IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0022 of 2016
2nd Review Appeal
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0048/2012; High Court No: HAC HAC 049 of 2011]

BETWEEN: **MUSKAN BALAGGAN**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Mr Justice Salesi Temo, Acting President of the Supreme Court**
The Hon. Mr Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr Justice Brian Keith, Judge of the Supreme Court
The Hon. Mr Justice Madan Lokur, Judge of the Supreme Court
The Hon. Mr Justice Filimone Jitoko, Judge of the Supreme Court
The Hon. Mr Justice Isikeli Mataitoga, Judge of the Supreme Court

Counsels: **Mr P. Sharma for the Petitioner**
Dr. A. Jack with Ms S. Shameem for the Respondent

Date of Hearing: **11th April, 2023**

Date of Judgment: **27th April, 2023**

JUDGMENT

Temo, Acting P

[1] His Lordship Mr. Justice Anthony Gates had been assigned the task to write the court's main judgment. The other justices are at liberty to write short judgments in addition to the main judgment. I had been honoured to read the draft judgments of His Lordships Mr.

Justice Gates, Mr. Justice Brian Keith, Mr. Justice Madan Lokur and Mr. Justice Isikeli Mataitoga. I entirely concur with their judgments, reasoning and conclusions.

[2] This case calls into question the meaning of section 98 (7) of the 2013 Constitution. Section 98(7) reads as follows:

"*The Supreme Court may review any judgment, pronouncement or order made by it*".

[3] What does the section mean? The answer is to look at section 98(7) in its context, within the 2013 Constitution, and within the Supreme Court Act 1998.

[4] Section 98(3) of the 2013 Constitution reads as follows:

"(3) The Supreme Court—

(a) is the final appellate court;

(b) has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal; and

(c) has original jurisdiction to hear and determine constitutional questions referred under section 91(5)".

Section 98(3) establish beyond doubt that the Supreme Court is the final appellate Court in the land and has exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal and has original jurisdiction to hear and determine constitutional questions referred to it under section 91(5).

[5] Section 98(4) of the 2013 Constitution reads as follows:

"(4) An appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal".

Section 98(4) showed again beyond doubt that to come to the Supreme Court is not automatic to any litigant or petitioner. You can only come before the Supreme Court, when it grants you leave that is, it gives you permission to come before it. And for you,

as a litigant, to come before the Supreme Court, you must satisfy the court that your case comes within the ambit of section 7(2) and 7(3) of the Supreme Court Act 1998.

[6] Section 7(2) and 7(3) of the Supreme Court Act 1998 reads as follows:

> ***"7 (2) In relation to a criminal matter, the Supreme Court must not grant leave to appeal unless-***
>
> ***a) a question of general legal importance is involved;***
>
> ***b) a substantial question of principle affecting the administration of criminal justice is involved; or***
>
> ***c) substantial and grave injustice may otherwise occur.***
>
> ***(3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant leave to appeal unless the case raised-***
>
> ***a) a far-reaching question of law;***
>
> ***b) a matter of great general or public importance;***
>
> ***c) a matter that is otherwise of substantial general interest to the administration of civil justice".***

[7] Once the Supreme Court hears your case, with the usual three judges' panel, their decision on the matter is final, whether or not it is a civil or criminal case. That is why section 98(3) (a) of the 2013 Constitution calls it "*the final appellate court*". And by virtue of section 98(6) of the 2013 Constitution, the decision of the Supreme Court is, subject to section 98(7), binding on all other courts of the state.

[8] Section 98 (7) of the Constitution gives a discretionary power to the Supreme Court *"to review any judgment, pronouncement or order made by it"*. Note that the section only mentions "*judgment, pronouncement or order*" in its singular sense. It doesn't mention "*judgments, pronouncements or orders*", in its plural sense. That could mean, and I do hold that it means, that the Supreme Court may only review one of its previous "*judgment, pronouncement or order*", and not any previous "*judgments, pronouncements or orders"*. Section 98(7) of the 2013 Constitution does not authorize a second, third or fourth review, because it does not authorize the same. It is arguable that any second, third or fourth review could be null and void, because there is no constitutional or legislative authority for it.

[9] When can the Supreme Court exercise its powers under section 98(7)? There is no time limitation. However, the Supreme Court is at liberty to call upon its section 98(7) review powers when it feels it is justifiable to do so, bearing in mind the requirements of section 7(2) and 7(3) of Supreme Court Act 1998. It was observed that the review powers of the Supreme Court had been abused in the past by mostly unrepresented petitioner who are serving long prison sentences in our correction facilities. Most of them had exhausted their review rights under section 98(7) of the Constitution. In most of the cases, they had abused the Supreme Court review powers by making multiple review applications. It was a waste of their time, the Director of Public Prosecution's Officers' time, including the Supreme Court Judges' time to be considering multiple review applications, which are plainly an abuse of process. It is suggested to them to address their grievance to the Mercy Commission, pursuant to section 119 of the 2013 Constitution.

Gates, J

Introduction

[10] This is effectively a 2nd Review application by the petitioner. A bench of six judges of the Supreme Court has been assembled to consider the extent of the jurisdiction to review an earlier decision of the Supreme Court, and whether there is power to hear and determine a second or further application for a review.

[11] An increasing number of review applications have been lodged in the Supreme Court in recent years. Some have purported to make second, third, fourth, and even fifth applications. Predominantly these have been in criminal matters usually brought by applicants in person. Very few applications have been lodged in civil matters.

[12] This court is not aware of any case prior to 1987 where Fiji's Final Court of Appeal, then the Privy Council, heard or allowed an application for review of an earlier decision of the Board in relation to Fiji.

[13] The 1970 Constitution did not grant a power of review. But under *"Appeals to Her Majesty in Council"* section 100, after setting out where appeals might lie from the Court of Appeal to the Board, stated:

> *"(3) Nothing in this or the preceding section shall affect any right of Her Majesty to grant special leave to appeal to Her Majesty in Council from the decision of any court in any civil or criminal matter."*

[14] The 1990 Constitution gave power to the Supreme Court *"to review any judgment, pronouncement, or any order made by it*" [section 118(3)]. It was some years later before the Supreme Court, as the final appellate court, had Judges appointed and commenced hearings.

[15] The 1997 Constitution also continued the wording: *"Section 122(5) the Supreme Court may review any judgment, pronouncement or order made by it."*

[16] The 2013 Constitution carried forward in its section 98(7) the identical wording of the 1997 Constitution with regard to review.

[17] In the interim, after the abrogation of the 1997 Constitution, the Administration of Justice Decree 2009 was passed. Again, a power for the Supreme Court to review its own decisions was retained in identical terms [section 8(5)].

Earlier Cases

[18] In **Eliki Mototabua v The State** CAV 0004 of 2005 as, 29 February 2008, the Supreme Court decided to constitute a new bench to re-hear the petition. A previous bench had heard the appeal and dismissed it, but no reasons were published. This was because one judge had been suspended and another had since retired.

[19] Full reasons set out in the judgment the Court, as it was then constituted, confirmed the earlier order that special leave was to be refused, and that the petition was to be dismissed.

[20] The court, by its re-hearing, was able thereby to confirm the decision to dismiss the petition, and was also able to provide reasons. This procedure could not be classified as a review. It had been resorted to because of the peculiar circumstances whereby a previous court had been unable to complete its decision by providing reasons

[21] On the 2 May 2008 the petitioner filed documents making application to argue 25 additional grounds. The court dismissed the application as an abuse of process [**Mototabua –v- The State**, CAV 0004/2005S, 23 July 2008]. It said none of the additional grounds raised any new matter. It might be thought the court had been indulgent in granting the petitioner in person a hearing at all. The court also observed in a short judgment that nothing had occurred since February 2008 justifying an application to exercise a review jurisdiction.

[22] The court said it would not entertain a challenge to his sentence, since he had not raised an appeal against sentence with the Court of Appeal.

[23] Finally the court ordered, as well as a dismissal of the petition:

> *"…….that no further petition or application relevant to conviction be filed in this matter in the Supreme Court without leave of a Judge of the High Court which may be granted or refused in Chambers without an oral hearing."*

[24] In **Silatolu v The State** CAV 0002/2006, 17 October 2008 the court considered the jurisdiction of the Court in review matters. Four applications were heard together. There were two parts to the power:

> *"The power conferred by s.122(5) is the power that all courts have, during the period between the oral pronouncement of their orders and their formal entry, to re-open and review their orders. However s122(5) enables the Supreme Court to review its orders even after they have been perfected by formal entry."*

[25] The power to re-open and to review was one "*to be exercised with great caution*." **Silatolu** cited cases from several jurisdictions. But a useful summary was referred to, drawn from the case of **Smith v NSW Bar Association** (1992) 176 CLR 252 and 265 where the High Court of Australia had said:

> *"The power is discretionary and, although it exists up until the entry of judgment, it is one that is exercised having regard to the public interest in maintaining the finality of litigation. Thus, if reasons for judgment have been given, the power is only exercised if there is some matter calling for review . . . these considerations may tend against the re-opening of a case, but they are not matters which bear on the nature of the review . . . once the case is re-opened . . . the power to review a judgment . . . where the order has not been entered will not ordinarily be exercised to permit a general re-opening . . . But . . . once a matter has been re-opened, the nature and extent of the review must depend on the error or omission which has led to that step being taken."*

[26] The court referred to the decision of the High Court in **Autodesk Inc v Dyason** (No.2) (1993) 176 CLR 300, 303 where Mason CJ said:

> *"What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and this . . . cannot be attributed solely to the neglect of the party seeking the re-hearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases."*

[27] The same principal applied in criminal appeals: **R v Cross** [1972] QB 937 CA, 941. In **Grierson v The King** (1938) 60 CLR 431, 435 Dickson J said:

> *". . . a second appeal from a conviction could not be entertained after the dismissal, on the merits, of an appeal or application for leave to appeal and . . . the first appeal could not be re-opened after a final determination."*

[28] A clear example of where the review jurisdiction should be entered upon was the decision in **Reg v Bow Street Magistrate ex parte Pinochet** (No.2) [2000] 1 AC 119. A differently constituted appellate committee set aside a decision of the House because of a non-declared conflict by a member of the original court. The issue was ostensible bias.

[29] **Silatolu** held a court of final appeal has power "*in truly exceptional circumstances*" to recall its orders even after they have been entered *"in order to avoid irremediable injustice."* The court cited:

> *"**Maharajah Pertab Narain Singh v Maharanee Subhao Koer ex parte Trilokinath** (1878) LR 5 Ind App 171, 173; **Venkata Narasimha Appa Row v***

The Court of Wards *(1886) 11 App Cas 660;* ***State Rail Authority NSW v Codelfa Construction Pty Ltd*** *(1982) 150 CLR 29, 38-9."*

[30] The court rejected the four reviews and its reasons for doing so were very similar in each of the cases. In summary they were:

1) Attempting to re-argue the same case, repeating arguments which had earlier been considered and rejected by the Court.
2) Raising fresh matters not raised previously in any of the courts.
3) Matters raised lacking in substance
4) Failure to establish any error or mistake by the court in its reasons for judgment
5) Failure to establish that the court had proceeded on some misapprehension of the facts and the relevant law having regard to the submissions then before it.

[31] The court held that "*all five applications were therefore vexatious and an abuse of process of this court. They involved an unnecessary waste of time and resources by the Prisons Department, the Director of Public Prosecutions and the Court."* It found it had an inherent jurisdiction to prevent abuse of its process by the making of unwarranted and vexatious application in existing proceedings: **Commonwealth Trading Bank v Inglis** (1974) 131 CLR 311. It reminded petitioners seeking review that the court's powers to prevent abuse remained alive even though the petition for special leave had been dismissed, for the time that the decision remained subject to review. This applied to both civil and criminal proceedings.

[32] Orders of summary dismissal on the papers were open to the court in order to prevent abuse. As a suitable procedure the court said it would first consider the application without an oral hearing. The applicant must lodge written submissions in support. The respondent would have an opportunity to reply, to which the applicant could make further reply. The court would then decide whether to dismiss summarily or to list the review application for an oral hearing. This procedure has been followed in Fiji for the last 14 years or so.

[33] Another 5 applicants sought review which were considered without a hearing before this court: **Eliki Mototabua v The State,** CAV0006 of 2006S, 10th February 2009. The court noted the applications were made by unrepresented petitioners. It found that the reviews sought were all without merit and an abuse of process.

[34] In some cases there had been a mistake of fact. In one case the court had been mistaken in stating that the magistrate had not ruled on the applicant's submission of no case to answer: **Mototabua.** But the court decided that that mistake was "*utterly irrelevant."* It did not matter now why the applicant gave sworn evidence before the magistrate. The point had not been taken in the High Court, and it was not within the leave granted by the Court of Appeal.

[35] In another instance the court observed the submissions were new, and did not disclose an arguable case. The court concluded it was *"not prepared to hear oral argument on the notice of motion which is frivolous and vexatious and the orders sought are refused."* **A K Singh v The State** CAV 0005 of 2008S, 10 February 2009. The review application was said to be "*a blatant attempt to re-argue the merits of the appeal after it has failed."*

[36] In the **State v Eliki Mototabua** [2012] FJSC 14 the court ordered that the petition be dismissed. This was a second review application which was brought by the Director of Public Prosecutions. It was a first application by the Director but a second application for review in the proceedings. The case has been used as foundational authority for the bringing of reviews and further reviews. That opinion is a misreading of the judgment of Gates P. Indeed the review ended when counsel for the State considered he could no longer continue with the review application because of prior authority.

[37] The court went on to provide some guidance on what should have been the procedure followed in the Magistrates Court after the prosecution faced an inability to proceed. But there was no review permitted. The court referred to **Silatolu** and to its strictures on the limited use to which review could be heard, never mind allowed.

[38] In **Anisimai** [2012] FJSC 3, Marshall J, had summarized the problems facing the Supreme Court:

> *"19. But a second or further appeal to the Supreme Court is another matter. If such rules allow this in our legal system it becomes "open season" for clogging the system with such appeals. There is nothing to stop it happening again and again in the same case. If so the hearing of appeals that are meritorious is inevitably delayed. The time of Fiji's top judges are wasted on cases that should never be before them. Also the prestige of the Supreme Court suffers because at the top of the pyramid it is, as a court of final appeal, only supposed to be dealing with matters of public and general importance with regard to the administration of criminal justice."*

[39] It is in paragraph [36] of the **Eliki Mototabua** judgment [Gates P] that applicants may have been encouraged to think 2nd review applications might gain some traction. It is generally agreed now that that window is no longer available, if it ever were. Finality of decision making in the appellate courts, bringing as it does finality to litigation issues, must trump perpetual scrutiny. We hold there is no such jurisdiction for 2nd reviews.

Time within which a review application must be lodged

[40] No time limit is set in the Supreme Court Act or the Supreme Court Rules 2016 for the lodging of a review application. While it may not be advisable or even permissible for this Court to give a binding direction specifying the reasonable period for filing a review petition, guidance may be had from two legislations, namely, the Court of Appeal Act, 1940 and the Supreme Court Rules 2016. Section 26 of the Court of Appeal provides for a limitation period of 30 days for giving a notice for filing an application for leave to appeal against the conviction or decision of the High Court in a criminal matter. Rule 5 of the Supreme Court Rules provides for the lodgment of an appeal in the Registry of the Supreme Court within 42 days of the date of the decision from which leave to appeal is sought. These legislations ought to provide a general guidance regarding the time within which a review petition may be filed by an aggrieved litigant.

[41] A question has arisen from time to time in the Supreme Court of India that where time is not specified for doing a particular act or performing a particular task for example in a contract for supply of goods or filing a response to a notice, then '*reasonable time'* must be read into the contract or statute or rule, as the case may be.

[42] In **Ramlila Maidan Incident v. Home Secretary, Union of India** (2012) 5 SCC 1 the Supreme Court of India held:

> *"It is a settled rule of law that wherever provision of a statute does not provide for a specific time, the same has to be done within a reasonable time. Again reasonable time cannot have a fixed connotation. It must depend upon the facts and circumstances of a given case."*

[43] In **K.B. Nagur M.D. (Ayu.) v. Union of India** (2012) 4 SCC 483 the Supreme Court held:

> *"It is a settled rule of statutory interpretation that wherever no specific time limit is prescribed, the concept of reasonable time shall hold the field for completing such an action. The courts in the process of interpretation can supply the lacuna, which would help to achieve the object of the Act and the legislative intent and make the provisions effective and operative."*

[44] To avoid labouring this issue, reference may finally be made to a comparatively recent decision in **Union of India v. Citi Bank, N.A**. MANU/SC/1482/2022 wherein the Supreme Court considered several earlier decisions and held:

> *"19. It is a settled proposition of law that when the proceedings are required to be initiated within a particular period provided under the Statute, the same are required to be initiated within the said period. However, where no such period has been provided in the Statute, the authorities are required to initiate the said proceeding within a reasonable period. No doubt that what would be a reasonable period would depend upon the facts and circumstances of each case."*

Finality or Perpetual Right?

[45] I have already referred to the need for finality in litigation. Cases must needs reach final conclusion. Section 98(7) provides an avenue for curative jurisdiction in rare cases of

obvious mistake, glaring error, and irremediable injustice. Once applied for, within a reasonable time, and declined, that must be the end of the matter. There is no continuing right to bring review applications. The litigation is at an end.

Criteria for special leave Sections 7(2) and (3)

[46] The criteria to be applied for the grant of special leave to bring a petition to the Supreme Court, must not be ignored also when considering a review. They are a reminder that the Supreme Court is not just another Court of Appeal. No review could be acceded to which failed to meet the criteria.

> *"(2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-*
> *(a) A question of general legal importance is involved;*
> *(b) A substantial question of principle affecting the administration of criminal justice is involved;*
> *or*
> *(c) Substantial and grave injustice may otherwise occur.*
>
> *(3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-*
> *(a) A far-reaching question of law;*
> *(b) A matter of great general or public importance;*
> *(c) A matter that is otherwise of substantial general interest to the administration of civil justice."*

[47] What is the jurisdiction of this Court in its review jurisdiction? The Supreme Court of India, in a recent decision delivered on 21 March 2023, **Sundar v State** by Inspector of Police, Review Petition (Crl.) Nos. 159-160 of 2013 in Criminal Appeal Nos. 200-201 of 2011 decided on 21 March 2023, referred to and relied on an earlier decision in **Mofil Khan v State of Jharkhand**, Review Petition (Criminal) NO. 641 of 2015 in Criminal Appeal No. 1795 of 2009 decided on 26 November 2021, which discussed the scope of review and held that:

> *"2.[....] Review is not rehearing of the appeal all over again and to maintain a review petition, it has to be shown that there has been a miscarriage of justice. An error which is not self-evident and has to be detected by*

> *a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An applicant cannot be allowed to re-argue the appeal in an application for review on the grounds that were urged at the time of hearing of the appeal. Even if the applicant succeeds in establishing that there may be another view possible on the conviction or sentence of the Accused that is not a sufficient ground for review. This Court shall exercise its jurisdiction to review only when a glaring omission or patent mistake has crept in the earlier decision due to judicial fallibility. There has to be an error apparent on the face of the record leading to miscarriage of justice."*

[48] Because the applicant has already had a decision of the Supreme Court on his or her petition in which the Court has provided its reasons, the Court may decide the review on the papers alone. It may, or may not, call for a hearing, and may reject the application simply by notification to the parties without the need for reasons or a judgment.

[49] In the instant case, we find the applicant has previously succeeded on a review and that this is therefore a second review. Many Judges have considered her case. We do not consider this a proper case for review as a second review. The application is therefore declined, there being no jurisdiction for a hearing or for allowing a second or subsequent review.

Keith, J

[50] I have read a draft of the judgment of Gates J. I entirely agree with him that second and subsequent reviews should not be allowed, but in view of the change of practice which this represents, I wish to add a few words of my own to make one or two additional observations not covered in his otherwise comprehensive judgment.

[51] The petitioner's application is phrased as an application for a review of the latest decision of the Supreme Court – in other words, the Supreme Court's decision on the review. Her legal team argue, therefore, that this is not a second application for a review of the original decision of the Supreme Court. It is the first application for a review of the decision of the Supreme Court on the previous review. I do not think that the problem can be got

round by a procedural device of that kind. A review of a decision of the Supreme Court on a review will inevitably involve a challenge to the original decision of the Supreme Court, and it is in reality another attempt to have the Supreme Court's original decision set aside. If the argument was correct, a petitioner could say that any subsequent application for a review was an application for a first review of the decision which immediately preceded it, and they could continue to petition the Supreme Court *ad infinitum*. It follows that the present application for a review should be treated as a second application for a review.

[52] In my view, there must come a time when you have to say that enough is enough. If you do not, there is nothing to prevent the determined but unsuccessful litigant claiming to be entitled to invoke the Supreme Court's exceptional power of review time and again. No-one would say that he or she is entitled to do that indefinitely. The only question, then, is *when* they should be regarded as having reached the end of the road. By the time a second application for a review is made, the Supreme Court will already have twice considered the issues which the case raises – on the original appeal to the Supreme Court and on the first application for a review. You have to proceed on the basis that any error in the first decision which is of the kind which should be corrected on a review will have been corrected on the review. Otherwise, cases will never end, and the important principle of finality in litigation will be set at nought.

[53] I acknowledge that section 98(7) of the Constitution does not in terms limit the number of times a litigant can apply to the Supreme Court to review a previous decision made by it, but I do not believe that those who were responsible for drafting the Constitution refrained from limiting the number of times such an application could be made because they thought that the number of times should be limitless. That does not mean that we should not interpret section 98(7) as permitting only one application for a review. The language of section 98(7) prevents us from doing that. But since section 98(7) confers on the Supreme Court a power to review earlier decisions which it made, *I think that it should be regarded as also conferring on the Supreme Court the power to determine when that power should be exercised*. In order to give effect to the fact that those who

were responsible for drafting the predecessors of section 98(7) must have thought that there had to be a limit on the number of times a litigant could request the Supreme Court to consider the same decision, it would be entirely appropriate for the Supreme Court now to declare that it will not exercise its power of review again in a particular case once that power of review has already been exercised in that case. The filing of a second or subsequent review should be treated as an abuse of the Court's process.

[54] What about those cases in which something new emerges after the first application for a review has been disposed of – for example, the discovery that the victim is still alive after the defendant has been convicted of murder and his application for a review of the original decision of the Supreme Court upholding his conviction has been refused? Admittedly, in future, applying for a review is not a path which the defendant can take, but there is another avenue open to the defendant which will remedy any obvious injustice. The Mercy Commission can be convened as a matter of urgency, and can recommend to the President of Fiji an unconditional pardon for the defendant.

[55] Finally, Gates J has very helpfully reviewed the authorities on when the Supreme Court should entertain a review. He has explained the very limited circumstances in which that should be done. I wish to add a couple of things to what he has said. First, the exceptional power of the Supreme Court to review an earlier judgment should not be treated by the litigants as a second bite of the cherry. It should never be used to disguise what would in truth be a further appeal on the merits. Nor should it be used to challenge a decision in which the Court preferred one of two reasonable outcomes. The power exists to enable the Court to put right mistakes which should never have been made. The mistake need not be obvious on a first reading of the earlier judgment, but it must be self-evident once the earlier judgment has been properly analysed.

[56] Secondly, it is sometimes said that the Supreme Court's power to review an earlier decision only arises when something new has emerged – for example, the development of new forensic techniques in the analysis of DNA which conclusively proves the defendant's innocence, or the discovery of new evidence which was concealed through

fraud, or the court's unawareness of some binding statutory provision. For my part, I do not agree that a review can only take place when something new has emerged. Reviews of an earlier decision of the Supreme Court are not limited to such cases. Let us give a couple of examples.

[57] In *Dromudole v The State* [2015] FJSC 28, the application for a review was granted because the Supreme Court had failed to address a particular ground of appeal, namely that the refusal by the trial judge to grant the petitioner an adjournment had resulted in him being denied a fair trial. The fact that this ground of appeal had not been addressed by the Supreme Court was "*a sufficiently compelling reason to justify the Supreme Court now taking the exceptional course of reviewing its previous judgment, limited, of course, to [that ground]"*. The Court went on to grant leave to appeal, and to allow the appeal, with the result that Dromudole was retried.

[58] The case of *Korovusere v The State* [2013] FJSC 2 was to similar effect. In that case the application for a review was granted because the Supreme Court had not considered the consequence of the trial judge's failure, both in his summing-up to the assessors and in his own judgment, to give any direction about the circumstances in which a defendant could be said to have withdrawn from a joint enterprise. The Court went on to grant leave to appeal, and to allow the appeal, with the result that Korovusere was convicted of a lesser offence. In neither of these cases did something new emerge. What had happened was that the Supreme Court had failed to engage with a particular ground of appeal (*Dromudole*) or a possible defence (*Korovusere*).

Lokur, J

[59] I have read with interest the draft judgment prepared by Justice Gates and entirely agree with the reasons given and the final order.

[60] Given the importance of the issues raised, Hon'ble the Acting President of our Supreme Court constituted a bench of six judges and encouraged us to freely express our views.

Hence this supplement without intending to detract, in any manner, from the views expressed by Justice Gates.

[61] Justice Gates has delineated the consistent practice followed in this court for about fourteen years while considering a review application on the papers circulated. It is not necessary to add anything to this.

[62] A review procedure, somewhat similar to the procedure of this court, of circulation on paper but without calling for a reply from the respondent, was incorporated by an amendment to the Supreme Court Rules in India. The amendment was challenged, *inter alia*, by the Supreme Court Bar Association. The vices identified by learned counsel in that case were an absence of a public hearing and oral presentation. The challenge was rejected in ***P.N. Eswara Iyer v. The Registrar, Supreme Court of India***, 1980 SCR (2) 889. It was held that:

> *"'Circulation', in the judicial context, merely means, not in court through oral arguments but by discussion at judicial conference. Judges, even under the amended rule, must meet, collectively cerebrate and reach conclusions."*

[63] The Indian procedure, an improved version of which is followed in our court, was held as not being arbitrary, unfair and unreasonable. The reason is that the judges (to the extent possible, the same judges who heard oral submissions in the first round) scrutinize the papers and direct a hearing in open court if there are good grounds made out by the review applicant. "*Only if preliminary judicial scrutiny is not able to discern any reason to review is oral exercise inhibited*." An open and oral hearing is, therefore, not absolutely precluded.

[64] The procedure followed by this court being fair and reasonable, there is no reason to give a review applicant another bite of the cherry, as it were, being a third bite by permitting a second review or, as pointed out by Justice Gates in some instances, a third, fourth or fifth review.

[65] The Constitution of the Republic of Fiji provides, in section 98(7) that "*The Supreme Court may review any judgment, pronouncement or order made by it*." The authority to review a judgment, pronouncement or order is given to the Supreme Court and not to a litigating party who can only apply for a review on very limited grounds and in exceptional circumstances as repeatedly held in decisions of this court. The section cannot be interpreted to permit promiscuity in filing review applications and avenging a forensic defeat, time and again, in the hope of reversing an unpalatable result at some point in time. The Latin maxim *Interest reipublicae ut sit finis litium* (it is in the interest of the state that there should be an end to litigation) is clearly applicable.

[66] It is also imperative that forensic engineering is tempered and fashioned by available resources. Were multiple review applications entertained by this court having a limited strength of judges, litigants awaiting a first hearing might have an interminable wait. This is certainly not in public interest. Judicial time is required to be judiciously rationed and cannot be spent on multiple considerations of the same cause.

[67] The Supreme Court is supreme, but not infallible. There might be a palpably extraordinary situation, when it is discovered that a victim is actually alive though the defendant is convicted of murder and his review application dismissed. In such an eventuality, this court can exercise its curative power *ex debito justiciae* as noted by Justice Gates.

[68] I agree that the review application be rejected and that section 98(7) of the Constitution does not permit a second (or subsequent) review application as of right.

Jitoko, J

[69] I have had the advantage of reading in draft the judgment of Gates J. I agree with it and for the reasons he gives, I would refuse the review.

Mataitoga, J

[70] I have read the draft judgment prepared by Justice Gates and concur with the reasoning and conclusions reached therein.

[71] I wish to add my own view on the issues of jurisdiction pursuant to Section 98 (7) of the Fiji Constitution 2013 and whether it provides for special appeal to the Supreme Court for second review of an earlier review judgment.

[72] The Petitioner seeks the Court's Leave pursuant to section 98(7) of the Constitution 2013 for another review [second] of the court's earlier decision dated 25 August 2022. On 19 April 2022 the court had granted the Petitioner a review hearing of the Supreme Court judgement dated 4 November 2016.

[73] Counsel for the petitioner had submitted timely written submissions to the court and was ready to support it further with oral submission. The same is observed for Counsel's appearing for the State, as respondent.

Court's Approach

[74] The Court's approach in this matter was to first determine whether it has the jurisdiction to grant review of an earlier review decision of the Supreme Court. Foremost in the Court approach is the need for finality in how review decision of the Supreme Court is to be managed in future, to avoid the current situation where Section 98(7) of the Constitution 2013 is used as providing jurisdiction for reviewing earlier decisions of the Court. Often these review applications are not supported with any grounds that show any miscarriage of justice nor do they raise issues of law of great public importance.

[75] The Court's loose interpretation of the nature of the jurisdiction granted by Section 98(7) of the Constitution 2013, along with the absence of clear provisions in the Supreme Court Act 1998 and the Supreme Court Rules 2016 as to how section 98(7) is to be properly

engaged and with what can only be described as a misunderstanding of 'relevance' in some of the case law, has given rise to the influx of reviews improperly advanced under section 98(7) of the Constitution.

[76] This is clearly illustrated by the number of applications pending before the court today, that seek this Courts leave for the 2nd, 3rd, or even 4th for review under section 98(7) of the Constitution. In most of the petitions filed, the grounds set out in support of the application for review, are rehashed from earlier submissions that were rejected in an earlier ruling of this court.

[77] The Court is mindful that it has inherent jurisdiction to prevent the abuse of its process by allowing reviews of earlier decisions of the court, which are unwarranted and vexatious applications in nature.

[78] In **Dromudole v The State** [2015] the Supreme Court stated an application for review

> *'..will always present an applicant with difficulties. It has been said that a decision of a final appellate court is one of great sanctity. It should not be disturbed save in exceptional circumstances'- paragraph 13*

The reason for that is the need to bring finality in the decision of the apex court of the country. You will always have litigants who are dissatisfied with the outcome of litigation. Where there is power to review its own decision, it has to be exercised with great caution and with the principle of finality in mind.

The nature of the Jurisdiction conferred on the Supreme Court pursuant to Section 98(7) Constitution 2013

[79] We need to look at the construction of the section more closely. The rules of statutory construction require primary attention to be directed to the text of the relevant provisions. The court looks to the ordinary meaning of the language which Parliament has chosen to use and considers how those words should be understood in light of the context in which the legislation was enacted. In this way, the process of statutory construction must begin

and end in consideration of the relevant statutory provisions. Where the wording is plain and clear of any ambiguity than the court will apply it as is:

[80] The wording of the section 98(7) provides:

> *'The Supreme Court may review any judgment, pronouncement or order made by it.'*

[81] On the plain reading of this section, it is clear that it does not confer any jurisdiction to any other Court other than the Supreme Court. Nor is it a provision that confers appellate powers to another Court. Rather, it is a discretionary power that the Supreme Court may choose to exercise, in very limited circumstances, to review any judgement, pronouncement or orders previously made by it so as to ensure that justice is done.

[82] It is expected that this power will be rarely exercised. Should it be exercised, it will be in the nature of revisional jurisdiction to correct a common law of Fiji recognised by this Court or an obvious miscarriage of justice resulting from an earlier decision.

[83] What is unclear from an examination of the Supreme Court Act 1998 or the Supreme Court Rules 2016 is how the discretionary power in section 98(7) of the Constitution is triggered.

[84] When Section 98 (7) is compared to Section 98(4) and (5) of the Constitution 2013, there is clear jurisdiction in the latter provision, for an appeal to be brought to the Supreme Court from a final judgement of the Court of Appeal, subject to requirements set in subsection 5.

[85] Section 98(7) of the Constitution on the other hand provides discretionary jurisdiction to the Supreme Court to review any of its previous pronouncement, judgement or order. There are two matters to note and these are:

(i) It is the Supreme Court that may review acting in its discretion;

(ii) The reference to what may be reviewed is to 'to any judgement, pronouncement or order made by it.' The reference to judgment,

pronouncement or order is in the singular; suggesting that the court may be limited to one opportunity to review.

[86] This provision does not provide the petitioner jurisdiction for a review of an earlier review judgment of the Supreme Court. This provision provides the Supreme Court, inherent jurisdiction to intervene and review any of its earlier judgment, pronouncement or order to ensure no miscarriage of justice is perpetrated or continued. It does not provide a backdoor method for unsuccessful litigants to seek another opportunity to relitigate its case.

[87] The High Court of Australia in **Autodeck Inc v Dyason** (2) (1993) 176 CLR 300, where Mason CJ stated the applicable principles as:

> '*What must emerge in order to enliven the exercise of the jurisdiction is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and this ... cannot be attributable solely to the neglect of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases.*

[88] In **Anisimai v The State** [2012] FJSC 3 VAC 0006 of 2008s the Supreme Court observed that **Silatolu & 3 Others** CAV 005 of 2005, were decided by the Court following incorrect principles. It also went further to decide that:

> *'There has been a wrong turning in ever deciding that section 8(5) could in appropriate case apply to validate a second or further final criminal appeal in the supreme court. To put matters right is a decision in each such second or further appeal to the Supreme Court that the Supreme Court has no jurisdiction to entertain in a second or further appeal.' Paragraph 65*

[89] It seems unsatisfactory that the laws of Fiji make no provision for how section 98(7) of the Constitution is to be enlivened, nor the procedure involved. In this regard, an observation is made that an amendment to the Supreme Court rules pertaining to the Courts exercise of its discretionary jurisdiction under section 98 (7) may be made pursuant to section 103(1) of the Constitution 2013 to expressly and clearly provide for such a process. This gap does not provide a satisfactory legal solution for matters that can be appropriately brought under section 98(7).

[90] On the basis of the above assessment and that no ground has been shown that would give any basis for hope that a reconsideration of the matter would be successful, the Review Petition is dismissed.

Orders:

1) *Review application refused as an abuse of the process of the court.*
2) *The Supreme Court declares that its power under section 98(7) of the Constitution to review any judgment, pronouncement or order made by it will not be exercised in respect of any judgment, pronouncement or order which has previously been the subject of a review under section 98(7) of the Constitution.*

The Hon. Mr Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT

The Hon. Mr Justice Anthony Gates
JUDGE OF THE SUPREME COURT

The Hon. Mr Justice Brian Keith
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Mr Justice Madan Lokur
JUDGE OF THE SUPREME COURT

The Hon. Mr Justice Filimone Jitoko
JUDGE OF THE SUPREME COURT

The Hon. Mr. Justice Isikeli Mataitoga
JUDGE OF THE SUPREME COURT