IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0015 of 2018
[Court of Appeal No: AAU 0064 of 2014]

BETWEEN: **PRIYA DARSHANI**

Petitioner

AND: **THE STATE**

Respondent

Coram: **Hon. Justice Suresh Chandra, Judge of the Supreme Court**
Hon. Justice Chandra Ekanayake, Judge of the Supreme Court
Hon. Justice Brian Keith, Judge of the Supreme Court

Counsel: **Ms. S. Nasedra for the Petitioner**
Mr. S. Vodokisolomone for the Respondent

Date of Hearing: **19 October, 2018**

Date of Judgment: **1 November, 2018**

JUDGMENT

Chandra, J

[1] The Petitioner was charged with two counts of murder contrary to Section 237 of the Crimes Act and three counts of Attempted Murder contrary to Sections 44 and 237 of the Crimes Act.

[2] The Petitioner pleaded guilty to the charges and was convicted and sentenced to life imprisonment with a non-parole period of 20 years.

[3] The Petitioner appealed against the conviction and sentence, but subsequently she withdrew her appeal against conviction.

[4] The Court of Appeal varied the sentence and ordered that the Petitioner was to serve a minimum term of 17 years before a pardon could be considered.

[5] The Petitioner is seeking special leave to appeal against conviction and sentence on the following grounds:

1. That the Learned Trial Judge erred in law and in fact in failing to consider the circumstances of the case and the resulting need for a psychological report to consider any background assessment of the Petitioner which as a result was not considered to determine her mental state at the time of trial.

2. That the Learned Trial Judge erred in failing to consider the need for a psychological report to consider any background assessment of the Petitioner which as a result was not considered as a mitigating factor in favour of the Petitioner.

The first ground relates to the conviction of the petitioner while the second ground relates to her sentence.

Jurisdiction of the Supreme Court

[6] Section 98(3) of the Constitution provides exclusive jurisdiction to the Supreme Court to hear and determine appeals from final judgments of the court of Appeal subject to such requirements as prescribed by law.

[7] Section 98(4) provides that an ap[peal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

[8] Section 79(2) of the Supreme Court Act No.14 of 998 provides:

> *"In relation to a criminal matter the Supreme Court must not grant special leave to appeal unless*
>
> *a. A question of general importance is involved;*
> *b. A substantial question of principle, affecting administration of criminal justice is involved; or*
> *c. Substantial and grave injustice may otherwise occur."*

[9] The threshold for granting special by the Supreme Court is very high as set out in *Livia Lila Matalulu & Anor v The Director of Public Prosecutions* [2003] FJSC 2; (17 April 2003):

> *"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice."*

[10] In the present application the two grounds of appeal which have been advanced by the Petitioner are new grounds and were not argued before the Court of Appeal.

[11] In *Eroni Vaqewa v. The State* [2016] FJSC 12; CAV0016.2015 (22 April 2016), it was acknowledged that although the Supreme Court has powers to entertain fresh grounds of appeal which were not raised in any Court below, it will not be entertained ***"unless its significance upon the special leave criteria was compelling": [at para. 28].***

[12] In considering the issue of whether new issues should be allowed to be argued in the appellate court when it was not raised in the trial Court Justice L' Heureux-Dube in *R v. Brown*, [1993] 2 SCR 918, 1993 CanLii 114 (SCC) in his dissent said:

> *"Courts have long frowned on the practice of raising new arguments on appeal, Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit*

new grounds to be raised on appeal. Appeals on questions of law alone are more likely to be received, as ordinarily they do not require further findings of fact. Three prerequisites must be satisfied in order to permit the raising of a new issue,..., for the first time on appeal: first there must be sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial, and third, the court must be satisfied that no miscarriage of justice will result...".

Factual Background

[13] The Petitioner who was 22 years old had lived in a de facto relationship with Mokai Falakiko Patolo who also had a de facto relationship with Taufa Patolo who was 33 years old. The Petitioner had one child in her relationship with Patolo while there were four children in the relationship with Taufa Patolo.

[14] On 18 December 2013 at 10.00 a.m. the Petitioner went to Viseisei, Lautoka to the house where Taufa Patolo and her 4 children were staying. Upon seeing the Petitioner, Taufa Patolo (the deceased) had an argument with the Petitioner on why she had come to her house. During the course of the argument the Petitioner picked up a crow bar which was lying on the ground outside the house and struck Taufa Patolo on her head. Taufa Patolo was carrying her 7 months old baby, Sarah Patolo, at the time she was struck and they both fell to the ground. The Petitioner struck Taufa Patolo several times on the head with the crow bar and then struck the 7 months old baby on her head. The Petitioner then pursued the other 3 children who were inside the house. She struck each of them with the crow bar and thereby caused serious injuries to each of them. Taufa Patolo and her 7 months old baby died instantly and the three children lay in the house seriously injured. The Petitioner left the house. Neighbours subsequently alerted Mokai Patolo and they heard the commotion and saw the family injured in and around the house. The neighbours apparently saw the Petitioner leaving Patolo's residence carrying her own son.

Consideration of the present application

[15] The Petitioner had pleaded guilty to all the counts before the High Court. Her appeal to the Court of Appeal as set out in the amended notice of appeal was on the following grounds:

> *"1. The learned trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that 20 years non-parole was excessive.*
>
> *2. The learned trial Judge erred in law when he sentenced the Appellant to 20 years non-parole period contrary to section 237 of the Crimes act 2009."*

[16] As stated above, the Court of Appeal by its judgment of 1 June 2018 varied the sentence of the Appellant and imposed a minimum term of 17 years before a pardon could be considered.

[17] At no stage either before the High Court nor before the Court of Appeal was any issue raised on behalf of the Petitioner regarding the need to obtain a psychological report. Although this argument has been raised in this Court, no such report has been furnished. Of course, the question would have to be considered if such a report was filed whether this Court would consider it at this stage.

[18] It has been submitted on behalf of the Petitioner citing section 104(1) of the Criminal Procedure Act that the High Court could have made enquiries which were necessary at the outset of the High Court proceedings.

[19] Section 104(1) of the Criminal Procedure Act stated:

> *"When, in the course of a trial at any time after a formal charge has been presented or drawn up, the court has reason to believe that the accused person may be of unsound mind so as to be incapable of making a proper defence, it shall inquire into the fact of such unsoundness and may adjourn the case under the provisions of section 223 for the purposes of –*
>
> *(a) Obtaining a medical report; and*
>
> *(b) Such other enquiries as it deems to be necessary."*

[20] It was submitted on behalf of the Petitioner that the Court could have drawn some insight on the need of a psychological background report given that the circumstances of the offending revolved around what would be commonly constituted as a "love triangle" given that the deceased and the Appellant were both de-facto partners of Mokai Falakiko Patolo, the pressure that would follow through from having such relationships is what should have drawn the Court to make the necessary enquiries.

[21] Counsel for the Petitioner cited the decision in *Bonaseva v State* [2015] FJSC 12; CAV0022.2014 (20 August 2015) to draw support for her submission. In *Bonaseva*, in the judgment of the Supreme Court, reference was made to an observation of the sentencing Judge to the effect that the Appellant in that case had been under heavy psychological pressure from a romantic relationship breakdown for which he had been undergoing counseling. However, there is no indication in the said case about the Court calling for a psychological report. Therefore the citation of Counsel has no relevance to the present case. In any event it would appear that it had been brought to the notice of Court on behalf of the Appellant in *Bonaseva* that the Appellant had been under heavy psychological pressure whereas in the present case there has been no reference to any psychological pressure on the Petitioner.

[22] In the mitigation submissions made on behalf of the Petitioner in the High Court before sentencing there is reference to the fact that "the offence was committed as a result of a combination of anger and weakened self control". There is no reference at all of the Petitioner having acted under psychological pressure.

[23] Therefore Counsel's submission relying on S.104(1) of the Crime Proceedings Act does not assist the Petitioner in the present case. It is essential in terms of the section that "the court has reason to believe" that the accused person may be of unsound mind so as to be incapable of making a proper defence. There must be necessary material placed before Court, for the court to arrive at such a conclusion which in the present case was not available.

[24] Counsel has also submitted a decision of the Supreme Court of Nauru, *CR1029 v The Republic* [2017] NRSC 75; Refugee Appeal Case 112 of 2015 (22 September2017). In that case the mental health of the Appellant was a 'live issue' which therefore is quite distinct from the present case, as the mental health was not raised at any stage in the case before the High Court where she pleaded guilty. Therefore that submission also does not assist the Petitioner.

[25] In the trial before the High Court, the Petitioner was represented by Counsel. Her Counsel did not raise that the Petitioner needed to be evaluated for any mental health condition. As submitted by Counsel for the Respondent, the Petitioner did not raise anything in her defence, which may have inferred or raised suspicion that her mind was affected by a disease or that she needed psychiatric evaluation.

[26] In any event, it would impose an undue burden on a Court to consider the mental health of an accused person who is charged with a serious crime committed under bizarre circumstances where such issues relating to the mental health of the accused have not been brought to the notice of Court.

[27] Although, the grounds of appeal raised on behalf of the Appellant were new grounds, this Court considered them to see whether there had been any miscarriage of justice. However in considering the manner in which the Appellant has been dealt with both in the High Court and the Court of Appeal this Court does not see any miscarriage of justice. Further, as discussed above, the submissions made on behalf of the Appellant have no merit for the granting of special leave and therefore special leave is refused and the petition of the Petitioner is dismissed.

Ekanayake, J

[28] I have read in draft the judgments of Chandra J and Keith J. I agree with their conclusions and reasoning and with the orders proposed.

Keith, J

[29] I have read a draft of the judgment of Chandra J, and I agree entirely that special leave to appeal should be refused. I add a few words of my own to explain my own reasoning, but I gratefully adopt Chandra J's recitation of the facts and the course which the case has taken.

The application for special leave to appeal against conviction

[30] Two things make the petitioner's application for special leave to appeal against her conviction unpromising even at first sight. First, she pleaded guilty to all counts and those pleas were unequivocal. An unequivocal plea of guilty will usually be an absolute bar against an appeal against conviction. I say "usually" advisedly, because there are some circumstances where an appeal following a plea of guilty is permissible. Examples of that are where there has been an incorrect ruling on a point of law by the trial judge which gave the defendant no escape from a verdict of guilty, where the defendant pleaded guilty on the basis of advice which turned out to be incorrect, and where the appellate court has allowed fresh evidence which undermines the conviction. None of those examples apply to this case.

[31] Secondly, although the petitioner's notice of appeal to the Court of Appeal purported to appeal against her conviction and sentence, an amended notice of appeal filed on her behalf by the Legal Aid Commission, as well as the written submissions filed in support of it, sought leave to appeal only against her sentence. Indeed, if the judgment of the Court of Appeal is anything to go by, the possibility of an appeal against conviction was not raised orally either. The inescapable fact is that this attempt in the Supreme Court to challenge her conviction is being made for the first time. That presents its own difficulties as Chandra J has pointed out. A new ground of appeal can only be raised in the Supreme Court if it is truly compelling.

[32] I have concluded that this ground of appeal is some way off from being compelling. Counsel for the petitioner did not spell out how the question of the petitioner's mental health was relevant to the proposed appeal against conviction. But I acknowledge that it

would have been relevant to a possible defence of diminished responsibility under section 243(1) of the Crimes Decree 2009 because that defence arises when, at the time of the killing, a defendant is suffering from an abnormality of mind which impairs their faculties in various respects. The difficulty for the petitioner is that such a defence cannot get off the ground without a medical or psychiatric report addressing the state of her mental health when the killings took place. At present, no such medical report has been prepared. Her counsel merely asserts that such a report may provide a basis for arguing that her mental health at the time may have afforded her a defence to the two counts of murder – the defence of diminished responsibility not being available in a case of attempted murder. The evidential basis for running the defence of diminished responsibility simply does not exist at present.

[33] The basis on which the petitioner's counsel put the proposed appeal against conviction was that the trial judge should himself have raised the question of the petitioner's mental health, and then caused it to be investigated. That in effect is to argue that the judge has a *duty* to raise and investigate a defendant's mental health even when the defendant's legal team has not asked him to do that. As a matter of principle, I doubt that this is correct. It is inconsistent with a criminal trial being an adversarial process. In our system of criminal justice, the judge merely holds the ring, and leaves it to the parties to decide what avenues need to be investigated and what evidence should be called. Indeed, none of the materials on which the petitioner's counsel relied support the proposition she was seeking to advance. They were (i) section 104 of the Criminal Procedure Act 2009, (ii) the judgment of the Supreme Court in *Bonaseva v The State* [2015] FJSC 75 and (iii) the judgment of the Supreme Court in Nauru in *CRI029 v The Republic* [2017] NRSC 75.

[34] As for (i), section 104 is about the court's duty to inquire into a defendant's unsoundness of mind for the purpose of determining whether a defendant is capable of properly defending the charge. That is not the issue here: even now, it is not suggested that the petitioner may have been unfit to plead. The fact that the legislature may exceptionally have imposed a duty of inquiry on the judge in one specific context does not mean that,

absent any legislative provision about it, a similar duty is cast upon the judge for other purposes.

[35] As for (ii), *Bonaseva* is said to be support for the proposition that some recognition is given in Fiji for "psychological pressure born out of [a] romantic relationship". But in that case, the Supreme Court was doing no more than quoting, with neither approval nor disapproval, what the trial judge had said when sentencing the defendant, namely that he was "under heavy psychological pressure from a romantic relationship breakdown for which he had been undergoing counseling". For my part, I do not doubt that this can be a mitigating factor in some cases, but it is of no help when it comes to determining the existence or otherwise of the judge's duty to investigate a defendant's mental health in a murder case to see whether a defence of diminished responsibility might be available to the defendant.

[36] As for (iii), *CRI029* was an appeal from the Refugee Status Review Tribunal. The mental health of the asylum-seeker had been a live issue in the Tribunal, and the Tribunal was empowered by section 24(1)(d) of the Refugees Convention Act 2012 to require the relevant official to arrange for such medical examination of the asylum-seeker as the Tribunal thought necessary, and to provide the Tribunal with a report of that examination. Moreover, the Supreme Court at para 49 cited with approval the statement of Kirby J in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 that "the Tribunal is not a body engaged in purely adversarial proceedings. It operates according to inquisitorial procedures." It was in those circumstances that the Supreme Court held that the Tribunal should have invoked its powers to arrange for a psychiatric or psychological assessment of the asylum-seeker's mental health. So *CRI029* can be distinguished from the present case in two important respects: the proceedings in the Tribunal were inquisitorial, not adversarial, and there was a specific legislative provision dealing with the Tribunal's power to call for a medical report.

[37] It is for these reasons that I agree with Chandra J that special leave to appeal against conviction should be refused.

The application for special leave to appeal against sentence

[38] This was a troubling case. The petitioner's attack with a crowbar on a woman and her children who was her rival in love was truly shocking. We can only guess at what drove her to take such an extreme course of action, but she is likely to have been in very considerable emotional turmoil at the time. Nor do we know whether she had an underlying condition which made her particularly susceptible to jealousy or particularly vulnerable to outbursts in which she was less able to maintain her self-control. If she had, this would unquestionably have afforded her at least some mitigation. Any evaluation of her psychiatric state at the time could well have provided the judge with significant help on whether such turmoil could be said to have reduced her culpability, even if it did not go far enough to afford her the defence of diminished responsibility. In other jurisdictions such as the UK, it would, I think, be inconceivable for a judge to proceed to sentence in a case like this without seeking a psychiatric report on the defendant, even in the highly unlikely event of the defence not asking for one.

[39] The problem for the defence, though, is that the case is now in the Supreme Court, and still there is no psychiatric report on the petitioner. We are where we are. The inescapable fact is that there is *at present* no evidential basis to give effect to the possibility that there might be some mitigation available to the petitioner, which the trial judge could not take into account because he did not have such a report. If there had been such a report before us now, it would have been open to us to consider whether it would have been likely to have affected the court's view of the length of time which the petitioner has to serve in prison before she can petition the Mercy Commission to recommend a pardon. It was for that reason that in the course of the hearing I asked counsel for the State to request that the State provides funding for such a report now. *If* such a report is obtained, and *if* it provides a foundation for either a defence of diminished responsibility or for reducing the length of time which the petitioner has to serve before she can petition the Mercy Commission to recommend a pardon, it would then be open to the petitioner to apply for a review of our decision.

[40] However, because there is at present no evidential basis which allows us to give effect to either of these possibilities, I agree with Chandra J that, in addition to refusing the petitioner special leave to appeal against her conviction, her application for special leave to appeal against her sentence must also be refused.

Orders of Court:

1. Special leave is refused and the petition is dismissed.
2. The sentence of the High Court as altered by the Court of Appeal is affirmed.

Hon. Justice S. Chandra
JUDGE OF THE SUPREME COURT

Hon. Justice C. Ekanayake
JUDGE OF THE SUPREME COURT

Hon. Justice B. Keith
JUDGE OF THE SUPREME COURT