IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0027 of 2019
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0109/2014; High Court No: HAC HAC 364 of 2011(Suva)]

BETWEEN: **BIMLESH PRAKASH DAYAL**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Mr. Justice William Calanchini, Judge of the Supreme Court**
The Hon. Mr. Justice Isikeli Mataitoga, Judge of the Supreme Court
The Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: **Ms S. Prakash for the Petitioner**
Dr. A Jack for the Respondent

Date of Hearing: **12th and 19th June, 2023**

Date of Judgement: **29th June, 2023**

JUDGEMENT

Calanchini, J

[1] I agree with the orders proposed by Qetaki, J.

Mataitoga, J

[2] I have read the judgement of Qetaki J, and I agree with reasons and conclusion made therein.

Qetaki, J

Background and Facts

[3] This is an application for leave to appeal to this Court against a judgement of the Court of Appeal dated 04 October 2018 dismissing the Petitioner's appeal against conviction and sentence.

[4] The trial was conducted on 18-24 April 2013 after which and the summing up , the learned Trial Judge, accepted the unanimous opinion of the assessors and convicted the Petitioner on three counts of murder that of his wife aged 29 years and his two daughters aged 7 and 5 respectively. The Petitioner was sentenced to mandatory life imprisonment with a non- parole period of 20 years on each count and each term was to be served concurrently. Note that section 237 of the Crimes Act 2009 provides: *"Penalty – Mandatory sentence of Imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered."*

[5] All three murders had been committed sometime during the night of 28th and early hours of the morning of 29th of October 2011 at Nanuku Settlement in Vatuwaqa, Central Division by the Petitioner (Accused). The Petitioner attacked his sleeping wife with a chopper which according to the pathologist almost beheaded her. The Petitioner then went to the adjoining bedroom and struck his two daughters with the same chopper. He then returned to his wife and lay beside her and attempted to take his own life by chopping his neck. The Petitioner also stabbed himself in the stomach with an ornamental dagger. The Petitioner's wife and daughters died from the knife wound inflicted on them by the Petitioner.

[6] The Petitioner filed an application for extension of time for leave to appeal against conviction and sentence (Notice of Appeal) on 12 September 2014, a delay of approximately 1 year and 4 months. He was represented by a new counsel and not the counsel at the trial. The respondent did not object to the appeal being pursued out of time.

Court of Appeal stage

[7] The Petitioner filed ten (10) grounds of appeal against conviction and two (2) grounds against sentence and the question is: whether they are arguable? Apart from the

respondent conceding that grounds 7 and 8 are arguable, (both grounds challenging the learned Trial Judge's decision for omitting to direct the assessors on the Defence of Provocation and related issues), the learned single Judge did no more than grant an extension of time and leave to appeal against conviction and sentence (non-parole period) on 19 June 2015.He stated: *"Upon receipt of the full record, the appellant may perfect his grounds of appeal and the arguments in support of the grounds for the full Court's consideration."*

[8] Subsequently, the Petitioner filed an amended Notice of Appeal against conviction and sentence on 17th August 2018 for consideration by the full Bench of the Court of Appeal.

"Conviction Appeal

i. *The learned trial judge erred in law and in fact when he completely failed to direct the assessors on the defence of provocation raised by the appellant.*

ii. *The learned trial judge erred in law and in fact by failing to give adequate direction to the assessors in respect of the defence of self defence.*

iii. *The learned trial judge erred in law and in fact when he completely failed to direct the assessors on the issue of diminished responsibility.*

iv. *The learned trial judge erred in law and in fact when he completely failed to properly guide the assessors on how to approach and weigh the evidence of uncharged acts.*

v. *The learned trial judge erred in law and in fact when he failed to guide and direct the assessors on how to approach the evidence contained in the caution interview and the weight to be attached to the disputed confession.*

vi. *The learned trial judge erred in law and in fact by taking away the role of assessors in determining the weight of the evidence of Roselyn, Forensic Scientific Officer and psychiatrist.*

vii. *The learned trial judge erred in law and in fact to allow hearsay evidence to be given in the trial and failed to direct and guide the assessors on how to approach these evidence and the weight to be attached to the hearsay evidence.*

viii. *The learned trial judge erred in law and in fact by not directing the assessors on the law of presumption of innocence.*

Sentence Appeal
ix. In fixing a minimum term the learned trial judge failed to give the appellant appropriate discount having regards to his mental health and diminished responsibility in the circumstances of the case."

[9] At the hearing before the full Bench of the Court of Appeal, all the grounds except ground (i) , which relate to *'Provocation",* were abandoned or dismissed with little or no legal resistance :

(a) Ground (ii) which relates to self-defence was abandoned by the appellant (see paragraph [15] of Court of Appeal judgement. Fernando JA stated: "*[15] the Appellant's prayer in his Amended Notice of Appeal dated 17th August 2018 that he be convicted of manslaughter, is an acknowledgement by him that he is not relying on his defence of self defence and thus his ground (ii) has to necessarily fail. Further at the hearing before us, the Appellant's counsel informed Court that he is abandoning ground (ii) of appeal referred to in paragraph 6 above, relating to self-defense."*

(b) Ground (iii) which relates to diminished responsibility was dismissed for lack of evidence. (See paragraphs [16] to [18] of the Court of Appeal judgement). Fernando JA: *"16] In relation to ground (iii) of appeal referred to at paragraph 6, namely diminished responsibility, Counsel for the Appellant admitted there was no evidence whatsoever in relation to diminished responsibility that could satisfy the elements of section 243 of the Crimes Act and therefore did don pursue that ground, but simply stated that he would rely on his submission of 23 August 2018. His submission merely states that "There was some evidence before the court on the issue of diminished responsibility", but has not drawn the attention of this Court to any such evidence."* The Court dismissed ground (iii) of the appeal.

(c) Grounds (v) and (ix) were abandoned (see paragraph [8] of Court of Appeal judgement. Fernando JA: *[8] The Appellant's written submissions of 22nd August 2018 the Appellant stated that he wishes to abandon grounds (v) and (ix) of appeal referred to at paragraph 6 above……"*

(c) Grounds (iv) and (vii) which relate to conviction of the appellant for his criminal conduct, were dismissed being of no merit as it has no relevance to the appeal, as the appellant's prayer was that he be convicted of manslaughter not murder. (See paragraph [39] of judgement of Court of Appeal). Fernando JA *"[39] The Appellant's grounds (iv) and (vii) of appeal relate intrinsically to the conviction of the Appellant for his criminal conduct and thus have no relevance to this appeal in view of the Appellant's prayer that he be convicted for manslaughter. Further there is no merit whatsoever in those grounds of appeal."*

(d) Ground (viii) on the complaint that the learned trial judge did not directly address the assessors on the '*Presumption of Innocence*" was taken note of but, the ground was dismissed as the Court considered that the omission did

not cause a substantial miscarriage of justice in terms of the proviso to section 23 (1) of the Court of Appeal Act. (See paragraph [40] of the judgement of the Court of Appeal). Fernando JA:" [*40] As regards ground (viii) I do take note that the learned trial Judge had not directed the assessors specifically on the "Presumption of Innocence" ...I would dismiss this ground of appeal placing reliance on the proviso to section 23 (1) of the Court of Appeal Act, since I consider that no substantial miscarriage of justice had occurred."*

(f) Ground (ix) as revised under Written Submission dated 22 August 2018, which was restricted to sentence, and which was urged before the court to show that the learned trial Judge had erred in exercising his judicial discretion in setting the minimum term to be served before pardon may be considered, was dismissed (see paragraphs [8] and [41] of the judgement of the Court of Appeal.). Fernando JA: *"[41] As regards the revised ground (ix) of appeal which was restricted to sentence I am of the view that no arguments have been urged before us to show that the learned Sentencing Judge had erred in exercising his judicial discretion in setting the minimum term to be served before pardon may be considered. I therefore dismiss that ground of appeal.*

[10] In considering "*Provocation"* the Court of Appeal noted that the basis of provocation as pleaded was one of sexual infidelity, as evidenced by the appellant's complaint contained in the Written Submission dated 23 August 2018 as follows : *"that despite there being evidence by him (Appellant) in his caution interview and also in Court that the deceased was involved in an extra marital affair with their landlord and his son, the learned trial judge failed to give direction on the defence of provocation".* Further, *"The Appellant told the Court in his evidence that he loved his wife and she loved him as well. This was love marriage, and the relationship was very good…… Learning that the wife whom he loved so much, had not once but twice cheated him with two different men, any ordinary person in the shoes of the Appellant is likely to snap and loose the control of his kind in such situation",* and finally *"The Appellant submits his wife confessing to him that she not only cheated him by sleeping with Sonu but also slept with Shalen, he has a sudden temporary loss of control, and for some moment he was not master of his mind. At that time, he was so furious that he only wanted to kill his family, himself and nothing else. His mind was out of his control for that spur of moment."*

[11] Ground (i), *"That the Learned Trial Judge erred in law and in fact when he completely failed to direct the assessors on the defence of provocation raised by the appellant",* requires that that the Court consider whether there was an evidential basis for the learned trial judge to direct the assessors on provocation. It is the prosecution that

bears the legal burden of proving every element of the offence of murder, A defendant who wishes to deny criminal responsibility for murder by relying on provocation or diminished responsibility, which are excuses provide by the Crimes Act 2009 for the killing of a person, bears an evidential burden in relation to that matter in view of section 59 (2), (3) and (4) of the Crimes Act 2009. However, a defendant does not bear the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution itself. The question whether an evidential burden has been discharged is one of law and matter for the determination by the trial judge. *"Evidential burden",* in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist according to section 59(7) of the Crimes Act.

[12] In **Stingel v R** [1990] 171 CLR 312, as a preliminary matter the trial judge has to decide as a question of law whether, on the version of events most favorable to the accused as suggested by the evidence, the jury might fail to be satisfied beyond a reasonable doubt that the killing was unprovoked. Only if the judge answers this question in the affirmative might the defence be left to the jury. On the duty of a judge when provocation is raised: a judge should only leave "*loss of control*" to the jury…. after consideration of each components of the defence. The judge has to be satisfied that there was sufficient evidence in respect of each of the three components and he was bound to consider the weight and quality of the evidence: In **R v Gurpinar, R v Kojo-Smith & Caton [2015] Cr.App R 31,CA, as reported in Archbold 2018, 19-62(Commenting on "*Loss of Control*" under the Coronors and Justice Act of UK.**

[13] In **Chand Singh & Another v Reginam** [1965] 11 FLR 119, it was held that where there was no evidence establishing a reasonable possibility of act of provocation, loss of self-control both actual and reasonable, and retaliation proportionate to the provocation, it is not necessary for the trial judge to leave the defence of provocation to the assessors. A similar view was held in: **Maha Narayan v Regina** [1972] FCA Reps 72/91 AAU 1/72 6 April 1972 and **Shyam Baran v Reginam [1978]** FCA Reps 78/633 AAU 12/78 30 November 1978.In light of these authorities, the Court of Appeal considered it necessary that it examined the appellants / Petitioner's caution statement and his evidence on oath before he High Court, as the appellant was the only

person who could have spoken as to what happened on that night of the killing and the events leading up to the killings.

Caution Statement of Appellant/Petitioner

[14] In the analysis of the Appellant's caution statement (Paragraphs [23] to [30] of judgement of the Court of Appeal, the inescapable conclusion is that, with the abandonment of ground (5) , the final statement of the Appellant/Petitioner which was not challenged, and which cuts across all the Appellant's alleged defences he sought to argue before that Court, is that ***" It turns the killing to*** "*"Honour Killing",* ***which is no defence in law."*** The Appellant/ Petitioner's Final statements are reflected in paragraphs [29] and [30] of the judgement states**:**

> *"[29] The Appellant at the conclusion of the Caution Statement when asked whether he wished to say anything else had said: "I want to say that whatever I have said during this interview is true and the action I carried out was to get rid of the family and myself but somehow, I was saved. I carried out this action to avoid any bad name of my family in the society and to prevent our reputation being tarnished."*
>
> *"[30] The final statement of the Appellant which is not challenged in view of the abandonment of ground 5 of appeal referred to at paragraph 6 above cuts across all the Appellant's alleged defences he sought to argue before this Court and turns the killings to an "Honour Killing", which is no defence in law."*

Appellant's Evidence on Oath

[15] In its analysis of the Appellant's testimony in Court (Paragraph [31] and [32] of Court of Appeal judgement), the Court of Appeal noted a number of contradictions in the Appellants testimony on oath before the learned trial Judge and the Caution Statement, as to the manner the appellant came to cause injuries to his wife (See paragraph [33] of Court of Appeal judgement). What was clear from both the caution Statement and the Testimony on oath, was that the appellant had suspicions about his wife's extra marital affairs with Sonu long before Shelma told him about it and he had sorted out that matter with his wife.

[16] For a trial judge to place the issue of *'Provocation'* before a Jury, there needs to be an evidentiary basis as stated earlier, satisfying the three elements of provocation as set out in Section 242 of the Crimes Act 2009, namely, that the appellant had caused the

death of the person who gave him the provocation (i) in the heat of passion, (ii) caused by sudden provocation as defined in subsection(2) of section 242, and (iii) before there was time for his passion to cool. These elements are not detached: **Lee Chun-Chuen v R**, [1963] AC 220, per Lord Devlin.

[17] After examination of the provisions of section 242 of the Crimes Act 2009, and relevant case law (paragraphs [35], the Court was of the view that there was no immediate wrongful act alleged on the part of the appellant's wife in the Defence submission of 23 August 2018, other than the possible insult the appellant may have suffered as a result of the wife's confession on his own instance, of having been compelled to succumb to the sexual advance of Salem on the threat of blackmail. That the confession of a past incident certainly could not have made the appellant lose his power of self-control to the extent of inducing him to kill his wife in the manner he committed it .It certainly could never be an excuse for the appellant's killing of his two children, It is improbable that the appellant who engaged in having sex with his wife moments before her brutal killing could claim that he acted in the heat of passion and before there was time for his passion to cool in respect of a provocation that she gave him as a result of a confession of infidelity she made to him at his own instance and prior to their engaging in sex.

[18] In its Written submission the respondent through its counsel stated that at the trial, the appellant had not sought a redirection on the issue of provocation when the learned trial judge had specifically stated at the Conclusion of his Summing Up: "*However before I release you I ask counsel if they wish me to add or explain anything in my summing up":* See **Alfaaz v State, Raj v State, Varasiko Tuwai v State .**Counsel for the Respondent also argued that in the absence of cogent reasons for not raising the issue by way of redirection , the appellant is barred from perusing an appeal on this ground.

[19] The Court (per Fernando J) stated:

> *"...In the absence of cogent reasons for not raising the issue by way of redirection, this Court would be slow to entertain and appeal on this ground and further state that there was no evidential basis to address the assessors on provocation.*

[20] It was also evident on analysis that, at the hearing the appellant had attempted to bring a completely new change to his defence by trying to attribute his provocation, to his wife killing his two children on the night of the incident. This cannot be taken seriously as it contradicted the appellant's defence at the trial, and his own Amended Notice of Appeal dated 17 August 2018 where the appellant had sought conviction for manslaughter. It also contradicted his written submission dated 23 August 2018, where it was stated:

> "*The appellant submits his wife confessing to him that she not only cheated him by sleeping with Sonu but also slept with Shalen, he had a sudden and temporary loss of control, and for some moment he was not master of his mind. At that time, he was so furious that he only wanted to kill his family and nothing else. His mind was out of his control for the spur of moment."*

Nothing is stated in the above submission that the provocation was due to his wife killing his two children. An appellant cannot be changing his position as and when he so wishes, particularly at the appeal stage, as this would amount to an abuse of the court process. The Court dismissed the appeal while affirming the conviction and sentence.

Application for leave to appeal to the Supreme Court

[21] The Petitioner's application for special leave to appeal to this Court was untimely filed on 07 October 2019, late by almost 11 months, and urging ten (10) grounds of appeal. On 25 May 2023 the Petitioner filed submissions in support of his petition through the Legal Aid Commission.

[22] The Legal Aid Commission, although, it earlier refused legal representation to the Petitioner when it was sought based on the merits of the application, had been ordered by his Lordship the Acting Chief Justice to represent the Petitioner for special leave to appeal, when the appeal was listed for callover on 08 May 2023.

[23] The ten (10) grounds filed by the Petitioner on 7 October 2019 when he first filed his application for Special Leave to appeal against conviction and sentence were as follows:

Grounds of application for leave

(1) The learned trial Judge erred in law in not considering that the petitioner was not properly convicted causing a substantial miscarriage of justice;

(2) The learned trial Judge erred in law when he failed to properly direct the assessors on the intention of the petitioner;

(3) The learned trial Judge erred in law when the assessors were not selected on a radically balanced panel as required by law causing a miscarriage of justice;

(4) The learned trial judge erred in law when he failed to put the defence or put it fairly and that his general direction were slanted towards prosecution causing miscarriage of justice;

(5) The learned trial judge erred in law in regard to the counsel for the defence not conducting the defence case properly causing a miscarriage of justice;

(6) The learned trial Judge erred in not considering the issue of provocation and self-defense causing substantial prejudice to the petitioner;

(7) The learned trial Judge erred in law in regard to charges that was laid as it was a wrong defective charge causing substantial miscarriage of justice;

(8) The learned trial Judge erred in law as he did not consider the use of circumstantial evidence in this case causing a grave miscarriage of justice;

(9) The learned trial Judge erred in law in regards to intent and the malice aforethought present in this case causing substantial miscarriage of justice; and

(10) The learned Judge erred in law in the lack of consideration given to the Sentencing and Penalties Act causing substantial miscarriage of justice.

Additional grounds of application for leave

[24] The Petitioner filed additional seven (7) grounds of appeal on 25 January, 2022, as follows:

(1) The learned trial Judge failed to consider an application for withdrawal of trial counsel in the trial proceeding at the High Court, infringing the right to have your own choice of counsel in trial, violating the constitutional rights under Constitution of Fiji (2013);

(2) The learned trial Judge erred in law and in fact when he did not consider the application of mistrial by the counsel in non-disclosure which is a miscarriage of justice;

(3) The Petitioner claims and submits that due to the trial counsel's negligence and the incompetency of the legal representative at the FCA had not the Petitioner been fairly represented;

(4) That the failure of the legal representatives in the trial and appeal for the Petitioner on addressing the issue of provocation to the Honorable Court had caused miscarriage of justice;

(5) That the trial counsel and the appeal counsel did not obtain instruction, there was also no communication before or during hearing by the counsels, incompetency by both counsel and overcharging;

(6) That the learned trial Judge failed to direct assessors on the unwilled acts and events and provocation sufficiently and on presumption of innocence;

(7) That the learned trial Judge erred in law in not sufficiently directing the assessors to consider the evidence at trial that afforded the foundation of defence of the Appellant on the Prospection case where Petitioner claims and argues that the mere view of facts which should have opened to assessors if it had been correctly instructed about law, such a misdirection will be material if it might have deprived the accused of a chance of acquittal of the charge.

Jurisdiction of Supreme Court

Constitution

[25] Section 98(4) of the Constitution of the Republic of Fiji states that:

"*An appeal may not be brought to the Supreme Court from a final judgement of the Court of Appeal unless the Supreme Court grants leave to appeal"*

Supreme Court Act 1998

[26] *Section 7 of the Supreme Court Act 1998 states that:*

(1) In exercising its discretion under section 98 of the Constitution of the Supreme Court of Fiji with respect to leave to appeal in any civil or criminal matter, the Supreme court having regard to the circumstances of the case-

(a) Refuse to grant leave to appeal;
(b) Grant leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
(c) Grant leave and allow the appeal and make such other orders as circumstances of the case require.

(2) In relation to a criminal matter, the Supreme Court must not grant leave to appeal unless-

(a) a question of general importance is involved;

(b) a substantial question of principle affecting the administration of justice is involved, or
(c) substantial and grave injustice may otherwise occur."

[27] The threshold for granting special leave by the Supreme Court is very high as set out in.

Livai Lila Matalulu & Another v Director of Public Prosecutions [2003 FJSC 2,

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

Proceedings at Supreme Court

[28] The Petitioner had filed in this Court the grounds of appeal against the decision of the Court of Appeal, on 7 October 2019, and additional grounds of appeal was similarly filed, on 25 January 2022. However, on the hearing date (12 June 2023) of the Petitioner's application for special leave, the Petitioner was ordered to file an Application for Enlargement of Time as the Petitioner had failed to do so given his application was late by approximately 11 months .The application is to be filed by Wednesday 14th June and to be served on the respondent, with respondent to reply as necessary by Friday 16 June. The hearing of the application was moved to 2:30pm on Monday 19 June 2023.

[29] On 14 June 2023, a Notice of Motion Seeking Enlargement of Time was filed by the Legal Aid Commission on behalf of the Petitioner, where the Petitioner seeks the following orders: (i) Enlargement of Time;(ii) Special Leave be granted to the Petitioner to pursue the grounds of appeal, and (iii) Any other orders the Honorable Court deems just in the circumstances of the application.

[30] Also filed on the same day were the Written Submission on Enlargement of Time, an Amended Petition Seeking Leave to Appeal against Conviction and Sentence, and an Affidavit Verifying Petition Seeking Leave to Appeal against Conviction and Sentence.

[31] The State in return had filed an Affidavit in Reply, on 16 June 2023 where Eileen Pickering, Inspector of Police, Suva deposed that "Police Inspector Nagata based at Nabua confirmed that Bimlesh Prakash Dayal has relatives residing in Tavua." In the Respondent's Submissions, also of the same date, the State submitted that there are no merits in the various grounds of appeal in Mr. Dayal's petition. The respondent added that: *"This is a case of substantial delay and the absence of any ground of merit (let alone ground which would probably succeed) does not support the petitioner's application for leave to file his petition late."*

[32] The respondent submitted that the State will be prejudiced were an extension of time to be granted by this Court.

> *"12. The Supreme Court is not a court of general appeal. Its limited resources are to be focused on matters of general legal importance. Allowing very late unmeritorious petitions such as this one, allows the Court less time to deal with other meritorious petitions brought in a timely fashion.it is respectfully submitted that access to justice is not just access to justice for the petitioner, but access to justice for all, and that allowing unmeritorious, very late appeals in the absence of compelling reasons for the delay, very much prejudices other prisoners."*

Application for Enlargement of Time

[33] This court had made pronouncements in the past on the approach to be taken when faced with an application for enlargement of time. For an application for enlargement of time several factors were considered as crucial in determining whether an extension of time ought to be granted in a specific case. In **Kumar v State; Sinu v State** [2012] FJSC 17, Hon Chief Justice Gates (as he was then) identified the following factors:

(i) The reason for the failure to filed within time;

(ii) The length of the delay;

(iii) Whether there is ground of merit justifying he appellate Court's consideration;

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed; and

(v) If time is enlarged, will the Respondent be unfairly prejudiced.

[34] Depending on circumstances of each case the Court has a discretion to enlarge time so as to hear meritorious appeals. In **Mohammed Sahid v State,** it was observed that:

"The Courts in these circumstances possess discretion to enlarge time so as to hear meritorious appeal or petition. Several cases in this jurisdiction have dealt with the way the Courts should evaluate these applications. Though the Courts will not be rigid in examining certain factors, it has been established that fairness is best observed by following a principled approach."

[35] The Petitioner, in his Affidavit in Support of an Application Seeking Enlargement of Time sworn on 13 June 2023, and filed on 14 June 2023 in paragraph 8 thereof, justified the delay, by saying:

"8. After the final Court of Appeal decision was pronounced, I was not satisfied with Mr. Yunus' performance and thus, did not further engage him to draft my petition for appeal to Supreme Court. My family members were abroad and I was not able to communicate with them on engaging another counsel. I was only able to obtain assistance from other inmates to formulate my grounds of appeal. With assistance from the Fiji Corrections Services, I was able to file my petition by 7 October 2019."

[36] This Court is in the dark as to the specific nature of Mr Yunus' performance that was not satisfactory to the Petitioner leading to his quest to engage another counsel. The Petitioner has had four legal counsels at his disposal from the trial at the High Court to the Court of Appeal stages. It is also not clear how and why the fact that the Petitioner's family members were abroad had an impact on the delay. Whether all were abroad or only some family members, is another issue. In an Affidavit In Reply, filed on behalf of the respondent on 16 June 2023, one Eileen Pickering, Inspector of Police, Suva, deposed that (paragraph 2):

"Superintendent of Police Nagata based at Nabua confirmed that Bimlesh Prakash Dayal has relatives residing in Tavua."

[37] On the length of the delay this court, in **Tukana v State** [2016] FJSC 23; CAV 0024.2015 (22 June 2016) said at paragraphs [22] and [24]:

"[22] The Fiji Supreme Court has consistently held that a short period of delay may be disregarded by the Court if it thinks fit, but when a substantial interval of time elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons. Explaining the approach of our Courts in ***Kamlesh Kumar v State; Sinu v State,*** *supra, Chief Justice Anthony Gates in paragraph [9] of his judgement quoted the following* ***dictum from*** *The Queen v Brown* (1963) SASR 190 at 191-

"The practice is that, if any reasonable explanation is forthcoming, and if the delay is relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided there is a question which justifies serious consideration."

"[24] In ***Nabainivalu v State*** *[2015]* FJSC 22; CAV 027.2014 (22 October 2015),
This Court held that a delay of 141 days after the pronouncement of the Ruling that was sought to be impugned in that case amounted to substantive delay and would not justify an enlargement of time in the absence of a question which justifies serious consideration."

[38] The delay in this case is quite substantial. The justification of the delay is flimsy and lacking in substance. The Petitioner's inability to obtain legal assistance for drafting of the Petition for special leave to appeal may be caused by reasons other than stated by him in his affidavit. It has been deposed on behalf of the respondent that the Petitioner have relatives who reside in Tavua. The Petitioner's additional grounds of appeal consistently complains about the performance of his legal counsels at the trial and at the Court of Appeal stages.

[39] On the aspects of the merit of the Petitioner's application and on Prejudice to the Respondent, the Respondent submitted that the Supreme Court is not a Court of general appeal, its limited resources are to be focused on matters of general legal importance. Allowing very late unmeritorious petitions such as this one, allows the Court less time to deal with other meritorious petitions brought in a timely fashion. The right to access to justice is not confined to access to justice for this Petitioner, but access to justice for all, and that allowing unmeritorious very late appeals in the absence of compelling reasons for the delay, very much prejudice other petitioners

Analysis of the Grounds of Appeal

[40] The ten (10) grounds of appeal filed on 07 October 2009 are discussed below:
Ground (1)-*That the learned trial judge erred in law in not considering that the Petitioner was not properly convicted causing a substantial miscarriage of justice.*

[41] This is a new ground not before raised at the trial or in the Court of Appeal. The Petitioner complains that due to his appeal counsel's incompetency, this ground of appeal was not canvassed at Court of Appeal stage. (See paragraph 5.14 Petitioner's

Written Submission filed on 25 May 2023 by Legal Aid Commission). In **Eroni Vaqewa v The State [**2016], FJSC 12, it was acknowledged that although the Supreme Court has powers to entertain fresh grounds of appeal which were not raised in any court below, it will not be entertained "*unless its significance upon the special leave criteria was compelling."*

[42] Three prerequisites must be satisfied when considering the issue of whether new issues should be allowed to be argued in the appellate court: firstly , there must be sufficient evidentiary record to resolve the issue; secondly, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial; and thirdly, the court must be satisfied that no miscarriage of justice will result, that is: the significance of the new ground on the special leave criteria (as per Section 7(2) of the Supreme Court Act).

[43] It appears the Petitioner is suggesting that the evidence adduced at the trial was insufficient to drive a conviction. At the trial, 19 witnesses were called by the State, and there were 15 exhibits (See paragraph 5.15 of Written Submission for Special Leave to Appeal filed on 25 May 2023 by Legal Aid Commission). The Court of Appeal has not pronounced a final decision on its merit, as such there is no jurisdiction to make a decision on it in this court. The ground lacks merit. The ground lacks support and does not meet the special leave criteria in Section 7(2), Supreme Court Act. Denial of this ground will not amount to a miscarriage of justice.

[44] **Ground (2):** *The learned trial judge erred in law when he failed to properly direct the assessors on the intention of the Petitioner.*

[45] This ground is new ground, but is related to the Petitioner's other grounds which were raised before the Court of Appeal. On new ground see above discussion on **Eroni Vaqewa** (supra) and **R v Brown** (supra)**.** The Petitioner alleges that due to his appeal counsel's incompetency, this ground was not canvassed at the Court of Appeal stage. He submitted that there was no clear direction to the assessors during the summing up on the element of intention. This has caused serious prejudice to the Petitioner. He futher submitted that if the mental element had clearly been put to the assessors, his

charges would have been reduced to manslaughter. The lack of such directions on intention caused a miscarriage of justice.

[46] The Petitioner challenged the admission of the *voir dire* inquiry which was ruled admissible by the trial judge and the caution interview was made available to the assessors as part of the evidence. However, no directions were given to the assessors on how to assess its credibility and weight, especially since the admission were contradictory to the Petitioners defence taken up at the trial. He submits that his intention was only to cause serious harm to stop Deceased 1 from attacking him. He states he hit her neck once but did not see where it was exactly. He further insinuates that it was Deceased 1 who had killed Deceased 2 and 3. Therefore, he submits that the learned trial judge failed to give proper directions to the assessors on intention to commit murders.

[47] Turning to the Summing Up, it was the State's position that the Petitioner was intending to kill all the Deceased persons but, in the alternative, if intention was not proven, then he was nevertheless reckless in causing their deaths (page 88 Vol. 1 Record of High Court of Fiji). The learned trial Judge directed the assessors as follows:

> *"10. An alternative verdict to murder which is open to you to find, is guilty of the lesser offence of manslaughter. Manslaughter has the same first two ingredients of murder, that is to say that the accused engages in conduct which caused the death of another, but instead of the recklessness as to causing the death by his conduct, he just has to be reckless as to whether his conduct will cause serious harm to the victim.*
>
> *11. So once again, what does it mean for us in this case? If you find that Bimlesh's conduct caused the death of each of Anju, Amisha and Anisha, looking at their cases separately, you must consider Bimleah's intentions. In each of the three cases you are considering, if you think he intended to kill that person then he is guilty of murder. However, if you think he didn't intend to kill, you must consider his recklessness in what he did. If you think that he was so reckless that there was every chance of death occurring by his actions, then he is guilty of murder; however, if you think his recklessness extended only to the causing of serious harm to each of those three, then he is not guilty of murder but guilty of the lesser offence of manslaughter. It is all about the degree of violence and I think that the post mortem evidence will help you here."*

[48] In my view, the summing up by the learned trial Judge was adequate under the circumstance. This ground has no merit, it does not meet the requirement for introducing fresh evidence in an appellate court nor satisfy the requirements under Section 7(2) of the Supreme Court Act.

[49] **Ground (3):** *The learned trial judge erred in law when the assessors were not selected on a radically balanced panel as required by law causing a miscarriage of justice.*

[50] This is a new ground of appeal which was not raised at the Court of Appeal stage. The Petitioner alleges that due to his appeal counsel's incompetency, this ground of appeal was not canvassed at the Court of appeal stages. The crux of the complaint is that the assessors selected to preside over his trial were not part of a fair and balanced selection. The Petitioner has not provided any materials to suggest bias. There is nothing in the Court Records to depict that the assessors were selected unfairly. Futher, the question of suitability of appointment of assessors is generally dealt with at the commencement of the trial. The Petitioner was legally represented at the trial and there is nothing in the Record to depict any objections taken up by counsel against the assessors. The ground has no merit and is dismissed. The ground does not meet the requirement for the introduction of fresh evidence in a appellate court nor meet the requirements for grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[51] **Ground 4**: *The learned trial judge erred in law when he failed to put the defence or put it fairly and that his general direction were slanted towards prosecution causing miscarriage of justice*.

[52] This is a new ground, where the Petitioner alleges that due to his counsel's incompetence, this ground of appeal was not canvassed at Court of Appeal stages. He submitted that the learned trial judge placed more emphasis on the evidence presented by the State and did not give importance to evidence given by him.

[53] According to the Summing Up, the evidence given at the caution interview are covered in paragraphs [23] and [24]. Overall, the evidence by the State covered in paragraphs [13] to [28]. Paragraphs [31] to [32] of the Summing Up raised the

evidence of the accused. The two paragraphs, in my view, fully covered the case for the defence as put at the trial, it was adequate as it included all material evidence as far as the defence is concerned. The summing Up was not inadequate or slanted against the Petitioner as alleged. The Summing Up was not unbalanced or prejudicial to the Petitioner. This ground does not meet the criteria for the introduction of fresh evidence in an appellate court and does not meet the requirement for grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[54] **Ground (5):** *The learned judge erred in law in regard to the counsel for the defence not conducting the defence case properly causing a miscarriage of justice.*

[55] This is a new ground of appeal that was not raised at the Court of Appeal stages. The Petitioner on this ground of appeal complains that his trial counsel failed to conduct the defence case properly. He further alleges incompetency and states his counsel had failed to put across his defence to all witnesses. However, the Record reveals that the Petitioner's trial counsel had cross-examined State witnesses. When the Petitioner gave evidence under oath, he explained his version and was cross-examined by the State counsel.

[56] It may be appropriate to point out that criminal trials are conducted in line with the Criminal Procedure Act 2009 and Rules of Criminal Proceedings. The Petitioner was legally represented at the trial. The Petitioner had not come up with specific instances during the trial which would lend support to this ground nor state specific instances or aspects of the trial where the learned trial judge had not conducted the trial in line with the above act and rules. A perusal of the Record does not disclose any instance in support of the Petitioner.

[57] In **Chand v State** [2019] FJCA 254 the Court of Appeal addressed the issue of criticism of former trial counsel in appeal and the procedure to be adopted when allegations of the conduct of former counsel are made the basis of ground (s) of appeal urged on behalf of the appellant, as at that time, there does not appear to be any judicial guideline in Fiji on such eventuality.

[58] The Court of Appeal sought assistance from practice in other jurisdictions , especially in the United Kingdom, which in the view of the court could be safely adopted in Fiji, in the case of **Regina v Michael Patrick Doherty Mc Gregor** [1997] EWCA Crim 556;[1997] 2 Cr.App.R 218.This ground was not canvassed at Court of Appeal stages, and further, the Petitioner admits that he has not fulfilled the steps established in **McGregor's** case (supra) which was adopted in **Chand v State** (supra)**.** This ground does not meet the requirements for the introduction of new evidence in appellate courts, and does not meet the requirements for the grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[59] **Ground (6):** *The learned trial judge erred in not considering the issue of provocation and self-defense causing substantial prejudice to the petitioner.*

[60] It was raised at the Court of Appeal stages where it was dismissed. The learned trial Judge's summing up at paragraphs [34] to [37] in my view adequately addressed the Petitioner's concerns as the learned trial judge was directing the assessors on the issues of provocation and self-defense. There were two questions arising which were before the assessors:

> *"1. Did the accused honestly believe or may have honestly believed that it was necessary to defend himself?*
>
> *2. If you think he really thought he had to defend himself in the circumstances as they then existed, was the amount of force which he used reasonable? The law is force used in self – defence is unreasonable and unlawful if it is out of proportion to the nature of the attack or if it is in excess of what is really required to defend himself."*

[61] The assessors returned a unanimous verdict of guilty on both counts. It is noted in this regard redirection was not sought by the counsel for the petitioner. The decision of the Full Bench of the Court of Appeal had canvassed the Petitioner's concerns in that court which is of a nature similar to this ground (see discussions on ground (i) in the Judgement of the Court of Appeal). I agree entirely with the assessment made by the Court of Appeal in paragraphs [36] to [38] of its decision. This ground does not meet the requirement for grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[62] **Ground (7)**: *The learned trial judge erred in law in regard to charges that has laid as it was a wrong defective charge causing substantial miscarriage of justice.*

[63] This is a new ground of appeal which was not canvassed in the Court of Appeal. These issues raised ought to have been raised at the beginning or during the trial. The respondent had conducted the prosecution case in line with the charges lawfully levelled against the accused. The totality of the evidence adduced by the prosecution has led the assessors to return a verdict of guilty on all counts., and the learned trial Judge accepted the unanimous verdict of the assessors. The ground does not meet the requirements for the introduction of newb evidence in an appellate court, and does not satisfy the requirement for the grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[64] **Ground (8):** *The Learned trial Judge erred in law as he did not consider the use of circumstantial evidence in this case causing a grave miscarriage of justice.*

[65] This is a new ground of appeal, and was not raised at the Court of Appeal. It must be emphasized that the State relied on the evidence of 19 witnesses and 15 exhibits, all the witnesses gave circumstantial evidence as no one saw what the accused did or was at the crime scene being an eye witness to the events. At the trial the assessors had the benefit of listening to the witnesses including the evidence of the accused. The learned trial judge in summing up fairly presented the evidence for both sides, the prosecution case, see paragraphs [13] to [28], as well as the case for the defence, see paragraphs [30] to [32]. The assessors, on the totality of the evidence, returned a unanimous verdict of guilty, which the learned trial Judge agreed with. This ground does not satisfy the requirements for the introduction of new evidence in an appellate court. The ground also does not meet the requirement for the grant of special leave under Section 7(2) of the Supreme Court Act.

[66] **Ground (9)**: *The learned trial Judge erred in law in regards to intent and the malice aforethought present in this case causing substantial miscarriage of justice.*

[67] This ground is closely tied to ground (2), which is a new ground and which I have already dismissed for want of merit. It is similarly dismissed as the learned trial Judge

had adequately directed the assessors on the question of the accused's intention. Further, the assessors on the totality of the evidence adduced at the trial returned a unanimous guilty verdict on all counts, which was accepted by the learned trial judge. The ground does not satisfy the requirements for the grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[68] **Ground (10)**: *The learned Judge erred in law in the lack of consideration given to the Sentencing and Penalties Act causing substantial miscarriage of justice***.**

[69] This ground is being advanced in support of the Petitioner's appeal against sentence. At the Court of Appeal, the Petitioner challenged the imposition of minimum term and stated that it was manifestly excessive, but did not provide arguments in support, the ground of appeal being dismissed as a result. This ground is similarly dismissed as it does not satisfy the requirement for the grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

Additional Grounds of Appeal

[70] On 25 January 2022, the Petitioner filed an additional seven grounds of appeal, which are now discussed.

[71] **Additional ground (1)**: *That the learned trial judge failed to consider an application for withdrawal of trial counsel in the trial proceeding at the High Court, infringing the right to have your own choice of your counsel in trial, violating the constitutional rights under Constitution of Fiji (2013).*

This is a new ground of appeal being raised in this Court for the first time. The Petitioner submitted that he made an application to withdraw his instructions from his counsel at the High Court, however, this was not allowed by the learned trial judge. The Petitioner blamed his counsel's incompetence for not raising the ground when applying for leave to appeal before the Court of Appeal. The Record of the High Court of Fiji on the trial, does not contain any material to support this ground. It is evident that the Petitioner was represented by counsel at the trial in the High Court. There is no violation of the Petitioner's constitutional right to legal representation. The ground

does not meet the requirements in **Vaqewa** and **R v Brown** (supra). It also does not meet the requirements under Section 7(2) of the Supreme Court Act.

[72] Additional ground (2): *That the learned trial judge erred in law and fact when he did not consider the application of mistrial by the counsel on non-disclosure which is a miscarriage of justice***.**

[73] This is a new ground being raised for the first time in this Court. The Petitioner submitted he made an application for mistrial at the trial in the High Court, but the application was not granted. This ground is not supported by the record of the High Court of Fiji on the trial of the Petitioner. No material exists in the record to support this ground. This ground does not meet the requirement under **Vaqewa**, and **R v Brown**, for the introduction of new evidence in a appellate court. It also does not meet the requirements for the grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[74] **Additional ground (3)**: *The Petitioner claims and submits that due to the trial counsel's negligence and the incompetency of the legal representative at the FCA had not the petitioner been fairly represented.*

This ground does not meet the requirement for the grant of special leave to appeal required under Section 7(2) of the Supreme Court Act.

[75] **Additional ground (4)**: *That the failure of the legal representatives in the trial and appeal for the petitioner on addressing the issue of provocation to the Honorable Court had caused miscarriage of justice.*

This ground does not meet the requirements for the grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[76] **Additional ground (5)**: *That the trial counsel and appeal counsel did not obtain instruction, there was also no communication before or during hearing by the counsels, incompetency and overcharging*.

[77] This ground is related to ground 5 (above). It does not meet the requirements under **Vaqewa** (supra) and **R v Brown** (supra) and under Section 7(2) of the Supreme Court Act.

[78] Additional ground (6*): That the learned trial judge failed to direct assessors on the unwilled acts and events and provocation sufficiently and on presumption of innocence.*

This ground does not meet the requirements for the grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

[79] **Additional ground (7):** *That the learned trial judge erred in law in not sufficiently directing the assessors to consider the evidence at trial that afforded the foundation of defence of the appellant on the prosecution case where petitioner claims and argues that the mere view of facts which should have opened to assessors if it had been properly instructed about law, such a misdirection will be material if it might have deprived the accused of a chance of acquittal of the charge.*

[80] This ground does not meet the requirements for the grant of special leave to appeal under Section 7(2) of the Supreme Court Act.

Fresh Grounds of Appeal Not Raised in Courts below

[81] Although the Supreme Court has powers to entertain fresh grounds of appeal which were not raised below, it will not be entertained "*unless its significance upon the special leave criteria was compelling.* **Eroni Vaqewa v State** (supra): In considering the issues of whether new issues should be allowed to be argued in the Supreme Court, Justice L'Heureux- Dube in **R v Brown** [1993] 2 SCR 918, 1993 Can. Lii 114 (SCC) in his dissenting opinion, adopted by this Court in **Vaqewa,** said:

> *"Courts have long frowned on the practice of raising new arguments on appeal, Only in those circumstances where balancing the interests of justice to all parties lead to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on question of law alone are more likely to be received , as ordinarily they do not require further findings of fact.t Three prerequisites must be satisfied in order to permit the raising of a new issue,..., for the first time on appeal; first, there must be sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for*

tactical reasons failed to raise the issue at trial, and third, the court must be satisfied that no miscarriage of justice will result….."

[82] His Lordship's comments on the need to discourage new issues on appeal is very relevant. In this case, the new grounds of appeal were not supported by the Record of the High Court of Fiji. They were misconceived and not based on the evidence adduced at the trial given the nature of the offences committed by the Petitioner. Further the grounds of appeal substantially relied on the allegations made by the Petitioner on not being properly represented by counsels, and alternatively, that the counsels were not competent and did not sufficiently represent and project the defence case to the Petitioner's detriment. The grounds formulated around the counsel's alleged inadequacies were devoid of details and substance being drafted without the knowledge of the counsels. The grounds were drafted without due regard to the interests of the counsels, and without regard to the guidelines for approaching at the trail and at the Court of Appeal stages. In denying all the new grounds, including the additional grounds of the application for leave to appeal, this Court is satisfied that no miscarriage of justice will result.

Conclusion

[83] I have carefully considered the following: Court of Appeal judgement which is being challenged, all the grounds of appeal and the Written Submissions of the parties, the Constitution and implications on the grounds, the Supreme Court Act and the cases cited in the submissions and their effects. All of the new grounds of appeal that have not been raised at the Court of Appeal stages do not meet the criteria set for the introduction of new grounds in appellate Court. The grounds of appeal do not meet the threshold requirements for the grant of leave to appeal specified in Section 7(2) of the Supreme Court Act.

[84] The Petitioner's application for enlargement of time is refused. The Petitioner's grounds for application for grant of leave to appeal are disallowed .The appeal is dismissed. The Petitioner's conviction and sentence are affirmed.

Order of Court:

1. *Application for Enlargement of Time is denied.*
2. *Application for grant of leave to appeal is denied.*
3. *The appeal against Conviction and Sentence is denied.*
4. *The Conviction and Sentence affirmed.*

The Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

The Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

The Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court

SOLICITORS:

Legal Aid Commission for the Petitioner

Office of the Director of Public Prosecution for the Respondent