IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0028 of 2015
[Court of Appeal No: AAU 009 of 2011]

BETWEEN	:	**VILIAME ROGOSE TIRITIRI**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**Hon. Justice Sathya Hettige, Justice of the Supreme Court** **Hon. Justice Suresh Chandra, Justice of the Supreme Court** **Hon. Justice Almeida Guneratne, Justice of the Supreme Court**
Counsel	:	**Mr. M. Yunus for the Petitioner** **Mr. M. Korovou for the Respondent**
Date of Hearing	:	**13 June 2016**
Date of Judgment	:	**23 June 2016**

JUDGMENT

Hettige J

[1] I agree with the reasoning and conclusion of the judgment of Chandra J.

Chandra J

[2] This is an application for special leave to appeal against the judgment of the Court Appeal affirming the Petitioner's conviction. The Petitioner was the first accused and was jointly charged with another, the second accused for murder.

[3] Following a trial in the High Court at Lautoka, the Petitioner was convicted for the offence and sentenced to life imprisonment with a minimum term of 12 years to be served. His co-accused was acquitted of the charge.

[4] The Petitioner applied for leave to appeal his conviction and sentence which application was refused by a single Judge of Appeal in terms of section 35(2) of the Court of Appeal Act, Cap.12.

[5] The petitioner appealed against the dismissal of his appeal by the single judge of appeal to the Supreme Court and the Supreme Court quashed the order of dismissal and remitted the renewed application for leave to be heard by a Full Bench of the Court of Appeal.

[6] The petitioner's appeal to the Court of Appeal was on the following grounds:

> *"1. That the learned Trial Judge erred in law and fact in not directing himself and or the assessors that the prosecution evidence before the court carried serious doubts in respect of operative cause or substantial cause of death and as such the benefit of doubt ought to have been given to the Appellant.*
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> *2. That the learned Trial Judge erred in law and in fact in not directing himself and or the assessors that the prosecution evidence before the court proved that at the material time of the alleged incident the appellant was intoxicated with liquor as such with his state of intoxication whether he could form*

intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

3. *That the learned Trial Judge erred in law and in fact in not directing himself and or the assessors regarding identification of the Appellant in the dock.*

4. *That the learned Trial Judge erred in law and in fact in not directing himself and or his assessors to refer any summing up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

5. *That the learned Trial Judge erred in law and in fact by not adequately/sufficiently/referring/directing/putting the defence case to the assessors."*

The evidence led at the trial as set out in the judgment of the Court of Appeal

[7] In the early hours of 21 March 2008, the Petitioner was part of a group who proceeded to drink beer at Namaka Public School in Nadi after a night of clubbing. At the time, the appellant was in a de-facto relationship with the co-accused's daughter. The co-accused was the headmaster of the school. He had access to the school premises outside the school hours.

[8] In his caution interview which was tendered by consent at the trial, the petitioner said that he left the drinking party with his uncle and walked towards the main road. When they reached a neighbouring property which was Sadhai's garage, they were confronted by the deceased who at the time was working as a security guard for the school. The confrontation developed into an argument when the appellant tried to justify why he was drinking at the school premises. The petitioner told the deceased to wait there until he fetched the co-accused who allowed them to drink at the school premises. When he returned to the crime scene, he saw his co-accused punch the deceased. He turned around to see who was behind him. He saw men and women from his drinking group. When he turned back, he saw the deceased lying unconscious on the ground with his face and forehead covered with blood. He saw the co-accused next to where the deceased was

lying. The petitioner said he kicked the side ribs of the deceased and noticed he was breathing, but not moving.

[9] The prosecution led the evidence of two eye witnesses, Waisele Cegunacoko and Saimoni Tikibo who contradicted the Petitioner's version that he did not take part in the assault at all. Waisale said the deceased was with him at the garage on the night of the assault on the deceased. He said the deceased was with him drinking kava when they heard two young men yelling and swearing on the road. The deceased went and told them not to swear. They started arguing. While arguing they moved to the driveway of the school. The Petitioner ran to the school premises, and returned with the headmaster (co-accused) and two other boys. They argued and had a fist fight with the deceased. One of the two boys standing beside the deceased hit the deceased with a beer bottle in the head. The deceased fell down. While he was lying on the ground, the two boys kept kicking him. Waisale saw the Petitioner picking up a block and smashed it on the deceased's head. When Waisala tried to intervene, the group had turned on him and Saimoni by throwing broken pieces at them.

[10] The deceased was taken to Nadi hospital by one of the men from the drinking party immediately after the incident. He was later transferred to Lautoka Hospital and then to CWM Hospital in Suva when his condition deteriorated. He died on the 31 March 2008. Post mortem examination revealed that the victim died of brain injuries (intra-ventricular haemorrhage and diffuse cerebral edema) that were consistent with the use of blunt impact on the head.

[11] Only the petitioner and his co-accused were charged with murder. The Petitioner was found guilty of murder while his co-accused was acquitted on a unanimous verdict of the Assessors which was accepted by the trial Judge.

[12] The Court of Appeal dismissed the appeal of the Petitioner on the basis that the grounds of appeal were without merit.

The Present Appeal

[13] The Petitioner has set out the following grounds of appeal in seeking special leave to appeal:

(i) That the learned Trial Judge erred in law and in fact in not directing himself and or the Assessors that the prosecution evidence before the Court carried serious doubts in respect of operating cause or substantial cause of death and as such the benefit of doubt ought to have been given to the Appellant.

(ii) That the learned Trial Judge erred in law and in fact in not directing himself and or the Assessors that the prosecution evidence before court proved that at the material time of the alleged incident the appellant was under the influence of liquor as such with his state of mind, he could not form intention, specific or otherwise, in the absence of such intention, he would not be guilty of the offence.

(iii) That the learned Trial Judge erred in law and in fact in not directing himself and or the assessors to refer in the summing up the possible defence on evidence and as such by this failure there was a substantial miscarriage of justice.

(iv) That the learned trial judge erred in law and in fact by not adequately/sufficiently/referring/directing/putting the defence case to the Assessors.

Criteria for Special Leave

[14] The supreme Court is empowered to hear and determine appeals from the final judgments of the Court of Appeal in terms of section 98(3) and (4) of the Constitution of the Republic of Fiji.

[15] Section 7(2) of the Supreme Court Act 1998 provides:

> *"In relation to a criminal matter, the Supreme Court must not grant special eave to appeal unless-*
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> *(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 could otherwise occur."*

[16] The Supreme Court has in several cases examined the threshold criteria enumerated in section 7(2) of the Supreme Court Act and has stated that the criteria set out in section 7(2) are extremely stringent and special leave is not granted as a matter of course. Vide **Bulu v Housing Authority** (2005) FJSC 1 2004S (8 April 2005); **Chand v The State** (2012) FJSC 6; CAV 14/2010 (9th May 2012).

Consideration of the Grounds of Appeal

[17] Ground 1 – Counsel for the Petitioner laid emphasis on this ground out of the four grounds of appeal. It was argued that the prosecution had failed to prove beyond reasonable doubt the operating cause or substantial cause of death and that the benefit of doubt must be given to the Petitioner to avoid any injustice.

[18] The cause of death in the post Mortem Report was intra-ventricular haemorrhage and diffuse cerebral edema due to blunt impact associated with systematic shock. The Doctor who conducted the autopsy was not available at the time of the trial and Dr. P.S. Goundar testified for the State and stated thus:

> *"Cause of death was due to intra ventricular haemorrhage and diffuse Edema due to blunt impact associated with systematic shock. Cerebral Hemisphere contains blood. Edema due to the fluid passing into brain substance. That was due to the blunt impact. There was systematic shock. Consistent with the impact on the head and injuries on the chest and abdomen."*

In cross examination Dr. Goundar has stated that a person forcibly hit with a beer bottle could be the cause as shown in the opinion for cause of death.

[19] It is necessary to consider the sequence of events that led to the death of the deceased which initiated as a brawl where several persons were involved and only two of them were charged and out of the two persons one was acquitted after trial.

[20] It was in evidence that the deceased had been hit on the head with a beer bottle on the head by an unknown person and that he fell to the ground. This by itself gives rise to two factors of impact. One, the blow with the beer bottle and the other being the fall on the ground. There was further evidence that when the deceased had fallen two unknown persons had kicked him which would therefore be the third impact. The act of the petitioner follows next, when there was evidence that he had hit the deceased with a block and that there were pieces of block found at the scene thereafter.

[21] The question that would arise would be whether all four factors of impact would have contributed to cause the death of the deceased or whether any one or a combination of any one or more of those factors would have caused the death. This leads to the consideration of the position as to whether the Petitioner's act of hitting with a block would have caused the death or was a contributing factor when three other factors had preceded his act. This brings about the inconclusive nature of the effect of the Petitioner's act which is in favour of the Petitioner and which is further strengthened by the fact that Dr. Goundar had stated in cross examination that the hit on the head of the deceased with a beer bottle may have caused the death, which blow had been dealt by an unknown person. Therefore there is a doubt as to causation in this case which would enure to the benefit of the Petitioner.

[22] It is in this background regarding the medical evidence that the culpability of the Petitioner has to be viewed and as to how the learned trial Judge addressed the Assessors in his summing up. Since there were two accused who were charged jointly for murder, it was necessary to consider whether they had acted together on the basis of a joint enterprise.

[23] The learned trial Judge having explained the principles relating to the doctrine of joint enterprise addressed the Assessors as follows :

> *"25. Therefore, in dealing with the principle, you must consider the following factors as matters of law. They are:*
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> *(i) The case of each accused must be considered separately. That is, you must find evidence as to what each accused did to demonstrate that he too had shared the intention in common to prosecute the unlawful purpose;*
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> *(ii) Each accused must have been actuated by that common intention with the doer of the unlawful purpose at the time the offence was committed. ... ... Therefore, only their acts will make them responsible for the outcome of their act/s or conduct, if you consider it to be so. Evidence transpired that another person, whose identity is not known, attacked the deceased with a beer bottle after receipt of which, the deceased fell on the ground. Any harm that might have been caused to the deceased as a result of that attack with the beer bottle shall not raise liability against these two accused persons or against anyone of them for the reason that the charge has not referred to such an unknown person being associated with these two accused in the incident. Therefore, you must consider whether the acts or the conduct of these two accused person, were unlawful; and if so, whether such act/s or conduct, accompanied by malice aforethought, caused the death of the deceased. In considering that, you must decide whether, they were actuated by common intention to commit the murder of the deceased. If they are not, they will be liable only to the extent of the injuries caused by each one of them.*
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> (Emphasis added).
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> *Similarly, it transpired in evidence, that there were others who had been associated with the accused that night and their conduct too appeared to be wrongful. This would perhaps have contributed*

towards the death of the deceased in some way or the other. Whatever the degree of their involvement, that cannot be considered against these two accused or anyone of them as such offending conduct has not been taken into account by the prosecution when the charge was laid."

[24] In the above summing up the learned trial Judge had clearly directed the Assessors that the hit on the head of the deceased with the bottle was quite distinct from the acts of the two accused and that they would not be responsible for the attack with the beer bottle and its effect. The Petitioner has been disassociated with the attack by the beer bottle and the evidence against him was the attack by him with a block on the deceased.

[25] As shown above the cause of death was likely to have been due to the attack with a blunt object which could be either the hit with the beer bottle, or the fall on the ground as a result of that attack, or punching by the unknown persons or the attack by the petitioner with a block. There was evidence that the other co-accused (the Headmaster) had also punched the deceased and therefore did he and the Petitioner act with a common intention to cause injury which was likely to cause death. The co-accused was found not guilty and was acquitted which meant that there was no act or acts accepted by the Assessors by the Petitioner and the co-accused acting in furtherance of a joint enterprise.

[26] This would result in the fact that the Petitioner has been dealt with only on the basis of his act of hitting the deceased with a block and the question that had to be considered was whether that was the likely cause of death. As the medical evidence as dealt with above was not quite certain on this issue, the petitioner's conviction for murder becomes questionable. The learned trial Judge had directed the Assessors as regards malice aforethought in the following manner :

"(xvi) Remember that the burden of proving the accused's guilt rested on the prosecution at all times. If you find that the act of the

accused or the conduct in issue was accompanied by malice aforethought then you can find them guilty for murder. If you think that the accused could have only the knowledge of a possible death of the deceased on account of their acts or conduct, then you cannot find the accused guilty of murder. Instead, you can find the accused guilty only of manslaughter, which is an offence less in gravity than the murder, as I indicated before. Manslaughter is the killing of a person without malice aforethought."

[27] Having given this direction to the Assessors, the Assessors brought in a verdict for murder and the learned trial Judge agreed with that verdict however having himself set out the position of malice aforethought in the above manner.

[28] The Court of Appeal in the judgment dismissing the Appellant's appeal when considering ground 1 which was on the same lines as Ground 1 before the Supreme Court stated:

[13] ... ... The Assessors and the trial Judge accepted the prosecution version of facts. They accepted that the appellant participated in the assault of the deceased with others with the foresight that the deceased could either be killed or seriously injured. The evidence of Waisale established that the deceased was struck in the head with a bottle by a man who accompanied the appellant to assault the deceased, and after the deceased had fallen on the ground, two men kicked him while the appellant picked up a block and smashed it on the deceased's head. The assessors and trial judge were entitled to conclude that the appellant was criminally responsible for the brain injuries sustained by the deceased as a result of the assault on him by the appellant and others under the doctrine of joint enterprise. For these reasons, this ground of appeal has not been made out."
(Emphasis added)

[29] The summing up of the learned trial Judge was on a different basis (vide para. 22 above) as he had dissociated the attack with the beer bottle by an unknown person from the assault by the Petitioner on the deceased and therefore the reasoning given by the Court of Appeal in dismissing ground 1 does not stand in line with the manner in which the case had been approached by the learned trial Judge and put to the Assessors.

[30] The fact that the co-accused was found not guilty shows that the acts of the two accused had not been viewed together as being on the principle of joint enterprise by the Assessors as well as by the learned trial Judge in accepting their verdict, in which event it would appear that the acts of each accused had been considered separately by the Assessors and the learned trial Judge.

[31] The resulting position would be that the Petitioner had to be considered in relation to the blow given by him on the deceased with a block. Did he have the intention to cause the death of the deceased by inflicting such a blow or did he have knowledge that it was likely to have caused death? In view of the nature of the medical evidence that was available in the case which gave the possibility that the cause of death was likely to be by the blow on the head of the deceased with a beer bottle by an unknown person, which act was viewed separately, the question of whether the blow dealt by the Petitioner by itself caused the death remains doubtful as the proximate cause had been the attack with the beer bottle.

[32] However, since the fact that the Petitioner dealt the blow with a block was established the question that would arise is whether he intended to cause death or whether he had knowledge that it was likely to have caused death. What could be attributable to the Petitioner in the circumstances of the case is that he should have had knowledge that the blow dealt by him was likely to cause death in which event he is liable for manslaughter and not for murder. **Pagett** [1983] 76 CR App R 279.

[33] Therefore there is merit in this ground of appeal and the question to be seen is whether this meets the threshold of Section 7(2) of the Supreme Court Act. The Petitioner has been found guilty of murder and sentenced to life imprisonment and if it is allowed to stand there would be a substantial miscarriage of justice. In these circumstances Special Leave to appeal is granted.

[34] Counsel for the Petitioner did not emphasise on the other grounds of appeal at the hearing although written submissions were filed regarding them. Those grounds of appeal have been adequately dealt with in the judgment of the Court of Appeal, and there is nothing more to be added and therefore those grounds have no merit.

Conclusion

[35] In view of the above reasons the conviction for murder of the Petitioner cannot stand and a conviction for manslaughter is entered.

[36] There is no tariff for manslaughter due to the range of circumstances found in such cases. **Kim Nambae v The State** (1999) Criminal Appeal AAU 15/98 (26 February 1999), and it has varied from 4 to 12 years depending on the circumstances of each case. A sentence of 8 years is imposed on the Petitioner with a non-parole period of 6 years.

[37] A conviction for manslaughter is entered against the Petitioner and a sentence of 8 years is imposed with a non-parole period of 6 years.

Almeida Guneratne J

[38] I agree with the reasons and conclusion in the judgment of Chandra J.

Orders of Court:

1. Special leave to appeal is granted in terms of Section 7(2) of the Supreme Court Act, 1998;

2. The judgment of the Court of Appeal affirming the judgment of the High Court is varied to the effect that the verdict of murder is set aside and a verdict of manslaughter is entered in its place against the Petitioner;

3. The Petitioner is sentenced to a term of 8 years with a non-parole period of 6 years.

Hon. Justice Sathyaa Hettige
JUSTICE OF THE SUPREME COURT

Hon. Justice Suresh Chandra
JUSTICE OF THE SUPREME COURT

Hon. Justice Almeida Guneratne
JUSTICE OF THE SUPREME COURT