IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0003 of 2020
[Court of Appeal No. AAU 135 of 2014]

BETWEEN : **ILIKIMI NAITINI**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Madam Justice Chandra Ekanayake**
Judge of the Supreme Court

The Hon. Mr. Justice Priyasath Dep
Judge of the Supreme Court

The Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Counsel : **Mr M. Fesaitu and Ms S. Prakash for the Petitioner**
Mr R. Kumar for the Respondent

Date of Hearing : **8 August, 2022**

Date of Judgment : **25 August, 2022**

JUDGMENT

Chandra Ekanayake J

[1] I have read the judgment in draft of Dep, J and I agree with its reasons, conclusions and orders proposed.

Dep J

[2] The petitioner Ilikimi Naitini, the 1st accused (hereinafter referred to as accused petitioner) along with Pailato Cavasiga, the 2nd accused were indicted in the High Court on a single count of murder of Tevita Voivoi contrary to section 237 of the Crimes Decree 2009. The offence was committed on 7th August 2012 at Nanuku Settlement, Vatuwaqa in the Central Division.

[3] This case was taken up in the High Court at Suva before Justice P K Madigan. The accused pleaded not guilty to the charges and the case was taken up for trial.

In the High Court

The Evidence

[4] The main witnesses for the prosecution are the two eyewitnesses Karalaini, wife of the deceased Tevita Voivoi and her sister Theresa Yee Singh.

[5] Karalaini, wife of the deceased Tevita in her evidence stated that she and her husband came to Nanuku Settlement that night to spend time with her sister Theresa. When she was drinking grog with her sister at about 11p.m, Tevita came back drunk, and she told him "to go to his cousin's place to sleep it off". She was speaking to him near the window when she saw the first accused Ilikimi pulling his T-shirt. Tevita fell but stood up again and they were punching each other. A second man came whom she identifies as the second accused, and he took Tevita's hand or hands and put them behind his back and he punched him on the back and on the back of his neck. After that the first accused went to get the pine post and hit Tevita's head with it. He hit him once on the head with it. After that he ran back to

the house he had come from, and the 2nd accused too went inside the house. She saw blood coming out of Tevita's ears. She never saw Tevita hit the 2nd accused because he was holding Tevita's hands behind his back. When they had gone into the house, she went and asked the second accused why he did it; she was crying, and the 2nd accused apologized.

[6] Witness Theresa Yee Singh' s evidence is somewhat similar to the evidence given by her sister Karalaini as regards to the incident and the involvement of the accused petitioner. However, there is a discrepancy between the evidence of Karalina and Theresa regarding the involvement of the second accused Pailato Cavasiga. This witness stated that the accused Pailato Cavasiga came to the scene and punched the deceased after accused petitioner had dealt a blow with a pole. The relevant portion of her evidence is as follows.

> *"..... This second man whom she identified as the 2nd accused threw 5 punches on Tevita's ribs. He did this after Tevita had already been hit with the pine post. The two women went outside and saw bleeding from Te's ears. The second person was punching him until the Policeman came; for maybe about 30 minutes. Police came and took Tevita to the hospital....."*

[7] The parties admitted the post-mortem report under agreed facts. The forensic pathologist Ponnu Swamy Goundar who conducted the post-mortem examination stated in his evidence that on examination of Tevita's body he found that the skull had been fractured on the midline of the occipital bone. The brain was damaged with extensive haemorrhage. He found that this haemorrhage to be the antecedent cause leading to the cause of death which was subdural haemorrhage. He stated that the skull and brain damage would have been caused by the extensive force of a blunt object and he identified the pine post as an object that could well have caused the damage.

[8] The prosecution led the evidence of police officers regarding the investigations, arrest of the accused and caution interviews conducted with the accused. Police Officers produced the transcripts of the interviews made under caution. The defence did not challenge the caution interviews.

[9] The court called upon the accused for their defence, and both accused gave evidence giving their version of the events. The accused petitioner in his evidence stated:

> *"…He came out of the bathroom and saw Tevita shouting at the window. He called out to him and told him to be quiet because people were sleeping. He saw two ladies inside chasing him away. He knew that if he didn't take him away, he might do harm to the ladies and break the window. He kept telling Tevita to go but he wouldn't. Tevita swore at him, so he pulled him away from the window. Tevita punched him and he knew that if he didn't retaliate, he would injure him and after that they had a fist fight. They were punching each other when the second man came to stop the fight. Tevita had a fist fight with the second man. Both of them couldn't control him and they feared that Tevita would injure both of them. Then he said "I told my partner to move away and I then used the pine post on him. Just one strike and he fell down".*

[10] The accused petitioner further stated that:

> *"he didn't hit him with the intention to make him die – his intention was to defend himself. When the Police came, they asked him why he did this and he told him that it was because of his behaviour; that he was a violent person and a member of a group who beat people up".*

[11] The second accused in his evidence gave his account of the incident. He stated that his cousin Atelina wanted him to go and settle a fight between Ilikimi and Tevita and he went towards them and saw his back facing him and "*he pulled him by the pants to move him backwards to try to stop the fight. In the process, Tevita elbowed him in the chest making him move back. He felt pain and because of the pain he punched him twice in the chest. After that he turned to see Ilikimi. He was looking at him and he heard something fall on the ground. When he looked, he saw the post on the ground. He looked at Ilikimi and then went inside".*

[12] Atelina Tinai gave evidence on behalf of the second accused Pailato. She corroborated his evidence

[13] After the conclusion of the summing up, the three assessors in their unanimous opinion found both accused guilty of murder. Accordingly, they were sentenced to life imprisonment with a minimum serving period of 18 years and 16 years respectively.

In the Court of Appeal

[14] Both accused appealed against the conviction to the Court of Appeal and on 13th September 2015 a single Judge of the Court of Appeal granted leave to appeal to the accused petitioner on one ground not raised by him and granted the 2nd accused leave on three grounds raised by him.

The accused petitioner Ilikimi Naitini's appeal

[15] The Court of Appeal granted leave to the accused petitioner on the following ground:

> *"The only issue that appears to be arguable but not raised by Naitini is the Trial Judge's failure to put the defence of provocation to the assessors. On this issue, I grant him leave."*

[16] The counsel for the accused petitioner informed the Court of Appeal at the hearing that he would urge only the sole ground of appeal articulated by the single judge and filed written submissions and made oral submissions at the hearing.

[17] The accused petitioner at the trial took up the position that he had acted in self defence. This plea was rejected both by the assessors and by the trial judge. However, in the Court of Appeal leave was granted on the basis that the trial judge failed to place the defense of provocation to the assessors and failed to direct himself in his judgment. The defence of provocation was not raised at the trial.

[18] It is settled law that even the defence failed to raise the plea of provocation or any other plea, if it is arising from the evidence, it is incumbent on the trial judge to consider such defences and direct the assessors and himself accordingly.

[19] The Court of appeal carefully considered the ground of appeal based on the failure of the trial judge to put to the assessors the defence of provocation. It referred to several important judgments including *Regina v Duffy* [1949] 1 All ER 932 and *Codrokadroka v The State* [2008] FJCA 122 which are relevant to the defence raised in this case. The Court of Appeal used the rationale in these cases to arrive at its decision.

[20] In *Regina v Duffy*, Devlin J in his summing up to the jury gave the following direction to the Jury.

> *"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."*

[21] In *Codrokadroka v State* [2008] FJCA 122; AAU0034.2006 (25 March 2008) provides a following guidelines as to how the judge should direct the assessors and himself regarding the defence of provocation :

> '*1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.*
>
> *2. There should be a "credible narrative" on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*
>
> *3. There should be a "credible narrative" of a resulting loss of self-control by the accused*
>
> *4. There should be a "credible narrative" of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.*
>
> *5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the fact of each case. However cumulative provocation is in principle relevant and admissible.*
>
> *6. There must be an evidential link between the provocation offered and the assault inflicted.'*

[22] According to the facts of this case the accused petitioner started the quarrel without any provocation by the deceased and exchange blows culminating in the accused picking up a pole and inflicting a fatal blow on the deceased resulting in his death. The Court of Appeal correctly held that 'provocation cannot be sought after or self-made. The 01st appellant had no business to go where he went and confronted the deceased'.

[23] The Court of Appeal rejected the plea of provocation put forward by the accused petitioner and dismissed the appeal and affirmed the conviction and the sentence.

2nd Accused Pailato Cavasiga's Appeal

[24] The Court of Appeal granted leave to appeal to the second accused Pailato Cavasiga on three grounds and the main ground of appeal raised by him is ground 1, which is relevant to the determination of the appeal states:

> "*The Learned Trial Judge erred in law and in fact when he found that the Appellant was an active participant in the joint enterprise that led to the death of the deceased.*

[25] The second appellant was indicted along with the accused petitioner as a joint offender. His criminal liability was based on whether or not he was a joint offender as defined in section 46 of the Crimes Decree 2009. Section 46 reads as follows.

> *'46. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence*

[26] As regards to the involvement of the second accused there is a material contradiction in the evidence of Karalaini and Theresa. There is a conflict of evidence as regards to what point of time the second accused got involved in the incident. Karalaini stated that he joined the accused petitioner before the accused petitioner dealt a blow with a pole, whereas witness Theresa stated that he came to the scene after the accused appellant dealt the fatal blow.

[27] The 2nd accused stated in his evidence that his cousin Antelina wanted him to stop the quarrel between accused petitioner and the deceased and he went and pulled the deceased back and his elbow struck him, he got angry and punched the deceased. Angelina gave evidence and supported the version of the 2 accused. When considering the totality of the evidence there is a doubt as to whether he shared the common murderous intention or intended to cause serious injuries with the accused petitioner.

[28] When considering the facts of this case, the prosecution has failed to prove beyond reasonable doubt that the 2nd accused formed a common intention with the 1st accused (accused petitioner) to prosecute an unlawful act to cause the death of Tevita. The act of assaulting with a pole by the accused petitioner is an independent act of the accused petitioner which the 2nd accused did not foresaw or anticipated. Therefore the 2nd accused is not an accessory to a joint enterprise as envisaged in section 46 of the Crimes Decree of 2009.

[29] Therefore the 2nd accused is entitled to an acquittal and Court of Appeal is correct in setting aside the conviction and sentence and acquitting the 2nd accused.

In the Supreme Court

[30] The accused Petitioner filed a leave to appeal petition in the Supreme Court on the following ground:

> *"The Court of Appeal erred in upholding the conviction of murder when the totality of the evidence did not support that the petitioner had the mens rea of having the intention or recklessness in causing the death".*

[31] In order to obtain leave the Petitioner has to satisfy the criteria set out in Section 7(2) of the Supreme Court Act which states:

> *"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 administrator of criminal justice is involved; or*
> *(c) Substantial and grave injustice may otherwise occur."*

[32] It was held in series of cases that the Supreme Court is not a Court of Appeal and the parties as of a right has no right of appeal. An aggrieved person should seek special leave to appeal from the Supreme Court under section 7(2) of the Supreme Court Act No. 14 of 1998.

[33] In *Livia Lila Matalulu and another v. The Director of Public Prosecutions* [2003] FJSC 2; (2003) 4 LRC 712 (2003) the court held that.

> "*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 would 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 principle or in the criminal jurisdiction, substantial and grave injustice."*

[34] In Aminiasi Katonivualiku v State, Criminal Appeal No. CAV 001/1999S (14th April 2003) at page 3 paragraph 5, the Supreme Court said:

> *"It is plain from this provision that the Supreme Court is not a Court of Criminal Appeal or general review nor is there any appeal to the Court as a matter of right, and whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal".*

[35] This Court will consider the ground raised by the petitioner to satisfy whether it fulfil the stringent criteria laid down in section 7 (2) of the Supreme Court Act in order to obtain leave.

[36] The accused petitioner in the trial in the High Court took up the plea of self defence which was rejected by the assessors and the Judge. A plea of provocation raised as the sole ground of appeal was rejected by the Court of Appeal. In this court the sole ground of appeal is that the totality of the evidence failed to establish that the accused had the requisite mens rea to convict him for murder.

[37] In this case it was admitted that the accused petitioner was the doer of the act, and his conduct caused the death of the deceased Tevita. Therefore, the prosecution has established the *actus reus* and the causal nexus between the act and the resultant death.

[38] The counsel for the petitioner strenuously argued that the accused petitioner did not have the intention or reckless to cause the death of the deceased and he should have been convicted for a lessor offence of manslaughter.

[39] Section 237 of the Crimes Decree 2009 which defines murder states:

> *"237. A person commits an indictable offence if –*
> *(a) the person engages in conduct; and*
> *(b) the conduct causes the death of another person; and*
> *(c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.*
> *Penalty – mandatory sentence of Imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered."*

[40] The recklessness is defined in section 21 of the Crimes Decree which read as follows: -

> *"21. – (1) A person is reckless with respect to a circumstance if –*
> *(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and*
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(2) A person is reckless with respect to a result if –*
>
> *(a) he or she is aware of a substantial risk that the result will occur; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(3) The question whether taking risk is unjustifiable is one of fact.*
>
> *(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element."*

[41] The counsel for the accused petitioner submits that the caution interview of the accused petitioner proves that he did not have the intention to kill the deceased. In his caution interview he had stated that he did not intend to kill the deceased.

[42] The caution statement of the accused petitioner is reproduced below:

Q29: How did you come to know Tevita Voivoi?
A: I came to know him during an incident where he assaulted the elder brother of Pailato named Naiteqe.

Q31: Can you tell me what happened next?
A: I went out to go back to Pailato and then when I met Tevita standing in the shed right at the window.

Q34: What did Tevita do?
A: As I pulled him from in front of the window, he punched me.

Q36: Then what happened?
A: As I assaulted Tevita, Pailato came to stop the fight.

Q39: A you pulled Tevita outside and assaulted him didn't you hear his wife calling out for you to stop what you were doing?
A: Yes. I heard her but I was really pissed off for what he had done to Pailato's elder brother, Naiteqe as they had injured him and ended up in hospital and admitted.

Q40: That means that you have been waiting for Tevita before this day?
A: Yes. It was not only Tevita, but the rest of his friends that assaulted Naiteqe.
Q44: At what time and place did Pailato joined in?
A: As we wrestled at the back of the shed.

Q45: Then what did Pailato do?
A: Pailato had pulled Tevita backwards and Tevita punched me. Here Pailato started to punch Tevita.

Q46: What did you do?
A: I was still angry and as I was free from Tevita, I picked a post and hit his head.

Q47: Where did you pick the post from?
A: It lay on that small ground.

Q50: How many times did you hit him?
A: Only once.

Q51: Where was Pailato when you hit Tevita with the pine post?
A: I told Pailato to move away and struck it on Tevita.

Q52: What was Tevita doing when you hit him on his head?
A: I can't recall. All I know is that I took the post and him with.

Q58: Can you explain what made you wild?
A: Because Tevita and his friends had assaulted Naiteqe where he ended up at Suva hospital.

Q59: Do you know that the post you used is big and heavy and can cause serious injuries if someone is hit with it? [Post shown to Illikini]
A: I had done that when I was angry and didn't expect that it would kill him?

Q63: What did you do when you saw him lying facing down motionless?
A: As I stood there a man came in civilian clothes saying he was a police officer and questioned me why did I hit Tevita with the post.

Q64: What did you tell this guy?
A: I told him that he has reaped the fruits of his actions.

Q73: Why didn't you assist Tevita as he lay on the ground after you had hit him?
A: That was what Tevita and his friends had done to Naiteqe when that assaulted him.

Q74: … … What can you say? [Medical report and cause of death shown]
A: When I hit him, I didn't expect that he would die.

Q75: Then why did you use a pine post to hit him with?
A: Because Tevita and his friends had also used a timber to assault Naiteqe. <u>I also used it but did not mean to cause his death.</u>

[43] The caution interview indicates that the accused petitioner had a strong motive to assault Tevita as an act of revenge for assaulting Pailato's brother Naiteqe and he was waiting for an opportunity to take revenge. In the last sentence he said that he did not mean to cause death, One has to gather his intention from the act and not by what he states after the act. This caution statement far from exculpating him has the effect of incriminating him in the commission of the crime of murder

[44] The counsel for the accused petitioner strenuously argued the accused petitioner did not intend to cause the death of Tevita and if at all he should have been convicted for the lessor offence of manslaughter. The question is whether the trial judge gave proper directions to

the assessors regarding the mental element and properly directed himself. It is necessary to advert to the relevant portions of the summing up and the judgment.

[45] It is advisable to advert to parts of the summing up dealing with the mental element required to establish the charge of murder.

> *"By looking at the first accused alone, he has admitted that he hit Tevita with the pine post in the course of the fight. The Doctor has said that Tevita died from injuries caused to the brain from the impact of a blunt object. Therefore, you might have no difficulty in finding that Ilikimi engaged in conduct that caused Tevita's death and Counsel for Ilikimi herself admits that on behalf of her client. You must then decide if he intended to kill him or alternatively if he was reckless in using such a heavy post to hit him. A person is reckless if he is aware that there would be a substantial risk of death resulting from the use of such a heavy post, and that he was not justified in taking such a risk. So that is the first step you should take, and it relates to the first accused only. If you think he intended to kill Tevita or was reckless in taking the risk that death might occur, then you will find him guilty and put his case to one side before considering the case against the second accused in the manner in which I am going to direct you."*
>
> (Para 11 of the summing up)

[46] The trial judge directed the assessors to consider the alternative offence of manslaughter which is a lessor offence. The relevant part of the summing up read thus.

> *"That is all I wish to say at this stage about the first accused.*
> *In summary then you will find him guilty of murder if you are sure that by hitting him over the head with the heavy post and that by doing that, he caused his death he intended to kill him or was reckless as to the substantial risk of death. If, however you find that he was acting in lawful self-defence then you will find him not guilty. If you think he had no intention to kill nor, was he reckless as to the risk of death by his actions but he was only intending to cause very serious harm to Ilikimi or was reckless as to the serious harm he might cause by his actions then you will find him not guilty of murder but guilty of the alternative offence of manslaughter".*
> (Pará 18 of the summing up)

[47] After the summing up, the assessors tendered their unanimous opinion that both accused are guilty of murder. The honourable high court judge agreed with the opinion of the assessors and convicted the accused for murder. In his judgment the honourable judge gave his reasons thus:

> *"The first accused had admitted striking the deceased with a heavy wooden post, which the Pathologist says would have caused the cracked skull and haemorrhage of the brain that led to his death. At trial he ran the defence of self-defence which the assessors obviously rejected. To use such extensive force against a very drunken man was entirely unnecessary to defend himself. The weight and size of the post, which had been produced in evidence, is such that one strike with it on the head would certainly presume an intention to kill or at least presume a significant risk of death to amount to recklessness. I find that the first accused certainly had the requisite intention to convict him for murder."*

[48] When considering the evidence, it was proved that there was a strong motive for the accused petitioner to cause serious injuries to the deceased and was waiting for an opportunity to confront him and the opportunity came his way in an unexpected circumstances. His conduct in attacking the deceased on the head with a pole two meters in length and weighing 10 KG indicates that he did have the murderous intention. A person is responsible for the probable and natural consequences of his act. The accused picked up a quarrel with the deceased who was unarmed and drunk. As stated by the Court of Appeal 'The 1st appellant had no business to go where he went and confronted the deceased'. He has no business to interfere in a matter that does not concern him.

[49] The honourable high court judge had given proper directions to the assessors and directed them to consider the lessor offence of manslaughter if they are not satisfied that the accused petitioner did not have the murderous intention or recklessness to convict him of murder.

[50] I find that the verdict and sentence is justified and supported by the evidence led in the case. Therefore, there is no reason to interfere with the judgment of the High Court in convicting the accused petitioner for the offence of murder and the well-considered judgment of the Court of Appeal.

[51] There are no merits in the leave to appeal application. Petitioner failed to satisfy the criteria set out in section 7(2) of the Supreme Court Act. Accordingly leave refused.

Jayawardena, J.

[52] I have considered the draft judgment of Dep J and I agree with its reasons and conclusions.

Orders

1. Leave refused. Application dismissed.

2. Judgment of the Court of Appeal affirmed.

3. Conviction and sentence of the accused petitioner will stand.

The Hon. Mr. Justice Priyasath Dep
Judge of the Supreme Court

The Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

The Hon. Mr. Justice Madan Lokur
Judge of the Supreme Court