IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

Criminal Petition No. CAV 0001 of 2019
[On Appeal from the Fiji Court of Appeal
Criminal Appeal No. AAU 0096 of 2013]

BETWEEN : **ALESI NALAVE**

1st Petitioner

KELERA MARAMA

2nd Petitioner

AND : **THE STATE**

Respondent

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

Counsel : **Mr. S. Ratu for the 1st Petitioner**
Mr. T. Lee for the 2nd Petitioner
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **17 and 25 October 2019**

Date of Judgment : **1 November 2019**

JUDGMENT

Chandra J:

[1] I have read the draft judgment of Stock J and I agree with the conclusion and orders in the said judgment.

Keith J:

[2] I have had an opportunity to read a draft of Stock J's comprehensive judgment. I agree with it in its entirety. There is nothing which I can usefully add.

Stock J:

Introduction

[3] On the night of 10 June 2004, the operator of a night club in Nadi, Sheryl Li, was attacked in the office of that club. Staff found her lying on the floor in a pool of blood. She was unconscious and was taken to hospital. On 15 June 2004 she was flown to New Zealand for hospitalisation but died without regaining consciousness. On 18 June, two women were arrested for the killing, Alesi Nalave ('Nalave') and Kerela Marama ('Marama'). Nalave was then aged 19 years and Marama was aged 20. When interviewed each admitted that she had taken part in an attack upon the deceased on the night in question.

[4] The proceedings which followed have a tortured history, pockmarked by extraordinary delays, such that the hearing this month of the petitions filed by Nalave and Marama has taken place over fifteen years since their arrest and six years since they were sentenced in the High Court:

(1) In August 2005, they pleaded guilty in the High Court to the murder of Sheryl Li but the guilty verdict which was then entered was set aside by the Court of Appeal in 2008 on the ground that their pleas had not been entered voluntarily.

(2) A retrial commenced in October 2012. The defendants pleaded not guilty. However, after a few witnesses had testified, that trial came to a halt because counsel for the defendants was suspended from practice.

(3) The second retrial, with which the present petitions are concerned, commenced in September 2013. Again, the defendants pleaded not guilty. On 24 September 2013, the assessors were unanimous in finding the two defendants guilty of murder, a finding with which the trial judge agreed. Accordingly, on 25 September 2013 they were each convicted. Each was sentenced to life imprisonment. In the case of Nalave, an order was made that she serve a minimum term of 6 years; in the case of Marama a minimum term of 4 years.

(4) Both women sought leave of the Court of Appeal to appeal the convictions. The hearing before the single judge for leave was on 2 December 2014. The ruling granting leave is dated 19 June 2015. Two years passed before the hearing of the appeal in August 2017. By a judgment dated 14 September 2017, the appeals were dismissed.

(5) On 15 October 2017 Nalave filed her petition to this Court for special leave to appeal the judgment of the Court of Appeal. It has taken a further two years for her application for leave to result in a hearing before this Court.

[5] When Nalave's petition came before this Court for hearing on 17 October 2019, we were under the impression that Marama had filed no petition and that we were concerned with the case of Nalave alone. An application was made that day by Ms Ratu who appeared on behalf of Nalave for an adjournment to allow her to study new material which had come to the attention of Mr Burney, for the respondent, which he had quite properly disclosed to her, namely, an email purporting to summarise the conclusions drawn by a pathologist in New Zealand who had performed a post mortem on the body of Ms Li. That apart, Mr Burney for the State expressed concern about the fact and impact of dock identifications of both Nalave and Marama at trial, a concern which this Court shared, and drew to our attention certain other features of the evidence which, he suggested, were troubling. Ms Ratu had already arranged to see Ms Marama in conference on 18 October, with a view to seeking leave to file a petition out of time and advancing arguments on her behalf. In those unusual circumstances, the Court adjourned the hearing to 25 October.

[6] In the event, Marama has filed a petition by which she seeks leave to appeal the judgment of the Court of Appeal out of time. She wrote to the Supreme Court Registry on 2 October 2017 indicating her intention to appeal but she was told that her letter did not constitute a petition because it was bereft of grounds. She did not take the matter any further because, she now says, she did not know what grounds to file and because she hoped for a Presidential pardon. Mr Burney does not oppose the application to extend time. She was represented before us by Mr Lee.

[7] There was a question whether Nalave filed her petition for leave within the prescribed period, but that question is resolved in her favour because it is accepted that her original petition was filed in time but has gone astray.

The issue at trial

[8] That Ms Li was unlawfully killed inside her nightclub on 10 June 2004 was not in issue at trial. The issue was the identity of her assailant or assailants. It was common ground that Nalave was at the nightclub on the night in question but her defence was that she never entered the office and had nothing to do with the attack. Marama's defence was an alibi, that she was not at the nightclub at all that night.

The evidence

[9] Because, as we shall later see, the ultimate disposal of these petitions turns on that part of the testimony at trial which was untainted by irregularities and material omissions in directions, it is necessary to rehearse the evidence in some detail.

(a) Ms Vugatoko

[10] Evidence was adduced from a friend of Nalave, Ms Vugakoto, that she and Nalave and others went to the nightclub at about 8pm on the night in question. Nalave carried a mobile telephone and had a face towel wrapped round her hand. At the club, they played billiards. Then Ms Vagutoko's boyfriend Dean arrived. Ms Vugakoto testified that at about 9.30 pm, Nalave asked who was the boss of the club and that she was told that the boss was a Chinese lady. Nalave asked where the office was and Ms Vugatoko said it was at the back of the premises.

[11] Ms Vugatoko then left the club for a short while and when she returned, Nalave was nowhere to be seen. Ms Vugatoko searched for her to no avail. Finally Ms Vugatoko left the club with Dean at about 11pm and on the way home noticed that Nalave was following her and was perspiring. Nalave was carrying her phone and the tea towel was wrapped around her neck. She asked Nalave where she had been, saying she had searched for her three times in the ladies' toilet but at first there was no response. They then went to Dean's home. There, Ms Vugatoko told Nalave to change but instead Nalave borrowed an iron to iron her clothes. Nalave went to the bathroom and Ms Vugatoko heard the sound of scrubbing and when Nalave emerged her clothes were wrinkled and wet. Nalave stayed the night and left in the morning.

[12] In cross-examination on behalf of Nalave, she accepted that when asked where she had been whilst Ms Vugatoko was searching for her, Nalave said she had been telephoning her father. In re-examination she said that immediately after that question had been posed, there had been no response but that the suggestion that she had been phoning her father came later before they reached Dean's home. It was also put to her that Nalave had never asked after the boss of the night club and that Ms Vugatoko had never mentioned that to the police, a matter which Mr Burney has suggested merits examination.

(b) The security guard

[13] A security guard who had been on duty at the club also testified. He had not seen either Nalave or Marama previously but in a dock identification at trial he identified both as having been present at the club on the night in question. His evidence was that they arrived together at about 7pm and they were carrying a file. He spoke to them and they asked to see the boss. One of them said they had come to apply for a job. He directed them to the manager. The next time he saw them was at about 11pm when they left the club. One of them had blood on her shoes and a tea towel wrapped around her hand. When he tried to stop her, she pushed him and ran away. He identified that person as Nalave. The other woman was carrying a plastic bag and she forced her way out. He identified that person as Marama.

(c) The pathologist's report

[14] A report by a pathologist who had carried out the post mortem in Auckland was admitted in evidence by consent. It disclosed multiple injuries on the deceased' s face and head, which included a linear fracture of the skull and a stab wound to the abdomen. The pathologist concluded that the deceased had received a heavy blow or blows to the right side of her face and head which resulted in the skull fracture and brain injuries. Death was caused by the head injuries.

(d) Ms Nalave's confession

[15] The officer who interviewed Nalave was Detective Constable Tacikalou. At the outset of his evidence, he testified that he had received three commendations from the Police Commissioner and had served on two overseas missions. In the summing up the judge reminded the assessors of these facts, adding that "he is an officer with unblemished record." I note that the evidence of a number of police officers who testified for the prosecution was introduced by reference to the fact and number of police commendations received.

[16] Nalave was interviewed by the police on 18 June. In the course of that interview, she at first said that she had met a man called Tomasi at the club and he had said that she should stand guard whilst he stole money from the office; that she stood guard and saw a Chinese lady enter the office. Tomasi had called Nalave in to the office. She went in and heard the Chinese lady ask Tomasi what he was doing there. At this stage of her narrative, the interview was interrupted for about an hour and upon its resumption she confirmed that in the interim she had told the police that her story about Tomasi was false. It was then that she admitted that she had taken part in the attack on Ms Li. She said that she had spoken to Marama at the club and that Marama said that she was at the club intending to steal money from the office. Marama went into the office and Nalave waited outside. Nalave then went to the toilet and when she emerged she saw Ms Li enter the office and she followed her in. Marama asked Ms Li whether she had been going out with Marama's boyfriend, pulled the lady's hair and punched her. Nalave then saw Ms Li lying on the ground and Marama suggested that they should render her unconscious. Each took hold of a bottle of liquor and hit her on the head. Nalave did so once. The bottom of the bottle used by Nalave broke on impact. The point of rendering Ms Li unconscious was, she said, to ensure that she could not identify her assailants. Nalave then took a bag containing coins, as well as a wallet from a ladies' handbag, wiped a blood stain from a table in the office, went to the toilet in the club, removed some cards from the wallet, hid the wallet and then left. When she left, her hand was wrapped by a towel so as to conceal the stolen coins.

(e) Ms Marama's confession

[17] Marama was interviewed on 19 June 2019. She said that she had never visited the club before 10 June. That night, she went there at about 10pm and there came a time when she heard her name called. It was Nalave, who then told her that she should do something to the Chinese lady. She saw the Chinese lady lying on the floor and she struck her twice on the back with a bottle which Narave had handed to her. They were in the room for about 15 minutes.

[18] At a voir dire in 2011, Nalave challenged the admissibility of the confession on the basis that it had been secured as a result of violence and threats but the challenge was unsuccessful. Marama also unsuccessfully challenged the admissibility of the evidence of her confession.

(f) Defence evidence

[19] Nalave testified in her own defence saying that although she was at the club on the night Ms Li was attacked, she had nothing to do with the attack. The only reason she was not seen by Ms Vugatoko for an extended period in the course of the evening was that she was outside using her telephone. She did not see Marama at the club that evening. She said that she had showered and washed her clothes after arrival at Dean's house but said she did so only because she had been perspiring. She alleged that her confession had been extracted as a result of a beating and threats.

[20] In cross-examination, she asserted that she had talked to her father on the telephone for about half an hour and then just sat outside waiting for others. When it was put to her that she must, according to her testimony, have waited outside for about two and a half hours, she accepted that to be so. She denied that she had gone out of the club to meet Marama and then re-entered the club with her. It was also put to her in cross-examination that on 11 June, she had visited a hospital in Lautoka with Marama because Marama had sustained an injury the night before. She denied that to be so. No evidence was led by the prosecution of that visit or its purpose.

[21] Marama's evidence was that she had been with Nalave earlier in the day. They had purchased some fish together. Then she had to work. She finished work at 5pm. Later, she went to Lautoka where she worked as a waitress at a nightclub between 7pm and 2am. It follows, according to this account, that she was nowhere near Ms Li's nightclub on the night of the killing. She had served a notice of alibi on 18 September 2013, that is two days after the trial commenced and later than the time prescribed for service of such a notice.[1] Marama called no witnesses in support of her alibi.

[1] What relevant time frame applied is not clear. The trial judge referred in his summing up to section 234 of the Penal Code in force before 2009 which prescribed 14 days from the end of the preliminary inquiry and then to section 125 of the Criminal Procedure Code which prescribes a period of 21 days after an order for transfer to the

Conviction and appeals

[22] The assessors unanimously expressed the opinion that Nalave and Marama were guilty of the murder of Ms Li, a finding with which the trial judge agreed.

[23] On 19 June 2015 the single judge granted Nalave and Marama an extension of time in which to appeal and leave to appeal the convictions.

[24] It is unnecessary to repeat the grounds or arguments advanced before the Court of Appeal, save to say that they included the contentions that the dock identification ought never to have been admitted in evidence; that the judge failed to direct the assessors to consider the inconsistencies between the witness statement of the security guard and his testimony; that there was an unsatisfactory direction relating to the alibi notice; that the non-production of exhibits, such as blood-stained shoes, rendered the convictions unsatisfactory; and that the evidence of an interviewing officer that he had received commendations was inappropriate and that the trial judge should have directed the assessors accordingly.

[25] None of these arguments found favour with that Court and the appeals were dismissed.

The new material

[26] What was disclosed by Mr Burney to Ms Ratu, for Nalave, shortly before the hearing on 16 October 2019, was an email dated 21 June 2004 from a detective sergeant in Auckland to the police in Fiji. It refers to the post mortem examination of the deceased by Dr Koelmeyer, the pathologist, performed on 16 June 2004. The officer recites his understanding that a female was currently under suspicion for the killing but had not yet been located and that no other person was being sought in relation to the murder. He had been informed that the weapon used was a 375ml beer bottle. In so far as is material to these petitions for leave, he then stated:

> "During the post mortem examination it was evident that the victim had suffered massive head trauma. Most notably were the lacerations to the right side of her head, bruising to her right ear, a deep laceration to the back of her head and a laceration above her right eye. … The base of her skull was fractured transversely.
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> "I informed Dr Koelmeyer the circumstances of the assault, he is of the belief that
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> 1. The injuries sustained by the deceased were inflicted with a piece of wood or similar weapon.
>
> 2. That a knife was possibly involved with the assault.

High Court or, where no such order had been made, at least 21 days before the date set for trial. Presumably in this case the Penal Code provisions applied in which event it is difficult to see why section 125 was mentioned or what provision the assessors were asked to apply. But, in the event, in the case of Marama, nothing in this application for leave turns on the point.

3. That one or more persons was involved with the assault.

4. That a great deal of force was used to inflict the injuries sustained. More force that (*sic*) could conceivably be inflicted by a woman.

5. The injury pattern on the right side of the head matches the defence bruising on the right arm.

Due to the major discrepancies that have arisen by comparison related to me by Ravi and the findings by Dr Koelmeyer, I will require the following information to enable Dr Koelmeyer to make an informed decision based on the evidence he has found, compared with the evidence compiled by the Fiji Police." (I have added the emphasis).

He then asks for photographs of the scene, examiners notes, a summary of the investigation to date and a list of exhibits.

The petitions

[27] We have two amended petitions filed on behalf of Nalave. Taken together with the two sets of written submissions filed, they contend on her behalf that the Court of Appeal failed to recognise the significance of the failure to produce certain exhibits at trial; should have, but did not, address a complaint about the joint enterprise direction at trial; erred in its finding that the judge's directions as to the approach to be taken to the confessions was adequate; erred in upholding the dock identifications by the security guard; and failed properly to assess the effect of the pathologist's report. The oral submissions on her behalf mostly concentrated on the suggested impact of the newly disclosed material which is said to be significant in the assessment that the injuries could not conceivably have been inflicted by a woman.

[28] The amended petition on behalf of Marama, taken together with the submissions filed, assert that the admission of the dock identification evidence, as well as the differences in accounts offered by the security guard, render her conviction unsafe; as does the effect of the pathologist's report and the newly disclosed email from New Zealand.

The dock identification

[29] The dock identification of the petitioners by the security guard ought not to have been permitted. Identification was squarely in issue in the case in relation to both petitioners. It was in issue in the case of Nalave because her defence was that whoever it was the guard saw coming into the club with a file and asking for the boss, who later, with blood on her shoes, pushed him and ran away, was not Nalave. It was in issue in the case of Marama because her defence was that she had never been to that club before and was not there on the night Ms Li was killed.

[30] The danger inherent in a dock identification is obvious. It is that "a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he is charged."[2]

[31] We must proceed on the basis that there had been no identification parade attended by this witness. That is because had he then identified either petitioner, that evidence would have been adduced and had he not, those acting for the petitioners at trial would have been informed accordingly. In this context, it is pertinent to note that when Marama's interview resumed on 20 June 2004, it was put to her that she had been identified during "the Identification Parade." She was then asked what she had to say about that and she replied that she had already admitted her part in the offence. The next question was: "Did you ever see the security officer inside the Frequency Lounge?" and her answer was "No". In combination, the reference to an identification parade followed immediately by the question whether she had seen the guard at the club might suggest that he had attended an identity parade at which he had identified her. But this reference to an identification parade remains a mystery which counsel before us were unable to resolve. Absent evidence of that parade, or of an admission by her that she had indeed been identified at such a parade, this assertion of a positive identification of Marama ought to have been edited out. Its effect is prejudicial and it has no probative value and the inclusion in the evidence was therefore irregular.

[32] This was not the first dock identification of the petitioners by the guard. The same had happened at the trial in October 2012. Indeed, in his 2013 testimony he said that he had seen Nalave during the previous court case the year before. What is particularly significant about his 2012 testimony is that he said that he had seen the two women when they were brought to the club by the police "to show the Police officers what they had done on the night the murder happened." That fact did not emerge at the 2013 trial. To have the petitioners identified by a dock identification at all when identity was in issue was a material irregularity but for that evidence to emerge and be laid before the trial judge and assessors without them knowing that the identifying witness had seen the two women in the custody of police officers at the club during a reconstruction of the crime is additionally troubling, for an identification in such circumstances is also tainted by its highly suggestive setting. In the event, what was presented to the 2013 trial court was an identification by the guard on the day he testified which, as far as that court knew – unless the court had drawn an impermissible conclusion from the reference in one of the interview records that there had been an identity parade - was the first time since 2004, apart from a sighting at court the previous year, that the witness had been asked to identify the two women who had drawn his suspicion on the night of the killing. And it was a dock identification.

[33] In his summing up, the trial judge summarised the evidence of the security guard including his identification of them. "If you accept his evidence," said the judge, "the prosecution wants to draw the inference that both accused were there in the night club at the time of

[2] Archbold 2018 [14-61] by reference to *Tido v The Queen* [2011] 2 Cr App R 23

the incident. If you only accept part of his evidence that 1st accused [Nalave] came, then that corroborates the earlier evidence of [Ms Vugakoto] that 1st accused came." In relation to the evidence of all the lay witnesses, he gave a suitable warning to bear in mind that the events in question took place nine years previously and that allowances for fading memories should be made.

[34] In relation to identification he said this:

> "30. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-persons and connect them to the offence that they alleged to have been committed.
>
> 31. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.
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> 32. In assessing the identification evidence, you must take following matters into account:
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> (i) Whether the witness has known the accused earlier?
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> (ii) For how long did the witness have the accused under observation and from what distance?
>
> (iii) Did the witness have any special reason to remember?
>
> (iv) In what light was the observation made?
>
> (v) Whether there was any obstacle to obstruct the view?"

[35] After conclusion of the summing up, counsel for the petitioners sought re-directions. According to the judge's notes, they included a re-direction in relation to the dock identification of Marama by the security guard, as to which the notes say: "Dock identification of second accused by second lay witness has very little weight."

[36] The Court of Appeal addressed the dock identification issue. They said that it did not add anything to the case against Nalave. They correctly noted that the judge failed to point out any weaknesses in the identification testimony and that dock identification is "suggestive and highly prejudicial to the accused, "However," they added, "the discretion to allow dock identification lies with the trial judge after weighing its probative value over its prejudicial effect (*Wainiqolo v State* unreported Cr App No AAU0027 of 2006; 24 November 2006." The Court added:

> "In the present case, Mr Ulunikoro's[3] initial identification of the appellants was not a fleeting glance. He had an opportunity to observe both appellants on a number of occasions when they were in the club on the night of the alleged incident. He even had a conversation with the women when they arrived at the club. No objection was taken to the admissibility of dock identification of the appellants by their respective trial counsel. In any event, the prejudicial effect of the first time dock identification diminished when the learned trial judge told the assessors to attach little weight to the dock identification."

[37] Whilst it is correct that a trial judge has a discretion to allow a dock identification, I endorse the suggestion by the editors of Archbold 2018 that "in practice the exercise of such a discretion should not even be considered unless the failure to hold an identification procedure was as a result of the defendant's default."[4] There was, as far as the evidence established, no identification parade and there was no suggestion that either petitioner had refused to attend one. Even had there been an identification parade at which the security guard had been asked if he could recognise anyone, it would have been a worthless exercise if it had taken place after the security guard had seen the accused persons in the custody of the police as suspects. In so far as it lay within the power of the trial judge to permit the dock identification – we do not know whether it merely emerged to his surprise – he ought not to have permitted it.

[38] The evidence having emerged, the direction to the assessors in relation to it was, with respect, inadequate. They ought, in my judgment, to have been told to put it out of their minds altogether with an explanation of why it was particularly dangerous to place weight on a dock identification. What the assessors were left with was a general *Turnbull* style warning with no attempt to marry that warning to the evidence in the case and the circumstances of the identification. Even if, contrary to my opinion, it had not been necessary to direct the assessors to put it out of their minds with a suitable explanation of why that was so, saying that they should attach to it very little weight would only suffice if they were told *why* they should attach only very little weight to it. And the direction as to questions they should ask themselves, such as what was the lighting like, was fine as far as it went but was divorced from any reference to what answers to those questions were suggested by the evidence and from several factors in *this* case which might impact on the reliability of the identification, such as the fact that (on the evidence before the court) eight or nine years had passed before the guard had identified the two women and that the witness statement he had made two days after the killing was noteworthy for the absence of any account involving suspicious activity by two women. These factors may or may not have undermined the reliability of the identification but if there was to be any reliance at all on the guard's identification, they had, in fairness to the accused, to be drawn to the attention of the finders of fact.

[3] Mr Ulunikoro was the security guard
[4] Ch. 14-59

[39] The point is well made by the Court of Appeal that defence counsel took no objection to the dock identifications. His failure to do so is puzzling but it does not cure the irregularity occasioned by its occurrence or the defects in the summing up to which I have referred. The judgment delivered on 25 September 2013 is brief and, given the judge's concurrence with the verdict of the assessors, does not go into any detail and therefore contains nothing which alters the impact of those defects on the safety of the convictions, a subject to which I must later return.

The guard's inconsistent accounts

[40] Mr Burney has drawn to our attention an aspect of the evidence which, I note, was addressed by the Court of Appeal. It is the marked difference in the account given by the security guard in his witness statement dated 12 June 2004 and his evidence at the 2013 trial. It will be remembered[5] that in his evidence he spoke of the two petitioners approaching him together, carrying a file and asking to see the boss, and then later rushing out, both shoving him aside, Nalave with blood on her shoes.

[41] In his witness statement, there was no mention of a woman other than Ms Vugatoko and a female accompanying her. The narrative in that statement is of a girl entering the club with Ms Vugatoko. He says in terms that that girl and Ms Vugatoko "came together." There is nothing about speaking to two women or girls, nothing about them carrying a file, nothing about anyone asking to see the boss. In his statement he said that at one stage he saw Ms Vugatoko together with Dean and someone called Niraj but without "the other girl". He asked her about "the other girl that they came together and [Vugatoko] said she did not know her." Ms Vugatoko was later searching for the girl. "I told her that she might be still inside the lounge. … After a while they were coming back, the two men and [Vugatoko] without the other girl." He then describes Ms Vugatoko asking for the girl and him suggesting that she search the toilet. "After a while I went inside and I met this girl near the main entrance inside the Lounge wrapping his hand with [a] piece of cloth." There is nothing about two girls pushing him aside; nothing about blood stained shoes.

[42] In cross-examination, the differences put to him were limited. Counsel concentrated on the fact that in his statement he had mentioned only one girl apart from Ms Vugatoko and had said nothing about anyone looking for a job. The guard explained the omissions put to him on the basis that the police did not take down everything he had told them, with the implication that he had told them about the second girl (a girl apart from the girl who came with Ms Vugatoko) but that that was not recorded. On one reading, I had thought that the reference in his statement to the girl whom Ms Vagutoko did not know might be a reference to that extra girl (a girl other than the one with whom Ms Vugatoko had arrived) but on a re-reading, I am satisfied that this is not so; and in any event, in cross-examination he

[5] See paragraph [13] above

accepted that in the written statement there is reference to only four persons. In the context of the questions and his answer, that meant only Vugatoko, Dean, Niraj and one girl.

[43] The judge reminded the assessors about one suggested discrepancy, namely, that in the statement the security guard had not mentioned anyone looking for a job. He did not aver to somewhat more significant differences, most particularly the reference in the statement to only one girl apart from Ms Vugatoko, the absence of any suggestion in the statement which, if true, went to the heart of the investigation under way when the statement was taken, namely, that on the night the owner of the club was killed, two women, carrying a file had asked him for the boss, that the same two later pushed past him in a rush and that one of them wore blood-stained shoes. These were hardly matters of fine detail. They were the only suspicious events of the evening and highly suspect at that. It is of course not incumbent on a judge to remind the assessors of all the evidence but given the challenge to the reliability of his testimony, the starker differences or omissions needed to be addressed, with an appropriate reminder as to how they were or were not explained. That said, the judge referred in general terms to the fact that there were inconsistencies and that it was for the assessors to decide whether to accept his evidence or part of it beyond reasonable doubt. We cannot know the basis upon which the assessors resolved this point and the judge did not address these remarkable omissions in his judgment. Absent an explanation, it is difficult to see how this issue was resolved.

[44] The Court of Appeal correctly commented that it was not accurate to assert, as was asserted in the grounds of appeal, that the judge failed to direct the assessors to consider the inconsistencies. The Court also said that cross-examination had extracted little of significance and in terms of the questions asked in cross-examination, that is true. But the differences were to be examined not merely by reference to the cross-examination but also by reference to the very obvious and major differences when compared with the statement itself, which was in evidence. The Court noted that amongst the reasons why a court might not attach much weight to "minor discrepancies", were the facts that a witness could not be expected to have a photographic memory, that powers of observation differ from person to person, that time estimates are difficult, and that sequences can readily be mixed up. With respect, none of those reasons was at play in the case of the guard's witness statement and his evidence. Apart from the fact that the differences were not minor, the point in the instant case, not mentioned as a measure of reliability, is that a statement made close to the time of the key events is, absent a good explanation to the contrary, liable to be more reliable than one made years after. And the statement made two days after the events in question made no mention of the key incriminating alleged facts offered by this witness at trial. It may be that the explanation lay in the condition in which the guard may have been when making his statement for he said in evidence that he was "having grog" when the police took him to the station, a piece of evidence of which the judge reminded the assessors. But this was not the guard's explanation, was not explored and no police officers were called to corroborate his assertion that the statement was not a complete record of what he had told them, a step that could properly have been taken given the contention that

his testimony was a subsequent invention, a contention that could not have taken the prosecution by surprise for the issue was bound to arise.

[45] In and of itself, this issue might not suffice to bring into serious question the safety of the conviction of either petitioner but it materially undermined the reliability of the guard's testimony, even putting aside the irregularity constituted by the dock identification, and the failure to direct that the significant differences between the guard's evidence nine years after the event and a statement made two days after the event were such as to warrant especial caution was itself a material omission. Put together with the problem stemming from the dock identification, it was in my judgment unsafe to rely on his evidence at all.

Mutually inconsistent confessions

[46] The fact that the confessions of the two petitioners cannot both be correct - for they conflict in highly material aspects - is surprisingly, not the basis of a ground of appeal, nor raised before the Court of Appeal. I say 'surprisingly' because the contradictions stand out on a first reading. This fact was one of the matters of concern which Mr Burney mentioned to us at the hearing on 17 October and, given that the State has raised it, and that it may go to the safety of one or more of the convictions, to ignore it on the basis that it is not advanced as a ground of appeal would be to permit form to prevail over the interests of justice.

[47] The differences may be highlighted as follows:

(a) Nalave said in her interview that it was Marama who called to her; that Marama was angry about a suggested friendship between Ms Li and Marama's boyfriend and said she intended to steal. She had stolen there twice before; whereas Marama said in her interview that it was Nalave who had called to her; that Nalave had told her to "do something to the Chinese lady"; and that she, Marama, had never been to the club before.

(b) Nalave said in her interview that Marama went in to the office first; that she waited outside; that Ms Li went into the office; that she followed, saw Marama punch Ms Li, saw the lady lying on the floor and then at Marama's suggestion, each hit her with a bottle to render her unconscious; whereas the effect of Marama's account is that she, Marama, only struck the lady when she had seen her lying face down on the floor, was given a bottle by Nalave and struck the deceased twice on her back.

(c) Nalave said in her interview that Marama had been wearing a black top, black jeans and a pair of black flip flops; whereas Marama said that she had been wearing a pink top and blue jeans.

[48] As Mr Burney correctly pointed out, both accounts cannot be true. That of itself is not necessarily problematic since it is common for suspects who admit complicity in an alleged

offence to seek to minimise their roles by suggesting that the other suspect was the prime mover. The question therefore is whether there is something in this particular case which renders the incompatibility of those accounts material to the safety of the conviction of either petitioner and, in particular, what directions were given and what findings were made in the light of these mutually inconsistent accounts.

[49] In his summing up, the judge provided a standard direction in relation to each alleged confession that if the assessors were satisfied that the statement under caution was made freely and not as a result of threats or assault "then you could consider the facts in the statement as evidence." "Then," he continued, "you will have further to decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of the charge are proved by this statement." There is a complaint that he did not then say in terms that if they were not satisfied that the statements were voluntary they should ignore it. Whilst it is desirable for that to be said, I do not consider the omission fatal in this case, for that consequence is implicit in what was said.

[50] There was, however, no reference in the summing up to the fact that both accounts could not be true and no direction as to what findings, in the light of that fact, were open to the assessors.

[51] The direction to the assessors, in relation to their approach to each interview statement, was that if they were sure that "the facts in the caution interview are truthful then you can use those to consider whether the elements of the charge are proved by this statement." As a general proposition, such a direction is unimpeachable but in the peculiar circumstances of this case, it was a misdirection unless accompanied by a warning that it was not possible to find all the facts in both statements to be true. The assessors ought to have been directed that in such circumstances it was open to them:

(1) to conclude that neither statement could be relied upon, bearing in mind in particular that the onus of proving their reliability lay upon the prosecution; or

(2) to conclude that each statement was true in so far as it contained an admission against interest which was not contradicted by the other statement; in this case that meant that it was open to them to conclude, subject to the issue of voluntariness, that each was true in so far as each admitted an assault on the deceased. Such a direction would have been accompanied by an explanation that admissions against interest, if made voluntarily, are more likely to be true than exculpatory statements or statements in mitigation of criminality.

[52] There was a further course theoretically open, which was to find one cautioned statement true and the other not, but there was no evidential foundation for such a conclusion wherefore it was not an option to leave for consideration.

[53] The matter does not end there because even had the judge drawn the attention of the assessors to the options open to them in light of the mutually inconsistent confessions and told them that it was open to them to find the non-contradictory parts of a particular defendant's statement true, it would then have been incumbent on him to direct them that they had then to consider the impact of those limited parts on the verdict appropriate to that defendant.

[54] That approach has a particularly significant bearing on the case against Marama. Her confession, if true, amounted to no more than an admission that once the deceased was already on the floor, lying face down, she hit her twice with a bottle on her back. Although, according to this version of events, Ms Nalave had earlier said that they were to 'do something' to the Chinese lady, there is no admission that that included either an attack to cause her death or serious harm or that such a possibility was in contemplation. That is highly material because, under the law as it stood at the date of the killing, neither petitioner was guilty of murder unless as a principal she had attacked the deceased intending to cause her death or to cause her grievous bodily harm or was an aider and abettor to such an attack with the requisite mens rea or was a joint offender acting pursuant to the formation of a common intention to prosecute an unlawful purpose in the prosecution of which purpose the offence of murder was a probable consequence.[6]

[55] Aiding and abetting was not relied upon or referred to. The judge referred to joint enterprise in his summing up but did so in standard generalised terms without reference to how the principles applied to the evidence in this case and in particular did not direct them, by an express reference to the limited scope of Marama's participation described in her confession, that they could only convict her of murder if they were sure either that she attacked the deceased with an intention to cause death or grievous bodily harm or that she was party to a common purpose the probable consequence of the pursuit of which was an attack with intent to cause death or to cause grievous bodily harm.[7] In the circumstances of this case, these were material non-directions.

Commendations and unblemished records

[56] I have earlier referred to the evidence given by the officer who interviewed Nalave that he had received three commendations.[8] In addition, I note that the evidence of the investigating officer, detective Mahand Chand, who was present during part of the interviews of both petitioners commenced by telling the trial court that he had received four commendations "for murder and robbery with violence uses investigations."

[57] Such evidence should not normally be adduced. The only conceivable objective in doing so is to bolster the credibility of the witness testifying but that line of thinking is not logical.

[6] Sections 21 and 22 of the Penal Code, in force at the time of the killing; subject matters covered to much the same effect by sections 45 and 46 Crimes Act 2009

[7] See sections 199 and 202 of the Penal Code in force at the time of the killing of the deceased.

[8] Paragraph [15] above

The evidence of a police officer is to be approached in the same manner as the evidence of a lay witness, to be tested by factors germane to the case at hand. If it were otherwise, then it would supposedly mean that in a case where a police officer's testimony is contradicted by a lay witness whose working life has not lent itself to public commendations, the officer's evidence, perhaps given years after his commendation for, say, an act of bravery, would by reason of the commendation alone be preferred to that of the layman. That cannot be right. No doubt many police officers take their public duties seriously and are truthful witnesses but, as in all walks of life, some may in a particular case provide evidence that is not reliable. Whether that is the case or not in a particular instance is tested by examination and cross-examination of relevant evidence and a commendation is not normally relevant to the issue of credibility.

[58] In this case the judge saw fit to remind the assessors, immediately before asking them to address the issue of voluntariness, that the officer who interviewed Nalave was "an officer with 34 years experience with unblemished record." The implication was that his evidence was, for that reason, likely to be creditworthy. What the judge ought, rather, to have told the assessors, given that the evidence of commendations had emerged, was that that was irrelevant to the issue of the officer's creditworthiness.

[59] This issue formed a ground of appeal before the Court of Appeal but is not specifically addressed by that Court's judgment. In my judgment the ground of appeal had merit.

Non-disclosure of the email of 21 June 2004

[60] We were asked by counsel for the petitioners to infer that the injuries disclosed in the pathologist's report which was produced at trial could not have been caused by the attack with bottles to which the two petitioners referred in their interviews. That point was neither taken at trial nor on appeal and this is not the forum for determination of such an issue but, in any event, that inference is not open on that evidence.

[61] That said, the email of 21 June 2004 from the police in New Zealand to the police in Fiji should have been disclosed well before trial. The failure to do so is yet another irregularity but the question is whether in reality it might have assisted the defence in their conduct of the trial. That is an irregularity which is now possibly germane only to the case of Nalave since, for reasons which I will provide, my opinion that Marama's conviction must be quashed rests on other grounds entirely.

[62] The suggestion in the email that no woman could conceivably inflict the force which occasioned the injuries to the deceased is, on its face, surprising but, that aside, the email was not itself a report by Dr Koelmeyer and, even putting that fact aside, he appears to have been working on the basis then presented that only one woman was suspected and that none other was being sought.

[63] It seems to me that even if Dr Koelmeyer had indeed said that no woman could conceivably have inflicted the injuries disclosed by the post mortem examination, he was most unlikely to have proffered an opinion helpful to the petitioners if asked to assess whether the injuries were consistent with an attack by two women with bottles which were used with intent to render the victim unconscious and struck with such force that the bottles broke. I am satisfied that in the event, no injustice was occasioned by the non-disclosure of the email.

Consequences

[64] In the light of the material irregularities, mis-directions and non-directions which I have itemised, it seems clear to me that Nalave should have leave to appeal and that Marama should have leave to appeal out of time; and that the hearing of their respective applications for leave should be treated as the hearing of their appeals. The ground on which I would grant leave in each case is that otherwise a grave and substantial injustice may occur.

[65] It is necessary now to address the consequences of these irregularities, mis-directions and non-directions, most particularly the question whether notwithstanding the points decided in favour of the petitioners, no miscarriage of justice has occurred.

(1) The case of Marama

[66] The consequences of the unsatisfactory features of the trial and summing up which I have specified are easier to resolve in the case of Marama than in the case of Nalave.

[67] In the case of Marama, the evidence of the security guard, for reasons I have given, falls to be ignored. That leaves only her confession. All that the judge said in that regard was that if the assessors found it to be true, they could use it to consider whether the elements of the offence charged were proved. Yet if her confession was true, it was not enough to establish that she was guilty of murder. Her confession, in so far as it did not conflict with Nalave's statement, amounted to no more than an admission that once the deceased was already on the floor lying face down, she hit her twice on her back. That was neither sufficient to establish an intention on her part to kill the deceased or to cause her grievous bodily harm or that she was party to a common purpose the probable consequence of which was an attack with either intention.

[68] Mr Burney does not seek to support the conviction in her case. We have not been asked to consider substituting a conviction for manslaughter, an issue which would, in light of the limited terms of the confession, give rise to questions of causation which we would not be in a position to determine.

[69] There is no basis in her case upon which to apply the proviso and accordingly the conviction for murder in the case of Marama cannot be sustained. I would allow her appeal,

set aside the order of the Court of Appeal dismissing her appeal to that Court and set aside her conviction.

[70] We canvassed with counsel the question whether, in such an eventuality, it would be appropriate to order a retrial. Mr Burney drew our attention to the fact that Marama has now served almost eleven years of her sentence but, more to the present point, a retrial would not result in the presentation of admissible evidence any different from that which was advanced at the trial in 2013. As I have already explained, that evidence is not sufficient to support a conviction for murder. Mr Burney does not seek an order for retrial and I am satisfied that the interests of justice do not warrant such an order.

(2) The case of Nalave

[71] Nalave is in a different position for, ignoring the testimony of the security guard, the evidence against her was that of Ms Vugatoko and of her confession which contained an admission that she struck the deceased on the head with intent to render her unconscious, an admission the reliability of which is untainted by the conflicts between her confession and that of Marama.

[72] Mr Burney expressed some reservation about the reliability of Ms Vugatoko's testimony. On the face of the notes of evidence, I see nothing in her testimony which is inherently improbable or contradictory. He said that in her witness statement she had not mentioned that Nalave had asked after the boss of the nightclub. This fact was put to her in cross-examination and she said that she had told the police that, but it does not appear that the statement was admitted in evidence. However, it is in the Court of Appeal bundle which we have and her evidence was, apart from that omission, consistent with that statement. Also in the bundle is the record of her evidence in the 2012 trial where there is a more marked discrepancy in that she said in 2012 that after she and Dean went home, Nalave arrived there an hour later. She was not cross-examined about that and her testimony in 2013 that Nalave accompanied her and Dean home not only accords with her witness statement but also with Nalave's confession. Whilst it is noteworthy that her evidence that Nalave asked after the boss was not mentioned in her statement and that the security guard's evidence about the women asking after the boss was also not his statement, I do not think that that renders Ms Vugatoko's evidence as a whole untrustworthy.

[73] Her evidence, if believed, is corroborative of the confession in its reference to a prolonged absence of Nalave, the sweaty condition of Nalave on leaving the club, and the fact of washing her clothes at Dean's house and is further inculpatory in that part which says that Nalave asked after the boss. As far as the evidence revealed, there is nothing in Ms Vugatoko's testimony or that of others to suggest any reason for treating her evidence with particular caution. There is no suggestion that she was or might have been complicit in

criminality that evening or that, otherwise, she had an interest to serve in testifying against Nalave.

[74] The judge told the assessors that if they only accepted part of the security guard's evidence, namely, that Nalave came to the club, that corroborated the evidence to that effect by Ms Vugatoko. Whilst, for reasons I have provided, the guard's evidence should not have been relied upon, the fact that Nalave came to the club with Ms Vagutoko was not in dispute, so this comment by the judge does not affect the safety of the conviction.

[75] Nalave's confession, if true, and in so far as it is not inconsistent with the account in Marama's confession, goes materially further than Marama's in proving complicity in murder. In the course of that confession she said that she saw a struggle between Marama and the deceased, saw the deceased lying on the floor and that Marama "told me to do something to her to be unconscious." The officer asked: "What did you do to make her unconscious?" She answered: "We grabbed a bottle each to hit the Chinese lady." Then a little later:

> "Q138. Can you tell me on which part the Chinese lady's body you hit with the bottle?
>
> A. On the head.
>
> Q139. Can you tell me as on which part of her head you hit her with the bottle?
>
> A. Yes I hit her on the right side of her head.
>
> Q140. How many times you hit her head?
>
> A. I hit her only once on the head and the bottom part of the bottle broke."

[76] She went on to say that Marama had struck the lady first. Then this exchange:

> Q 147 Can you explain to me where was the Chinese lady lying after you and [Marama] had hit her inside the office?
>
> A. She was lying on the floor with her head facing towards the carton placed beside the brown cupboard with her legs towards the office door.
>
> Q 148. What then you did when she was lying on the floor?
>
> A. I looked at her and knew she was unconscious and I put the bottle I had used on the floor near to where her leg was lying.
>
> Q149. How did you know she was unconscious?
>
> A. Because [Marama] told me for us to hit her head and ensure that she become unconscious so that she cannot explain who hit her."

She later said that she and Marama had spent 20 minutes inside the office.

[77] There can be no doubt but that Nalave's confession is a confession to an unlawful assault with an intention to cause grievous bodily harm and given that death resulted, it is a confession to the offence of murder as that was then defined. I recognise that in the passages to which I have referred, she paints Marama as the prime mover, the initiator, and that that conflicts with the confession of Marama but what does not conflict with it is her admission that she struck the deceased on her head with a bottle with such force that the bottle broke and that she did so in order to render the deceased unconscious. what stand That confession of an involvement in an attack in the office of the club was supported to a material degree by the testimony of Ms Vagutoko.

[78] The ultimate question which therefore presents itself for determination is whether this Court can safely conclude that had the assessors been adequately directed to ignore the evidence of the security guard and the evidence of commendations and been given appropriate directions in relation to the fact of mutually inconsistent statements, they (and the judge) would inevitably have concluded that Nalave's confession in its material part was voluntary and reliable. To pose that question is to recognise the relevant irregularities, misdirections and non-directions and to address the proviso to section 23(1) of the Court of Appeal Act. It is the crucial question to ask in Nalave's case because – in addition to Ms Vugatoko's evidence, which does not prove guilt on its own - it is the confession which is the only relevant evidence against Nalave left for consideration after putting aside the evidence which ought not to have been relied on.

[79] I have concluded that the admissible evidence going to the question of voluntariness is compelling and that had the appropriate directions been given, the assessors and the judge would nonetheless inevitably have been driven to the conclusion that the confession was voluntary.

[80] The petitioner's evidence was that she was beaten and threatened. The force used was heavy, she said. The questions recorded were not hers and the answers attributed to her were not uttered by her. The interviewing officer, named Lepani, just wrote it. Indeed, it had been put to that officer in cross-examination that he had forced Nalave to provide Marama's name and that he had taken Nalave to see Marama before the interview commenced.

[81] There was an exception however to the suggestion that she had volunteered none of the information recorded in the interview record. It was she who had volunteered the name of Tomasi[9] and she had done so because she was in such pain as a result of the beating she

[9] See paragraph [16] above

had received at the hands of the police, that she had to tell them a lie to stop them beating her.

[82] There are cogent inherent improbabilities in her account and in the contention put on her behalf that the police forced the name of Marama upon her. If the police objective was to force her to name and incriminate Marama, and to concoct an account that only Nalave and Marama were involved in the attack on the deceased, it would have been odd indeed not only to include in the record of interview the allegation about Tomasi but also to interrupt the interview in order to check the veracity of that allegation. That they did check that story is not only recorded in the record of interview but more significantly for present purposes by the evidence of a Ms Fong who was called as a witness for the prosecution to say that she was familiar with everyone who lived in Votualevu where, according to the record of Nalave's interview, Nalave had said she played volleyball with Tomasi. Ms Fong said that not only was there no such person in Votualavu but that on 18 June 2004, the police had contacted her to ask about Tomasi, that she told them she knew no-one by that name and that, in connection with this inquiry, she had seen Nalave at the police station in Nadi on 18 June. That in turn accords with that part of the record of interview which speaks of a confrontation that day between Nalave and Ms Fong. It is also noteworthy that Ms Fong said in evidence that when she saw Nalave at the police station, Nalave looked normal and she saw no injuries. If, as Nalave suggested, she had only volunteered the name Tomasi because she was then in such pain as a result of a beating, it is unlikely that she would have appeared normal to Fong a short while afterwards.

[83] Furthermore, the fact is that Marama was not arrested until 19 June 2004, the day after Nalave is said to have implicated her in the course of the interview. It is suggested in the interview record that it was as a result of the confrontation with Ms Fong (and another person) and during that confrontation or after it, but before the interview resumed, that Nalave first mentioned Marama, referring to her as Kelera. The record suggests that the police officer then asked her:"Where can we get Kelera?", to which Nalave answered: "She works for Bollywood Niteclub Lautoka". The interview was then suspended for the day. Marama was arrested, according to the evidence at trial, in the afternoon of the following day, 19 June. It asks too much of credulity to imagine a concoction of these questions and answers. They sit naturally in themselves and with undisputed evidence of events consequential upon answers in the interview.

[84] The record of the interview (or interviews, for the questioning did not all take place in one session) is long and in question and answer form, 264 questions and answers in all, and in its flow and detail sits ill with a concoction.

[85] It can further be said that had it been the police objective to concoct incriminating stories by the two suspects, they are unlikely to have concocted two inconsistent accounts.

[86] These factors apart, Nalave was seen by a doctor on 20 June and the medical report disclosed no injuries to support the account of a heavy assault. That in itself is not at all conclusive of the matter but is a relevant fact to take into account.

[87] For these reasons, I am persuaded that a finding of voluntariness of Nalave's confession would be an inevitable conclusion, even without the support which might be gleaned from the inadmissible or otherwise tainted evidence. In this regard, I take also into account such prejudice as might be said to have been occasioned by the suggestion put in cross-examination of Nalave, unsupported by evidence, that she had visited a hospital in the company of Marama on 11 June 2004. The question ought not to have been put.

[88] The issue of voluntariness does not finally dispose of the proviso question for there remains the issue of reliability of the confession, particularly in light of the fact that both confessions – those of Nalave and Marama - cannot in their entirety be true. But in this regard, it is noteworthy that the conflict presents itself in those sections which seek to shift prime responsibility on the other. The statement by Nalave that she struck the deceased on her head with an intention to render her unconscious is not in that vein and as an admission against interest, is more likely to be true than the exculpatory or mitigatory parts. Accordingly, I am also satisfied that a finding that that key part of the confession was reliable and true was inevitable.

[89] In the result, whilst I would grant Nalave leave to appeal the judgment of the Court of Appeal and treat the hearing of the application for leave as the hearing of the appeal, I would in her case apply the proviso to section 23(1) of the Court of Appeal Act, as applied to the Supreme Court, and dismiss her appeal.

[90] The result which I propose for these appeals – that the appeal is allowed in Marama's case but not in Nalave's – may to the layman seem incongruous. But it is incumbent on the courts to decide cases according to the admissible evidence against each defendant separately and if, as in this case, the untainted and admissible evidence against one of two defendants is inadequate to prove the charge against that defendant, but suffices to prove the same charge against the other, that difference must be reflected in the outcome. The result for which I contend in the case of Nalave is not incongruous with the result which I propose for the case of Marama. It is a consequence of a material difference between the admissible evidence in the two cases.

Delay

[91] I cannot leave this case without saying something about its history of delay.

[92] In sentencing the petitioners in 2013, the trial judge noted the very long delays in the case up to that date. That trial took place nine years, no less, after they had been arrested. While the record shows that there were periods when the petitioners could not be found or did not appear on remand dates, the record which I have perused suggests that in the case of Nalave, those periods were short. Nalave has now faced three trials. The result of the first trial was set aside and the reason for that order did not lie at the door of either petitioner. Why it then took seven years before the commencement of the second trial is not apparent from any of the papers I have seen. The fact that the second trial miscarried was also not the fault of either Nalave or Marama.

[93] In setting minimum terms, the judge appears to have taken the delays into account. But since the imposition of sentences in October 2013, a full six years has passed. It took four years for the appeals to be heard and that was almost two years from the time the single judge granted leave. It has taken a further two years from the time Nalave filed her petition for the hearing before this Court to take place, by the time of which hearing Nalave had spent in the region of 10 years in custody.

[94] The fact that her conviction has been affirmed does not derogate from the stress and anxiety that delays occasion. It is to be hoped that that fact and this history will be placed before those in whose hands lie the decision as to the appropriate release date in the case of Nalave.

[95] There is one further matter which warrants mention. It has been brought to my attention that it may sometimes be thought that where there has been an unsuccessful appeal against conviction or sentence, the minimum term of imprisonment specified by the sentencing judge only takes effect from the date upon which an appeal is finally determined. If that is the understanding, it is incorrect. A minimum term is to be calculated as from the date of sentence and not from the date on which an appeal is determined. In Nalave's case, sentence was passed on 2 October 2013, so that she has now served the minimum term of six years specified by the judge when passing sentence upon her. It is therefore open to her to apply now to the Mercy Commission to recommend her release.

Orders:

1. The petitioner Nalave is granted leave to appeal the judgment of the Court of Appeal dated 14 September 2017;

2. The hearing of Nalave's application for leave to appeal is treated as the hearing of her appeal; and

3. Nalave's appeal is dismissed.

4. The petitioner Marama is granted leave to appeal out of time against the judgment of the Court of Appeal dated 14 September 2017;

5. The hearing of Marama's application for leave to appeal is treated as the hearing of her appeal; and

6. Marama's appeal is allowed and her conviction by the High Court dated 25 September 2013 for the offence of murder is set aside.

Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

Hon. Mr. Justice Frank Stock
Judge of the Supreme Court

Solicitors:
Office of the Legal Aid Commission for the Petitioners
Office of the Director of Public Prosecutions for the State