control of his/her mind. The relationship between the gravity of the provocation and the way an accused retaliates is critical in assessing the defence of provocation. It is important to recognize that both these factors need to be assessed by the social standards of today. In this case what was the provocation, if any offered, offered by the deceased. Was sleeping with the accused's legal wife sudden provocation for the accused. The evidence of PW2 and others suggest that Kolora (accused's legal wife) was living with the deceased for sometime. They had a child out of that relationship. They must have been sleeping together previously to have a child. The accused knew about this. On the day in question he saw the deceased with Kolora. In his caution interview he stated that he went and got the kitchen knife to scare the deceased. He went to the bedroom window and broke the louvers. He knew in advance that the deceased and Kolora were sleeping in the house. It was not a sudden discovery. Given the evidence it is up to you to decide whether there was sudden provocation. If finding his wife in bed with the deceased was provocative, was the stabbing with the kitchen knife proportionate retaliation. Again this is matter for you to decide."

[29] Section 203 and 204 of the Penal Code provide:

> S.203 - "When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."
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> S.204 – The term "provocation" means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stand in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

[30] Counsel for the State submitted that it was clear from the summing up that the learned trial Judge had discussed section 203 in his direction to the assessors which was so as seen from his summing up cited above. Although the summing up does not refer to section 203, it is clear that the learned trial Judge has set out the principles laid down in section 203 in his summing up while referring to section 204.

[31] Although the summing up of the learned trial Judge does not recite section 204 verbatim, he has read the section to the Assessors. A reading of the direction shows that he has co-related the relevant evidence to the essentials laid down in section 204 regarding provocation. As to the submission whether Kolora was under his care and whether the fact that the deceased was found in the house of Kolora at the time of the incident were matters that led to the provocation, it was clear from the evidence that the Petitioner was not living with his wife, Kolora for nearly three years, that she had a defacto relationship with the deceased and she had a child from that relationship. The learned trial Judge while directing the Assessors on provocation had adverted to these items of evidence. In those circumstances the submission that Kolora was a person under his care is not sound and therefore is devoid of merit and the direction of the learned trial Judge cannot be said to be inadequate.

[32] Counsel for the State further submitted that the law on provocation has moved on since the decision of the Court of Appeal and cited the decision in **Pravin Ram v The State** 2012 FLR Vol.2 p 34 to the effect that the reasonable man's test is no longer applicable but the ordinary man's test in the accused's position at the time of the offending must now prevail. That the direction must be in regard to whether the ordinary man in the accused position would have been provoked by the wrongful action of the deceased. Whether the provocation was sudden and the accused did not have time to cool off.

[33] In **Pravin Ram** (supra) at p44,

> [39] Before considering the provisions of the Penal Code and the local decisions, it might be instructive to look at the decision of the House of Lords in **Mancini v Director of Public Prosecutions** [1942] AC 1 which fairly well settled some of the contentious issue in the common law of provocation, in the context of a factual scenario which had some resemblance to what occurred in the instant case. First, the provocation had to be such as to temporarily deprive the person provoked of the power of self-control, as a result of which he committed the unlawful act which caused death. Secondly, the provocation had to be such as would have made a reasonable man act in the same way. These two requirements are commonly called the subjective and objective elements of the defence respectively.
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> [40] In **R v Duffy** [1949] 1 All ER 932 the gist of the defence of provocation was encapsulated by Devlin J. in a single sentence in his summing-up, which was afterwards treated as a classic direction to the jury.
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> > 'Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.'
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> [41] It must be noted that two decisions of the House of Lords subsequent to Mancini added glosses to these principles. First, in **Holmes v Director of Public Prosecutions** [1946] AC 588 it was decided that mere words could not constitute provocation, whatever their effect upon the 'reasonable man' is a wholly impersonal fiction

to which no special characteristic of the accused should be attributed. Difficulties involving the application of the test of the 'reasonable man', in the context of the defence of provocation, have also been stressed in subsequent English decisions.

[42] Section 203 of the Fiji Penal Code, Cap 17, closely following the pre-1957 English common law principles highlighted above, provides that-

> 'When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by *sudden provocation* as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only. (Emphasis added).

The above quoted provision of the Penal Code has to be read with the definition of provocation found in s204 of the Penal Code. The latter section has explained that, 'except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered. It is worth noting that the Fiji Penal Code has avoided the problems associated with the application of the test of the 'reasonable man' by adopting the more acceptable test of the 'ordinary person'.

[34] The Court of Appeal concluded that there was a misdirection by the learned trial Judge but held that the said misdirection was irrelevant as the facts did not support a finding of provocation. The Court of Appeal held that there was no substantial miscarriage of justice caused to the Petitioner.

[35] From the above it would be seen that although the Court of Appeal was of the view that according to the evidence at the trial there was no need for the learned trial Judge to given a direction to the Assessors on provocation, according to **Pravin Ram** (supra), there was evidence to raise the issue of provocation which the defence did. It was therefore the duty of the learned trial Judge to direct the Assessors on the issue of

provocation which he did. In that sense it cannot be said that there was no necessity for the learned trial Judge to direct the Assessors on the issue of provocation.

[36] Having considered that the learned trial Judge had discharged his duty by directing the Assessors on provocation the question that has to be considered is whether it was adequate and as observed in **Pravin Ram** (supra) whether the proper test had been applied. The learned trial judge had explained the effect of section 203 of the Penal Code to the Assessors and had thereby directed them that the provocation had to be determined on the basis of social standard of today and referred to section 204 of the Penal Code which refers to the standard of the ordinary man, which is in keeping with the observations made in **Pravin Ram's** (supra) case.

[37] In the above circumstances, as the directions given by the learned trial Judge to the Assessors being adequate the ground raised by the Petitioner in support of his application seeking leave to appeal out of time becomes devoid of merit.

[38] Since the ground urged by the Petitioner is devoid of merit, the next factor in Kumar's decision regarding the granting of leave for an application out of time, there is no likelihood that this ground of appeal would succeed.

[39] As regards the fifth factor in Kumar's decision regarding prejudice to the Respondent, the delay is almost 14 years and it quite clear that it would cause prejudice to the Respondent if leave is granted to the Petitioner to appeal out of time.

[40] Since the Petitioner has failed to satisfy us that his application to appeal out of time should be allowed, his application that special leave to appeal to the Supreme Court should be granted in terms of S.7(2) of the Supreme Court would also fail.

[41] The application for special leave to appeal to the Supreme Court is refused and the conviction and sentence imposed on the Petitioner is affirmed.

Jayawardena J

[42] I agree with the conclusion, findings and the orders of Court.

Orders of Court:

(1) The application for special leave to appeal to the Supreme Court out of time is refused.
(2) The appeal of the Petitioner is dismissed.
(3) The conviction and sentence of the Petitioner is affirmed.

Hon. Mr. Justice S. Marsoof
JUDGE OF THE SUPREME COURT

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

Hon. Mr. Justice P. Jayawardena
JUDGE OF THE SUPREME COURT

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