

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0014 of 2020

[On Appeal from the Court of Appeal Criminal
Appeal No: AAU0143/14; HAC 176/2021]

BETWEEN : **RAJENDRA BAKA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon Madam Justice Lowell Goddard
Judge of the Supreme Court

The Hon Mr Justice Isikeli Mataitoga
Judge of the Supreme Court

Counsel : **Ms N. Mishra for the Petitioner**

Dr A. Jack for the Respondent

Date of Hearing: **4 August, 2023**

Date of Judgment: **30 August, 2023**

JUDGMENT

Temo, AP

[1] I have read Madam Justice Lowell Goddard's draft judgment. I entirely agree with her Ladyship's reasons, conclusions and proposed orders.

Goddard, J

[2] The petitioner seeks special leave to appeal from a judgment of the Fiji Court of Appeal delivered on 27 February 2020, dismissing his appeal against conviction on one count of murder pursuant to section 237 of the Crimes Act No.44 of 2009. The particulars of the charge were that on 9 December 2012, at Lautoka, the petitioner recklessly murdered Nancy Shobna Pillay, his de facto wife. The grounds on which he advances this petition for special leave are based on the defence of provocation, as provided for under section 242 Crimes Act 2009. However, these are new grounds that were not argued before the Court of Appeal; nor were they raised as an arguable defence at the petitioner's trial, either by his counsel or by the learned trial judge. A jurisdictional issue therefore immediately arises, as to whether this Court can consider a grant of special leave when the grounds tendered in support of it have not been the subject of any determination by the Court of Appeal and are brought de novo.

Chronology

[3] The petitioner was charged with one count of recklessly murdering Ms Pillay on 9 December 2012. Her death resulted from the infliction of a deep penetrative stab wound to her chest. In addition she sustained four other injuries consistent with defending herself.

[4] The fatality occurred on a fishing boat belonging to a friend, Muneshwar Chand. It came at the end of a long day of drinking for the couple, involving their landlord, Paras Ram, Mr Chand and another, Maika Kaufusi. At some stage during the afternoon, Paras Ram ordered the petitioner from his house because of a physical altercation between the petitioner and Paras Ram and his brother.

[5] After leaving the house, the petitioner and Ms Pillay, together with Mr Chand and Maika Kaufusi, went to a shop where they consumed more beer. All then went to the Lautoka Fisheries wharf. There they continued drinking until putting to sea in Mr Chand's boat

at around 5pm. They anchored near Bekana Island and after having dinner, the petitioner and Ms Pillay went into the cabin to sleep. The other two men remained outside. The petitioner and Ms Pillay started arguing and this culminated in her receiving 5 wounds inflicted with a kitchen knife, including a deep penetrating wound to her chest which quickly proved fatal.

[6] At trial, the petitioner challenged the admissibility of the caution interview he made to police, as not having been made voluntarily. Following a *voir dire* hearing, the trial judge concluded that the admissions he had made were voluntary and they were admitted into evidence before the assessors.

[7] Having failed in challenging the admissibility of the admissions in his caution interview, the petitioner adopted a different stance at trial and denied he was responsible for the stabbing. Instead he contended in his evidence that the deceased had stabbed herself. This was untenable in light of the clear medical evidence given by an experienced clinical pathologist, that the fatal stab wound had involved a “*fair amount of force*” and could not have been self-inflicted by the deceased.

[8] The assessors returned a unanimous verdict of guilty of murder and this was confirmed by the trial Judge on 3 October 2014. The petitioner was sentenced to mandatory life imprisonment, with a non-pardon period of 20 years.

[9] Following his conviction, the petitioner appealed to the Court of Appeal on the following two grounds:

“(a) *The learned trial judge failed to adequately address the assessors on the confession made by him in his caution interview; and*

(b) *The trial judge was wrong to rely on Ganeshwar Chand’s evidence, that Maika Kaufusi told him the appellant had stabbed his wife, when Mr Kaufusi was not himself called to give evidence.”*

[10] On 27 February 2020, the Court of Appeal dismissed the appeal on both grounds, after carefully examining the evidence and the summing-up. The learned appeal judges were satisfied that the trial judge’s ruling on the admissibility of the petitioner’s caution interview was soundly based and according to principle; and that his directions to the assessors as to how they should evaluate the caution interview statement and its testimonial truthfulness, were in conformity with legal requirements. In relation to the second ground of appeal, the learned judges found it to be ill-conceived, as it was the petitioner himself who had told police in his caution interview that he had made the impugned statement to Mr Kaufusi. Therefore, the statement did not need to be adduced through Mr Kaufusi, either as evidence of its truthfulness or as an exception to the hearsay rule.

Special leave to appeal to this Court

[11] The petitioner seeks the special leave of this Court to appeal against the judgment of the Court of Appeal but on grounds that were not raised or argued at his appeal and were not therefore adjudicated upon by the Court of Appeal. These grounds concern the partial defence of provocation and whether that should have been directed on by the trial judge of his own volition. The grounds are set out thus in the petition:

- “i. The learned trial judge erred in law in not directing the assessors and himself on the evidence of provocation contained in the police records of interview statement tendered and relied upon by prosecution;*
- ii. The learned trial judge erred in law in not directing the assessors and himself in general terms as to the meaning of provocation; and*
- iii. The learned trial judge erred in law in not directing the assessors and himself on the assessment of the gravity of provocation, the attributes of the ordinary person and the objective ordinary person test.”*

Jurisdiction to grant special leave to appeal

- [12] Section 98(3) of the Constitution of Fiji provides for this Court to be the final appellate court with exclusive jurisdiction to hear and determine appeals from all **final judgments** of the Court of Appeal.
- [13] Under section 98(4) an appeal from a final judgment of the Court of Appeal can only be brought by the leave of this Court. The granting of leave is a discretionary matter.
- [14] Under section 7(2) of the Supreme Court Act, leave must not be granted in a criminal matter 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.*
- [15] The starting point is to consider whether, in the present case, there has been a final judgment of the Court of Appeal amenable to hearing and determination by this Court. The decision that was handed down by the Court of Appeal was a reasoned judgment in which each of the specific points raised on appeal by the petitioner was carefully examined and definitively determined. Neither of those appeal points, nor any challenge to the manner of their determination, is the subject of the petition now before this Court. The matters now advanced by the petitioner bear no relation to his arguments on appeal and have not been the subject of consideration or determination by the Court of Appeal. On that basis, there is no final judgment of that Court in respect of which this Court can exercise its discretion to grant leave and thus no jurisdiction for this Court to do so.
- [16] The absence of jurisdiction for the Supreme Court to grant leave in cases which have not been the subject of a judgment in the Court of Appeal was confirmed by the learned Chief Justice in **Ilaisa Sousou Cava v The State**, CAV 0028 of 2014; 11 January 2022. In that case, His Lordship dismissed the petitioner's application for consideration of an

appeal against sentence out of time because the petitioner had abandoned his appeal in the Court of Appeal and thus there was no judgment of that Court and nothing for the Supreme Court to consider in the exercise of its discretion under section 7(2).

[17] Counsel for the Director of Public Prosecutions referred the Court to two further decisions of this Court, in which there was obiter reference confirming the absence of jurisdiction to consider grounds of appeal, if they have not been the subject of a final judgment of the Court of Appeal.

[18] In **Vaqewa v State** [2016] FJSC 12; CAV0016.2015 (22 April 2016), this Court advised that a fresh ground not raised in the High Court or in the Court of Appeal will not be entertained “*unless its significance upon the special leave criteria [is] compelling*” (para. 28 of the judgment).

[19] That observation in **Vaqewa** was recently endorsed by the Court in **Dayal v State** [2023] FJSC 21; CAV0027.2019 (29 June 2023), at para 41.

[20] The law being settled and there being no final judgment of the Court of Appeal in this case, in respect of which this Court can exercise its discretion to grant leave, there is no jurisdiction for the Court to do so.

Is there nevertheless a significant and compelling reason for consideration of section 7(2)(c) in this case?

[21] Notwithstanding there has been no final judgment of the Court of Appeal amenable to the consideration of special leave by this Court, we have nevertheless considered whether, in the interests of justice, the new grounds advanced are of such compelling significance as to engage the special leave criteria in section 7(2)(c) of the Supreme Court Act. The provisions of section 7(2)(a) and (b) do not apply. We simply undertake this exercise for the sake of completeness.

[22] The asserted failure by the trial judge to direct the assessors on the partial defence of provocation, when that had not been raised or relied upon by the petitioner himself, would have required the judge to consider two matters: first, whether there was a credible evidential narrative sufficient to support the defence of provocation; and second, whether, if there was, the giving of a judicial direction on the partial defence could have undermined and unduly prejudiced the petitioner's assertion of innocence and denial of the stabbing.

The defence of provocation

[23] Section 242 Crimes Act 2009 states:

“242. – (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in sub-section (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only.

(2) The term “provocation” means (except as stated in this definition to the contrary) any wrongful act or insult of such a nature as to be likely when –

(a) done to an ordinary person; or

(b) done in the presence of an ordinary person to another person –

(i) who is under his or her immediate care; or

(ii) who is the husband, wife, parent, brother or sister, or child of the ordinary person –

to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

The defence case

[24] While there is no onus on a defendant to advance any defence or to prove anything at all at his trial, the petitioner in this case elected to give evidence before the assessors and to

deny that it was he who had stabbed Ms Pillay, instead contending that she had inflicted the fatal stab wound on herself.

[25] The only evidence of provocation came from the petitioner's caution statement to the police and briefly in his evidence at trial. The petitioner did not himself rely on that evidence as part of his defence and the learned trial judge was not asked by his counsel to direct the assessors on it

[26] The relevant passages of his caution statement are as follows:

Q59: Why you people were not able to do any fishing?

A: While we were travelling in the boat, I had questioned Nancy as to whether she got any affairs with Paras Ram.

Q60: Then what happened?

A: Nancy admitted that she got affairs with Paras Ram. She also told me that so many times she had slept with Paras Ram.

Q61: When you were questioning Nancy, at that time where were Maika and Gyaneshwar?

A: Only myself and Nancy were inside the cabin. Both Gyaneshwar and Maika were at the back.

Q62: Why you had to question Nancy at that time of her having any affairs with Paras Ram?

A: I was suspecting from long time and during daytime when Paras Ram had told me to go away and Nancy to stay back, since then I became very angry.

Q63: Then what happened?

A: Nancy started swearing at me and bit my left little and ring fingers. I was drunk and could not control my temper. I picked a small knife from the side and hit her once on her chest.

Q64: *How many times you struck Nancy with a knife and which part of her body you struck her with the knife?*

A: *Only once I struck on her chest.*

Q65: *Where did you find the knife which you used in striking Nancy?*

A: *That knife was inside the cabin where we were.*

Q66: *Now where is that knife?*

A: *I don't know.*

Q67: *After hitting Nancy, what you did with that knife?*

A: *I threw it inside the boat.*

....

Q70: *During the course of police investigation, a blood stained chopper was found inside the boat. (A blood stained chopper shown to the suspect). What can you say about this?*

A: *This chopper was inside the boat where I killed Nancy. This chopper and the knife which I used in killing Nancy are always kept inside the boat. Both knives are used in gutting fish. I did not use the chopper but I only used the knife on Nancy.*

Q71: *What did you do after hitting Nancy with the knife?*

A: *I threw the same knife inside the boat and came out from the cabin. Nancy remained seated where she was sitting.*

....

Q75: *After hitting Nancy with the knife, why you left her inside and you went out of the cabin?*

A: *I was not fully able to come up when Maika came and asked me as to why I hit Nancy with a knife.*

Q76: *What did you do after you were questioned by Maika?*

A: *I told Maika that Nancy bit my finger and that is why I hit her with a knife.*

.....

Q82: *Before hitting Nancy, was there any argument between you and her?*

A: *During daytime when Paras Ram told me to go away and Nancy to stay back from that time it was in my mind that Nancy and Paras Ram are having affairs. When I became drunk the same thing came into my mind and before hitting, questioned Nancy and she talked back to me. Same time when I tried to slap her whereby she bit my left ring and little finger. I became very angry and picked the knife and poked into her chest.*

Q83: *What did you do when you came to know that Nancy died due to you hitting her with the knife?*

A: *I returned to the Fisheries jetty with Maika and Gyaneshwar. Maika had informed the security, and after sometime police came and took me to the station.*

Q84: *Do you wish to say anything else?*

A: *When Maika saw Nancy lying dead, he questioned me as to why I had hit her with the knife. At that time he punched me about two or three times. I have received injuries on my mouth and chest. Police took me to the hospital.*

[27] In his evidence in chief before the assessors at trial, the petitioner said:

“What happened while you were drinking? It was getting dark and then I asked Nancy what’s the problem that now we don’t have a house to stay. Nancy had earlier told me that I was away at the sea, she already had some liquor at home with Paras Ram and she was drunk. She said, you don’t trust me and you don’t have faith in me and she picked up the knife then I hold her hand. When I hold her hand she bite my small finger. Then I left her hand. When I left her hand there was force and she stabbed herself.”

[28] Under cross-examination, the petitioner said:

- “(1) Is it 1st true you had a fight with Nancy in the boat on 9/12/2012? Yes.*
- (2) Is it also you accused her having affair with Paras Ram? Yes*
- (3) The same Paras Ram you punched that day? Yes”*

- [29] As is clear, the main thrust of the evidence of provocation came from the petitioner's caution statement which was adduced in evidence by the prosecution, and supplemented to a degree by the petitioner's evidence at trial.
- [30] The critical issue for determination is whether that evidential narrative, as disclosed, was of such a nature as to "be likely when done to an ordinary person to deprive him or her of the power of self-control". Were narrative sufficiently cogent in this regard, it would have required the trial judge to consider directing the jury that they must decide on the balance of probabilities, whether the petitioner had been so provoked as to lose his self-control and act as he did, in which case they would then have to consider returning a verdict of manslaughter.
- [31] As per the reasoning in **Ram v State**; [2012] FJSC 12; CAV0001.2011 (9 May 2012), this situation can pose a dilemma for an accused person or for the trial judge and requires a very careful balancing act in cases where, notwithstanding there is a credible narrative indicating provocation, the accused has elected to advance a positive defence of denial. At paragraph 32 in **Ram**, the following passage taken from Lord Bingham's opinion in Robert Smalling v The Queen [2001] UKPC 12 is instructive:

32. *The reasoning of Lord Steyn was followed by Lord Bingham of Cornhill, who delivered the opinion of the Privy Council in an appeal from Jamaica in Robert Smalling v The Queen [2001] UKPC 12. In the course of his opinion, after referring to Bullard v The Queen, Lord Bingham observed –*

This authority recognizes the acute practical dilemma facing a defendant who may have an arguable defence of provocation, giving possible ground to support a conviction of manslaughter instead of murder, but who chooses to deny participation in the killing altogether. Justice requires that consideration be given to a possible defence disclosed by the evidence even if, for reasons good or bad, the defendant chooses not to advance it. Before the judge can properly invite the jury to consider a defence of provocation, there must be evidence fit for the jury's consideration that the defendant was provoked to lose his self-control and act as he did." (emphasis added).

Was there a credible narrative sufficient to engage the partial defence of provocation?

[32] In the petitioner's case, none of the three essential elements of Section 242 were established to the requisite degree by the evidence as adduced at his trial.

[33] Therefore, the defence of provocation was not available to him and there was no sufficient or proper basis on which the trial judge could or should have directed the jury accordingly. That being so, no dilemma presented for the judge over giving directions to the assessors in relation to potentially conflicting lines of defence.

[34] In relation to the first element of the partial defence, "*caused by sudden provocation*", the petitioner said the suspicion that Ms Pillay might have been having an affair with Paras Ram had been in his mind much earlier in the day and had resurfaced later when they were in the cabin of the boat. It had resurfaced later because he was annoyed they no longer had a house to sleep in. Thus, any provocation due to suspected infidelity was not sudden or out of the blue but r the result of a long day of drinking and quarrelling.

[35] In relation to the second element, "*in the heat of passion*", it was not any suspected infidelity of itself that caused the petitioner to pick up the knife and fatally stab Ms Pillay in the chest. That is not what triggered him. On his own evidence he stabbed her because she bit him. He said, "*I tried to slap her whereby she bit my left ring and little finger. I became very angry and picked the knife and poked into her chest.*"

[36] In relation to the third element and in light of the well-established principle that sexual infidelity is disregarded as a "*qualifying trigger*" for loss of self-control, the petitioner's suspicions about Ms Pillay's faithfulness could not avail him [see **Dayal v State** at para 35].

[37] Thus, none of the elements of the partial defence of provocation were established in this case and there was no credible narrative for the trial judge to direct the assessors to consider.

[38] The assessors were properly directed on the evidence and unanimously rejected the petitioner's denial that he had stabbed Ms Pillay. The pathological evidence and the petitioner's own admissions in his caution statement constituted evidence beyond reasonable doubt that he had recklessly caused her death and there was no request for any redirection from defence counsel.

Decision


[39] There having been no final judgment of the Court of Appeal on the matters contained in the petition for special leave to appeal, there is no jurisdiction for this Court to grant special leave and leave is accordingly refused. Furthermore, we are satisfied that no substantial and grave injustice has occurred.

Mataitoga, J

[40] I support the reasoning and conclusions of Madam Justice Goddard in this judgment.

Order of Court:

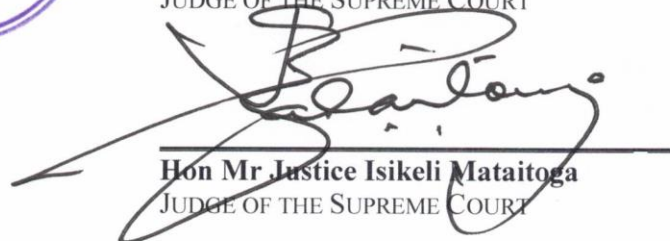
The petition is dismissed.



Hon Acting Chief Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT



Hon Madam Justice Lowell Goddard
JUDGE OF THE SUPREME COURT



Hon Mr Justice Isikeli Mataitoga
JUDGE OF THE SUPREME COURT