

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV0012 OF 2023

[Court of Appeal No: AAU0108 of 2018]

BETWEEN : **THE STATE**

Petitioner

AND : **PAULIASI NAUSARA**

Respondent

Coram : The Hon. Mr Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court

Counsel: Mr E. Samisoni for the Petitioner
Mr M. Fesaitu and Ms L. Volau for the Respondent

Date of Hearing: 13th October, 2025

Date of Judgment: 30th October, 2025

JUDGMENT

Gates, J

[1] I agree with the reasoning in the judgment of Arnold J which follows. I concur with the orders.

Arnold, J

Introduction

- [2] Under the Constitution of the Republic of Fiji, everyone charged with an offence has the right to a fair trial.¹ An element of a fair trial is that accused people know what the case against them is. Accordingly, the Constitution also provides that everyone charged with an offence has the right to be informed, in legible writing and in a language they understand, of the nature and reasons for the charge against them.²
- [3] The criminal justice system provides various mechanisms through which an accused person is provided with the necessary details, an obvious one being pre-trial disclosure by the prosecution. This case involves another mechanism for providing an accused with information, namely the requirement that a charging document (in this case an information) contain particulars of the offence being alleged.
- [4] On the evening of 21 March 2015 in circumstances which I explain later in this judgment, the Respondent, Pauliasi Nausara, punched, kicked and stomped on Michael Semiti Osborne while he was not in a position to defend himself, causing him serious injuries. Mr Osborne was taken to hospital unconscious and was admitted to the intensive care unit and then to the trauma ward. Mr Osborne remained in hospital in a vegetative state until 25 June 2015, when he died.
- [5] At the Respondent's trial for the murder of Mr Osborne, the three assessors expressed the opinion that he was not guilty of murder but was guilty of manslaughter. Sunil Sharma J disagreed and convicted the Respondent of murder. The Judge sentenced the Respondent to mandatory life imprisonment with a minimum term of 18 years before he was eligible for consideration for a Presidential pardon.
- [6] The Respondent appealed against his conviction, raising a number of grounds of appeal. The Court of Appeal allowed his appeal, quashed his conviction and ordered a retrial.³ This was on the basis that the information did not provide sufficient particulars of the respondent's offending in two respects – (i) the date in the

¹ Constitution of the Republic of Fiji 2013, section 15(1).

² Section 14(2)(b).

³ *Nauasara v State* [2023] FJCA 135.

information did not relate to the respondent's actions that contributed to Mr Osborne's death and (ii) the information did not specify whether the prosecution was relying on intention or recklessness as the mental element for murder. The Court considered that these were deficiencies which prejudiced the respondent in his defence. Having reached this view, the Court of Appeal did not deal with the other grounds which the respondent had raised.

[7] The State now petitions for leave to appeal against the Court of Appeal's decision.

[8] The structure of this judgment is as follows. First, I will give a brief outline of the factual background, up until the start of the respondent's trial. Second, I will briefly describe relevant aspects of the trial and then of the decision of the Court of Appeal. Finally, I will discuss the issues and consider whether any of the criteria in section 7(2) of the Supreme Court Act 1998 is met. The judgment is structured in this way to give some context to the information, both before and after it was laid.

Factual background

[9] On the morning of 21 March 2015, the respondent was driving home from his work as a security officer when he saw the deceased and some friends at a mini-bus stand. They had been drinking and were trying to flag down a vehicle. The respondent said he stopped because he knew them well, and they hired him to take them for a cruise. The group stopped to buy some beer and then at about 3pm, ended up at a car park near a multi-purpose sports court at Natabua, where they were drinking, listening to music and watching volleyball. The respondent left the car to go and relieve himself, leaving the keys in the ignition. When he returned, his car was gone.

[10] Mr Osborne had taken the car, apparently to take a friend who was asleep in the back seat home. However, he picked up some other people, bought more alcohol and then headed back to return the car. In the meantime, the respondent had contacted his boss and asked for his help in locating his car. His boss picked him up in his twin cab vehicle. As they were filling it at a gas station, they heard a car playing loud music go past; it was the respondent's car, so they followed it. Ultimately, they pulled up behind it as it was attempting to reverse having missed a turning. While reversing, the car bumped into the front of the twin-cab.

[11] Three of the men at the scene gave evidence for the prosecution. Their account of what happened after the cars stopped was that the respondent went up to Mr Osborne who was in the driver's seat of the car and punched him two or three times on the side of the head through the open driver's door window. They said that the punches knocked Mr Osborne out. The respondent then opened the car door, pulled Mr Osborne from the car and began kicking, punching and stomping him as he lay on the ground. They said Mr Osborne did not defend himself or take any other action as he was unconscious. While this was happening, the respondent shouted "mortuary" a number of times. One witness said that he yelled to the respondent to stop, which resulted in the respondent attacking him before turning his attention back to Mr Osborne. Mr Osborne was described as a small person and very thin, smaller than the respondent. The eyewitnesses said that by the end of the beating, Mr Osborne's face was bloodied and almost unrecognisable. His friends got a van and took him to hospital, where he remained until his death.

[12] The respondent gave evidence in his defence, offering a different account of the interaction between him and Mr Osborne. He said that after he and his boss had parked the twin cab behind his car, blocking it from moving, he went to the driver's door and opened it. As he pulled Mr Osborne out of the car, Mr Osborne punched him, so he started punching Mr Osborne back. He said he threw three punches at Mr Osborne, who fell down but was still verbally abusing him. He therefore continued to punch Mr Osborne. When asked why, he said:

The reason why I punched him, My Lord was because when I pulled him out he had punched me, my lord. Secondly, when I saw my vehicle it was damaged. I tried to protect myself because he was drunk and swearing.

The respondent acknowledged that he had also kicked Mr Osborne. He said his boss came over and stopped him.

[13] In his evidence, the respondent denied that he had any intention to kill Mr Osborne, saying they had been friends since school days and had played volleyball together.

Pre-trial events

[14] On 2 April 2015, before Mr Osborne had died, the respondent was charged with causing him grievous bodily harm. The charging officer advised the respondent that he was:

...being charged for the offence of **Grievous Harm: contrary to section 258 of the Crimes Degree No. 44 of 2009** in that you on 21.03.15 at about 8pm maliciously punched, kicked and stomped one Michael Semeti Osborne at the junction of Oriana Place and F/40 road causing him injuries resulting in him being admitted at the ICU, Lautoka Hospital.

[15] The Respondent stated that he understood the charge against him and gave the following explanation in his charge statement:

I was really angry after I found my vehicle stolen. They needed transport and I helped them to take them around. And when they drove off with my vehicle without my knowledge I really got angry and so I went looking for my vehicle. After I found them with my vehicle, I saw the damage on the back bumper and the damaged lights and this made me angry and also when the person driving my vehicle tried to punch me so that was why I punched him.

[16] Following Mr Osborne's death on 25 June 2015, the respondent was charged with his murder. On 4 July 2015, the charging officer charged the respondent in the following terms:

... you are now charged that you on the 21st day of March, 2015 at the junction of Oriana Place and F/40, Lautoka punched and kicked on MICHAL SEMITI OSBORNE causing him head injuries and he was admitted at Lautoka Hospital till 25th day of June, 2015 when he passed away (died) at 9.30pm at Trauma Ward, Lautoka Hospital due to that punch and kick which is an offence under s 237 of the Crimes Decree number: 44 of 2009.

Again, the Respondent indicated that he understood the charge and made the statement "I did not murder him".

[17] A formal written charge of murder, dated 15 July 2015, was then laid against the respondent in the Magistrates Court. The particulars read:

PAULIASI NAUASARA between 21st day of March, 2015 to 25th day of June, 2015 at Lautoka in the Western Division, murdered **MICHEAL SEMITI OSBORNE**.

The respondent appeared before a Resident Magistrate on 24 July 2015, when the charge was read over and explained to him. The respondent indicated that he

understood the charge. On the prosecution's application, the Resident Magistrate ordered that the case be removed to the High Court.

[18] Disclosures were filed progressively in late 2015/early 2016, although they were apparently not provided to defence counsel until April/May 2016. An information dated 25 February 2016 was filed in the High Court on 29 February 2016. It read:

PAULIASI NAUASARA is charged with the following offence:

Statement of Offence

MURDER: Contrary to section 237(1) of the Crimes Degree No. 44 of 2009

Particulars of Offence

PAULIASI NAUASARA on the 25th of June 2015 at Lautoka in the Western Division murdered **MICHAEL SEMITI OSBORNE**.

As will be apparent, the information did not refer to the date of the assault, ie 21 March 2015, as the charge in the Magistrate's Court had. The Respondent entered a plea of "Not Guilty" on 13 June 2016 after the information had been read to him and he had confirmed that he understood the charge.

The trial

[19] The respondent was represented by two counsel at trial. When trial began on 27 September 2018, an amended agreed statement of facts was filed. Relevantly, it read:

- 3) **It is agreed that** the deceased and his friends were drinking about 5 cartons of beer. This was on the 21st of March 2015. While they were drinking beer they met the accused person at the mini bus stand.
- 4) **It is agreed that** from the mini bus stand, the deceased and his friends hired the accused for a cruise and also bought a carton of beer. The deceased and his friends ended up at the multipurpose court where the deceased and his friends drank and watched volleyball.
- 5) **It is agreed that** it was at this time that the accused left the car to go and relieve himself when the deceased drove the car away from the multipurpose court with his friends. The time was about 8pm. At Oriana Junction the deceased stopped the car to drop one of his friends when the

accused and one James Ledger⁴ came in a twin cab and parked at the back of the said vehicle.

- 6) **It is agreed that** the accused was arrested by the Lautoka Police, interviewed and charged accordingly.

[20] Apart from the witnesses referred to above, the prosecution called a pathologist and the admitting doctor from the hospital, as well as a police officer. The pathologist's report identified the causes of death as being septicaemia, multiple bedsores, history of head injury and history of assault, all of which were discussed in evidence. The respondent was the only defence witness.

[21] In the course of his summing up, the Judge identified the ingredients of the offence of murder as follows:

15. In order to prove the offence of murder the prosecution must prove beyond reasonable doubt the following:

- (a) the accused
- (b) engaged in conduct; and
- (c) caused the death of the deceased; and
- (d) the accused intended to cause the death; or
- (e) was reckless as to causing the death of the deceased by his conduct. The accused is reckless with respect to causing the death of the deceased if:
 - 1. he was aware of a substantial risk that death will occur due to his conduct; and
 - 2. having regard to the circumstances known to him, it was unjustifiable for him to take that risk.

[22] The Judge went on to say that there was no dispute about the first three elements, bearing in mind that in relation to the third (ie causation), all that had to be shown was that the injuries inflicted by the respondent had substantially contributed to Mr Osborne's death. In relation to the mental element, the Judge said that the prosecution had to prove either intention or recklessness and said that the prosecution's case was that the respondent intended to cause the Mr Osborne's death. He then went on to put manslaughter to the assessors and also instructed on self-defence and provocation.

⁴ James Ledger was the respondent's boss who was helping him find his car. He did not give evidence at trial.

Court of Appeal decision

[23] The Respondent framed one of his grounds of appeal against conviction as follows:

That the learned trial judge erred in law by convicting the appellant for murder based on a defective information and charge statement this is especially so since **no murder took place on the 25th of June, 2015**. The appellant was home on that particular day and had never even gone anywhere close to the victim hence the appellant pleaded not guilty at the commencement of trial when the information was read to him afresh.

As I have said, his appeal succeeded on this ground.

[24] To put the discussion in context, I should refer at the outset to relevant provisions of the Criminal Procedure Act 2009 (CPA) and the Constitution of the Republic of Fiji 2013.

[25] Section 56(5) of the CPA provides that a police officer can institute proceedings by filing a formal charge, duly signed, in the Magistrate's Court, which the Magistrate then signs. The form to be used for this is form 3 in the Criminal Procedure Act (Form) Rules 1945. Section 58 of the CPA provides that:

Every charge or information shall contain—

- (a) A statement of the specific offence or offences with which the accused person is charged; and
- (b) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged.

The charge form signed by the Magistrate and referred to in paragraph [17] above meets these requirements. The Court of Appeal found that the subsequent information filed in the High Court did not.

[26] The CPA also contains provisions dealing with defective informations. Section 279 provides:

279. — (1) Subject to sub-section (2), no finding, sentence or order passed by a Magistrates Court of competent jurisdiction shall be reserved or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect of substance or form or for any variance between such information, complaint, summons or warrant and the evidence, unless it is found that —

(a) such objection was raised before the Magistrates Court whose decision is appealed from; and

(b) the Magistrates Court refused to adjourn the hearing of the case to a future day notwithstanding that it was shown to the Magistrates Court that by such variance the appellant had been deceived or misled.

(2) If the appellant was not represented by a lawyer at the hearing before the Magistrates Court, the High Court may allow any such objection to be raised.

[27] There is a different provision in relation to the High Court. Sections 214(1) and (2) provide:

214. — (1) Every objection to any information for any formal defect on the face of it shall be taken immediately after the information has been read over to the accused person, and not at a later time.

(2) Where, before a trial upon information (or at any stage of such trial), it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot be made without injustice, having regard to the merits of the case.

The section goes on to deal with the effect of amendments and with various different situations where amendment may arise.

[28] The defective information provisions are, in my view, relevant to the issues before the Court for three reasons. I will focus on section 214. First, it shows that some deficiencies in informations are not significant, in the sense that they will not affect the fairness of the trial. Second, it envisages the possibility of amendments to an information as the trial develops, as long as they do not cause injustice. Third, it empowers the Judge to act of his or her own motion in dealing with a defective information, although one would expect that it will often be counsel who raise the issue with the judge.

[29] In addition to these provisions from the CPA, it is important to recall the provisions in the Constitution that I mentioned at the outset of this judgment. To reiterate, under section 14(2) every person charged with an offence has the right to be informed in legible writing, in a language they understand, of the nature and reasons for the charge; and under section 15(1), everyone charged with an offence has the right to a fair trial before a court of law.

[30] As I noted earlier, the Court of Appeal considered that the High Court information was defective in relation to date and mental element. As to date, the particulars simply provided that the respondent “on the 25th of June 2015 at Lautoka in the Western Division murdered [Mr Osborne]”. Because there was no mention of the events of 21 March 2015, the Court of Appeal considered that the implication was that the respondent had engaged in conduct on 25 June that resulted in the death of Mr Osborne.⁵ The Court thought that this had had a material effect on the conduct of the defence given the explanation the respondent gave in his appeal ground for pleading not guilty (see paragraph [23] above).⁶

[31] Turning to the second deficiency, the mental element for murder can be either an intention to kill or recklessness (as defined in section 21 of the Crimes Act 2009). The Court of Appeal considered that the prosecution was required to specify in the information which mental state it was relying on, and the failure to do so prejudiced the respondent. In the Court of Appeal’s view, the need for the prosecution to identify the relevant mental element was as a matter of fairness to the respondent and to enable him to prepare his defence properly.

Discussion

[32] I will deal with the date issue and the mental element issue in turn. Before I do so, however, I should emphasise two preliminary points.

[33] The first is a point made by this Court in *Naduva v The State*.⁷ Delivering a judgment with which the other members of the Court agreed, Justice Young emphasised that to understand what is meant by a charging document and its particulars, it was important to consider it in the full context of the way the trial was conducted.⁸ When considering an information or other charging document in the context of an appeal, the appellate court must recognise that the document does not exist in a vacuum; rather, it sits in a context. If considered outside that context as a standalone document, there is a risk

⁵ *State v Nauasara*, above n 3, at [15]-[16] and [29].

⁶ At [29]-[30].

⁷ *Naduva v State* [2024] FJSC 48.

⁸ At [22], citing *Cotter v State of Western Australia* [2011] WASCA 202 at [28].

that a formalistic rather than a substantive approach will be taken. What the court should be thinking about are realistic possibilities, not theoretical ones.

[34] The second preliminary point illustrates the first. There is no indication in the Record that the respondent's defence counsel considered they were impeded in their ability to present the respondent's defence as a result of a lack of particulars in the information in the respects identified by the Court of Appeal. There appears to have been some discussion between counsel about the medical evidence but that appears to have been resolved by the time the trial started. In any event, it is clear that there was no application for more or better particulars in respect of either the date issue or the mental element issue, although the Judge did raise the latter point, as I discuss below. Moreover, at the conclusion of the State's case, defence counsel conceded that there was a case to answer; at the conclusion of the Judge's summing up, counsel did not ask that further directions be given.

Date

[35] Although there are several references in the judgment of the Court of Appeal to 25 June 2015 being the "erroneous" or "wrong" date",⁹ it was included in the information because that was the day of Mr Osborne's death, that is, the day on which the physical elements of the offence of murder were complete. It needed to be there. The Court of Appeal's real concern was not that 25 June 2015 was the wrong date but that it was not linked back to the respondent's actions of 21 March 2015; as a consequence, the Court said, the respondent would not have known what the allegation against him was.

[36] With respect to the Court of Appeal, that conclusion is unsustainable on the facts of this case. I note in this connection that the respondent's counsel in this Court, Mr Fesaitu, did not contend that the date issue had caused the respondent prejudice, responsibly in my view.

[37] By way of explanation, soon after the events of 21 March 2015, the respondent was charged with causing Mr Osborne grievous bodily harm. At that time, the interview notes show that the police advised him that Mr Osborne was in a coma. In July 2015 after Mr Osborne's death, the respondent was charged with murder. The charging

⁹ *State v Nauasara*, above n 3, at [29] and [38].

officer gave a clear summary of the allegation against him, linking the events of 21 March 2015 to Mr Osborne’s death (see paragraph [16] above). The formal charging document filed in the Magistrates Court made the same link in its particulars (see paragraph [17] above).

[38] Although the particulars in the High Court information dated 25 February 2016 did not make that link, everything that happened after that – the material provided on disclosure (which included the interview statements of the three eyewitnesses), the statement of agreed facts negotiated between counsel (see paragraph [19] above), the pathologist’s report and so on – related back to the events of 21 March 2015 and the consequent death of Mr Osborne. It is fanciful to suggest, as the respondent did in the ground of appeal set out at paragraph [23] above, that he thought the information related to something he was alleged to have done to Mr Osborne on 25 February 2016.

[39] While I think it would have been better had the information been formulated in the same way as the charge in the Magistrates Court and referred to the assault on 21 March 2015, the failure to do so was of no practical moment.

Mental element

[40] Section 237 of the Crimes Act provides that a person commits murder if his conduct causes the death of another person and he “intends to cause, or is reckless as to causing, the death of the other person by the conduct”. The meaning of “intention” is given in section 19 of the Crimes Act and the meaning of “recklessness” in section 21. So to charge someone with the murder is to allege that they have, by their conduct, intentionally or recklessly caused the deceased’s death. For the State, Mr Samisoni argued that an allegation of murder was sufficient in itself and, at least in a case such as this, there was no need to specify which form of the mental element the prosecution said applied, given that the issue of intention or recklessness depended on the way the evidence developed at trial.

[41] The Court of Appeal considered that the failure to state in the information whether intention or recklessness was being alleged was “unfair and prejudicial to the

[respondent's] ability to prepare his case properly".¹⁰ As a consequence, there was a miscarriage of justice.¹¹

[42] However, the Court did not explain how the failure to specify whether intention or recklessness was alleged prejudiced the respondent's ability to present his defence. A perusal of the trial record shows that it created no such prejudice.

[43] To explain this, I begin with the way the prosecutor opened the case. The prosecutor outlined the elements of murder. In relation to the mental element, he urged the assessors to listen carefully to the witnesses so that they could decide whether the respondent had caused Mr Osborne's death intentionally or recklessly. At that point, he was effectively leaving it to the assessors to decide on the basis of the evidence.

[44] In his closing address, the prosecutor emphasised that the eyewitnesses said that the respondent was shouting "mortuary, mortuary" as he was assaulting Mr Osborne and said that this was evidence of an intention to kill.

[45] Following completion of the closing addresses, the following exchange occurred between the Judge and the prosecutor:

Judge: What is the State's case intention or recklessness?

Prosecutor: My Lord in this case when we started we were thinking broadly on recklessness, after hearing the evidence it falls properly on intention but it's basically in the middle.

Judge: You will have to choose.

Prosecutor: That is why in my Closing Submissions I have left it to the Assessors, my submissions, my lord because of the words that were uttered.

[46] On the basis of this exchange, the Judge considered that the State was basing its case on intention and that was reflected in his summing up. Having outlined the elements of murder (see paragraph [21] above), the Judge said that the prosecution was alleging that the respondent had intended to kill the deceased. The Judge went on to say that

¹⁰ At [40].

if the assessors were satisfied that the prosecution had proved all the elements beyond reasonable doubt, they must find the respondent guilty of murder. He then said:

28. If you accept that the accused did not intend to cause the death of the deceased or you are not sure whether he intended to cause the death of the deceased then consider the offence of manslaughter which is a lesser charge than murder.

In other words, the Judge did not leave recklessness as an available mental element for murder to the assessors – if the assessors were not sure that the respondent had an intention to kill, they had to move on to consider the lesser offence of manslaughter.¹²

[47] Removing recklessness as a mental element for murder from the assessors in this way was obviously favourable to the respondent, given that intention to kill will generally be a more difficult mental state to prove than recklessness – that was certainly so in the present case.

[48] Not only did the trial Judge sum up to the assessors in a way favourable to the respondent, there is nothing to indicate that the respondent was in fact impeded in preparing or presenting his defence as a result of this suggested deficiency in the information. The respondent's explanation to police when he was charged with assault causing grievous bodily harm raised the possibility of a provocation defence to murder, which would apply in respect of both mental elements for murder; his explanation at trial for his actions appeared to raise self-defence, which equally would have applied to either mental element. When the Judge discussed the content of his summing up with counsel, defence counsel said that their theory was not based on self-defence given the lack of proportionality in the assaults, but rather was based on provocation. In the result, the Judge summed up on both self-defence and provocation. Importantly, however, there was no indication from defence counsel at any stage that they had been unable through lack of particulars to advance a defence.

[49] As the foregoing discussion demonstrates, to the extent that there were any deficiencies in the High Court information, they did not give rise to any injustice. The respondent knew from the time he was charged with murder in the Magistrates Court

¹² Presumably the Judge could have exercised his power under section 214 of the CPA to amend the information, although there was no need to do so.

what the allegations against him were. He was able to, and did, advance his defence, albeit that it was ultimately unsuccessful.

[50] Finally, I refer to the decisions of the New Zealand Court of Appeal and Supreme Court in *Fungavaka v R*, a case which raises similar issues to the present case. Mr Fungavaka had an argument with his girlfriend one evening. As she was standing in front of his car, he revved the engine and ran into her. He then spun the car around and ran over her again as she was lying on the ground. She died of multiple blunt force trauma injuries.

[51] The charge simply provided that Mr Fungavaka “on the 20th day of August 2013 at Kataia murdered [the victim]”. On appeal, Mr Fungavaka’s counsel argued that the charge was under-particularised for two reasons. The first was that there should have been one charge in relation to each running over. The second was that the charge should in any event have been more particularised.

[52] In rejecting the submission that the charge was under-particularised, the Court noted that the summary of facts provided to the accused by the prosecution set out the details of the Crown’s allegations as to what happened. In addition, a year before trial at a pre-trial hearing, the Judge said that the Crown case would be that “Mr Fungavaka deliberately drove at [the victim] that night and in doing so, intended to kill her or to cause her bodily injury that he knew was likely to cause death, being reckless as to whether death ensued.”¹³ Despite any under-particularisation in the charge itself, then, Mr Fungavaka was fully informed of the particulars of the charge he faced.

[53] This analysis was upheld by the Supreme Court when it refused Mr Fungavaka leave to appeal.¹⁴ The Court said that it was apparent from the record that Mr Fungavaka was made aware of the substance of the charge against him and that there was nothing to suggest that trial counsel experienced any difficulty as a result of the way the information was framed.¹⁵

¹³ *Fungavaka v R* [2017] NZCA 195 at [11]. Similarly, in *Talley’s Group Ltd v Worksafe New Zealand* [2018] NZCA 587, [2019] 2 NZLR 198, the Court of Appeal held that a charging document was defective because it did not provide the necessary particulars, but the summary of facts that accompanied it did provide particulars. As a consequence, the defect in the charging document was one of form only. This supports the view that a charging document should be viewed in context rather than as a stand-alone document.

¹⁴ *Fungavaka v R* [2017] NZSC 119.

¹⁵ At [5].

[54] The same is true in the present case. There is simply no doubt that the respondent was well aware, both before and after the information was filed in the High Court, what the prosecution case against him was. There is no indication in the record that defence counsel were in any way embarrassed by a lack of particulars. And, as I have said, the Judge put the case to the assessors in relation to the mental element for murder on a basis of intention to kill, thus effectively particularising the charge in relation to mental element in a way that was favourable to the respondent.

[55] In the result, although the High Court information should have made the link to 21 March 2015, there was in fact no prejudice to the respondent as a result of the way the information was drafted.

Should leave to appeal be granted?

[56] Under section 7(2) of the Supreme Court Act 1998, the Court may grant leave to appeal only where (i) a question of general legal importance is involved; (ii) a substantial question of principle affecting the administration of criminal justice is involved; or (iii) substantial or grave injustice may otherwise occur. I consider that the second and third of these requirements are met in this case. Considering an information in isolation as the Court of Appeal did, without regard to what happened before it was filed and, more particularly, after (especially at trial), is an error of principle of general importance. In addition, there can be a substantial or grave miscarriage of justice where a person's conviction is wrongly quashed – i.e, justice goes both ways – to the accused and to the State. Accordingly I would grant the petitioner leave to appeal.

Determination

[57] In the result, I consider that the Court of Appeal's decision to quash the respondent's conviction and order a retrial cannot be sustained. Accordingly, I would grant leave to appeal and allow the appeal. I would make the following orders:

- (a) The orders of the Court of Appeal setting aside the respondent's conviction and ordering a new trial are quashed;
- (b) The respondent's conviction for murder is restored;

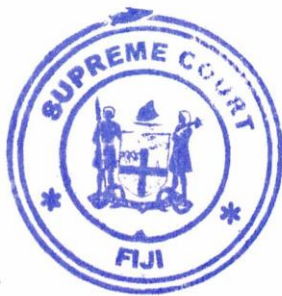
- (c) The respondent's file should be returned to the Court of Appeal so that the grounds of appeal which he raised but were not dealt with can be determined. This should be undertaken by a differently constituted Court.

Goddard, J

[58] I have read the judgment of Arnold J in this case and agree entirely with his findings and conclusions.

Orders of the Court:

1. The Petitioner is granted leave to appeal and the appeal is allowed.
2. The Orders of the Court of Appeal quashing the Respondent's conviction and ordering a retrial are quashed.
3. The Respondent's conviction for murder is restored.
4. The Respondent's file is to be returned to the Court of Appeal so that the grounds of appeal which he raised but were not dealt with can be determined. This should be undertaken by a differently constituted Court.



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The Hon Mr Justice Anthony Gates
JUDGE OF THE SUPREME COURT

A handwritten signature in blue ink, appearing to read "Terence Arnold".

The Hon Mr Justice Terence Arnold
JUDGE OF THE SUPREME COURT

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The Hon Madam Justice Lowell Goddard
JUDGE OF THE SUPREME COURT