

**IN THE SUPREME COURT OF FIJI**  
**[APPELLATE CRIMINAL JURISDICTION]**

**Criminal Petition No. CAV 008 of 2015**  
**(Criminal Appeal No. AAU 0066/2008)**

**BETWEEN** : **FILIMONI VETAU**

**PETITIONER**

**AND** : **THE STATE**

**RESPONDENT**

**CORAM** : **Hon. Chief Justice Anthony Gates, President of the Supreme Court**  
**Hon. Mr. Justice Sathya Hettige, Justice of the Supreme Court**  
**Hon. Mr. Justice Buwaneka Aluwihare, Justice of the Supreme Court**

**COUNSEL** : **Petitioner in Person**  
**Mr. S. Vodokisolomone for the Respondent**

**Date of Hearing:** **5 April 2016**

**Date of Judgment:** **21 April 2016**

---

**JUDGMENT OF THE COURT**

---

**Gates, P**

I have read in draft the succeeding judgment of Hettige J. I agree with his Lordship's reasoning and conclusions, and that special leave must be refused.

**Sathya Hettige, J**

1. This is an application for special leave to appeal against the judgment of the Full Court of Appeal ( Calanchini P. Malalgoda JA and Madigan JA) dated 29<sup>th</sup> May 2014 affirming the conviction of the petitioner by the High Court of Labasa.
2. The petitioner with two other co- accused, was charged with murder contrary to section 199 of the Penal Code and punishable under section 200 of the said Code, Cap 17, Robbery with Violence contrary to section 293 (1) (b) of the Penal Code , Cap 17 and Unlawful Use of a Motor Vehicle contrary to section 292 of the Penal Code, Cap17, on an Information filed by the Director of Public Prosecutions in the High Court at Labasa on the 17<sup>th</sup> August, 2007.
3. The petitioner entered a plea of guilty before the trial in the High Court to the charges of Robbery with Violence and to the Unlawful Use of a Motor Vehicle count and proceeded to trial on the charge of murder together with two other co- accused.
4. After a voir dire which extended from 21<sup>st</sup> April 2008 to 25<sup>th</sup> April 2008 wherein the prosecution called 14 witnesses on the voluntariness of the caution interview statement and the charge statement, ruling was delivered by the trial Judge on 25<sup>th</sup> April 2008 on the admissibility of the caution interview statement holding that the caution interview statement is admissible in evidence at the trial.  
After trial before the assessors in the High Court the petitioner was found guilty on an unanimous opinion by the assessors, an opinion with which the trial Judge agreed and the petitioner was convicted of murder and was sentenced to life imprisonment a sentence fixed by law and was ordered to serve a minimum

term of 18 years before being eligible for parole. The co-accused were found guilty of manslaughter in the High Court.

5. The petitioner being dissatisfied with the decision of the High Court filed leave to appeal application in the Court of Appeal against the conviction based on the following grounds:

- a) *The learned trial Judge failed to conduct a voir dire to determine the voluntariness of the cautioned interview statement.*
- b) *The learned trial Judge used the unassessed caution interview to the prejudice of the accused in directing the assessors.*
- c) *The learned trial Judge erred in law in not addressing the assessors on the doctrine of joint enterprise and thereby allowing the assessors to find his co-accused guilty of manslaughter while he was found guilty of murder. The learned trial Judge failed to direct the assessors on partial defence of intoxication in the commission of the crime.*

6. In the Court of Appeal the petitioner succeeded in obtaining leave to appeal on four grounds of appeal and filed further amended grounds of appeal on the 10<sup>th</sup> of September 2013 and the appeal matter was set down for hearing before the Full Court of Appeal.

7. The Full Court of Appeal dismissed the petitioner's appeal on 29<sup>th</sup> May 2014.

### **Brief Factual Matrix**

8. On the 7<sup>th</sup> July 2007, the petitioner and other co-accused had been drinking in the afternoon at Labasa and decided to go to a shop to buy some more beer in Vulovi. As the shop was closed, the petitioner decided to take a taxi and steal

the money from the driver. Having failed to rob the taxi driver as a police patrol arrived at the scene the petitioner got off the taxi and started walking. The petitioner again decided to take another taxi and rob the driver. The driver was directed to go towards the hospital. They asked the deceased to stop the taxi and the petitioner pulled the deceased out of the car, pushed him against the car and demanded money and robbed him of \$25.00. Thereafter the driver was put down in the back seat and the second accused drove the taxi towards the Qelewaqa river bank at Bocalevu, a remote area where the crime scene was. The petitioner punched the deceased 6 times in the face and removed the singlet of the deceased, twisted it and then tied at the back of the neck, while covering the mouth. The petitioner having robbed the driver of his mobile phone, tied him up with the singlet to cover his mouth followed by a white plastic flour sack being pulled over the deceased's head and the deceased was pushed into the river.

9. It is to be noted that 14 witnesses were called to testify at the trial within trial by the prosecution and The trial Judge held that the caution interview and the charge statement were admissible in evidence in the trial. The petitioner did not dispute the caution interview statements.
10. In view of the sworn evidence given by the petitioner it is to be stated that it was not in dispute that it was the petitioner who personally inflicted the injuries on the deceased which finally caused the death of the deceased. It is worth noting that there was no reference to quantity of alcohol consumed as a possible defence by the petitioner in his sworn evidence at the trial.
11. It is useful to mention that in considering the evidence as transpired in trial court, the unchallenged evidence of the pathologist who testified in court on the cause of the death of the deceased, is important in that that the death was due to

asphyxia by suffocation which could have been caused by blocking of the mouth and nose with pressure.

### **Grounds of Appeal to Supreme Court**

12. By the petition dated 11<sup>th</sup> June 2014 the petitioner filed the following grounds of appeal in the Supreme Court:

- i) *That the learned trial Judge failed to conduct a voir dire to determine the voluntariness of the caution interview.*
- ii) *The learned trial Judge used the un-assessed caution interview to the prejudice of the accused in directing the assessors.*
- iii) *That the learned trial Judge failed to direct the assessors on the partial defence of intoxication in the commission of the crime.*

13. On the 19<sup>th</sup> of February 2016 the petitioner filed the following amended grounds of appeal against the conviction:

- i) That the court should consider the atmospheric authoritative environment at where the appellant has to make his statement in caution interview.
- ii) That he was physically assaulted verbally abused , threats, fear of intimidation that the appellant was refused his request to communicate or have his lawyer present by police before his caution interview.
- iii) That the appellant was taken to court whilst interview still in progress.
- iv) That the statement given to police on trial was used against the appellant though not given in trial proper.
- v) Nothing can be established that the punches fully established intent to kill.
- vi) That the learned trial Judge did not apply the correct test for intoxication.

- vii) The Judge should have told the assessors that the appellant was charged with murder and he would not be convicted unless he was found beyond reasonable doubt that he inflicted the blows with intent to murder or cause bodily harm. If neither is established the appellant is acquitted of murder.
- viii) Misguided representation by Legal Aid counsel.

### **Special Leave to Appeal**

14. At this stage, it is necessary to deal with the petitioner's application for special leave to appeal and consider the threshold criteria laid down in section 7(2) of the Supreme Court Act No. 14 of 1998 before dealing with the grounds of appeal.

15. It is also important to refer to section 98(3)(b) of Constitution of the Republic of Fiji of 2013 which provides exclusive jurisdiction to hear and determine, "*subject to such requirements as prescribed by law*" final judgments of the Court of Appeal.

Section 98(3) reads as follows: "*Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by law, to hear and determine appeals from all final judgments of the Court of Appeal*"

Section 98(4) also provides as follows:

*"an appeal may not be brought to the Supreme Court from a final Judgment of the Court of Appeal unless Supreme Court grants leave to appeal."*

16. The petitioner's application for leave to appeal is subject to the provisions specifically contained in section 7(2) of the Supreme Court Act No. 14 of 1998 which reads as follows:

*"In relation to a criminal matter the Supreme Court must not grant special leave to appeal unless*

- a) *A question of general importance is involved*
- b) *A substantial question of principle , affecting administration of criminal justice is involved; or*
- c) *Substantial and grave injustice may otherwise occur”*

17. It is manifestly clear from the above provisions contained in the section 7 (2) of the Supreme Court Act special leave should not be granted as a matter of course. The court in **Aminiasi Katonivualiku v State (2003) FJSC Crim. App. No. CAV0001/1999S, 17 April 2003** clarified the jurisdiction of the Supreme Court at page 3 as follows:

*“It is plain from this provision that the Supreme Court is not a Court of criminal appeal or general review nor is there an appeal to the Court as a matter of right and , whilst we accept in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal which in this instance, was an order for a new trial.”*

18. It is to be noted that the above passage in Aminiasi case (supra) was cited with approval in subsequent Supreme Court decisions such as **Raura v The State** (2006) FJSC 4; CAV0010U. 2005S (4<sup>th</sup> May 2006), **Chand v The State** (2012) FJSC6 ; CAV14/2010( 9<sup>th</sup> May 2012).

19. It is relevant to consider the dictum of Lord Summer in **Ibrahim v Rex** (1914) AC 599 at page 614 wherein the wordings such as “substantial” and “grave injustice” contained in the threshold criteria in section 7(2) above have been explained as follows:

*“Leave to appeal is not granted except where some clear departure from the requirements of justice exists: Riel v Reg(1885) 10 App.Case. 675; nor unless by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise , substantial and grave injustice has been done: In re*

*Abraham Mallory Dittet (1887) 12 App.Case 459. It is true that these 5 are cases for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: Riel's case supra; ex parte Deeming (1982) A.C. 422. The Board cannot give special leave to appeal where grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: Ex parte Macrea (1893) A.C. 346. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general tends to divert the due and orderly administration of the law into a new a course, which may be drawn into an evil precedent in future: Reg. v. Bertrand (1867) L.R. 1 P.C. 520."*

20. In **Dip Chand v State** CAV0014/2012 9<sup>th</sup> May 2012, the Suprem Court observed that  
*"given the criteria set out in section 7 (2) of the Supreme Court Act 14 of 1998 are extremely stringent and special leave to appeal is not granted as a matter of course. The fact the majority of grounds relied upon by the petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult."*
21. It is important to mention that grounds of appeal Nos.1-4 referred to in the petition which the petitioner relies upon have not been raised in the Court of Appeal and the petitioner's task of crossing the threshold requirements in section 7 (2) of the Supreme Court Act seeking special leave to appeal is even more arduous.
22. It is relevant to consider the provisions contained in Article 136 of the Indian Constitution which seems to be entirely a discretionary power of the Indian Supreme Court whether to grant special leave or not in a particular case as the Indian Supreme Court is not a regular Appeal Court. The relevancy of the provisions in Article 136 of the Indian Constitution is extra-ordinary discretionary

power exercised by the Indian Supreme Court which is similar to the exclusive discretionary power in Fiji Supreme Court in leave to appeal applications. The Article 136 of Indian Constitution reads as follows:

*“Notwithstanding anything in this chapter , the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination , sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India”*

23. In **Chandrasingh v State of Rajasthan** AIR 2003 SC 2889 (vide paragraphs 43 and 45) the Court observed that under Article 136 it was not bound to set aside an Order even if an order is not in conformity with the law since the power under Art.136 was discretionary.
24. Similarly the extraordinary power of the Supreme Court in Fiji will be exercised under section 7(2) of the Supreme Court in its discretion, only if the threshold criteria encapsulated therein is met by a petitioner notwithstanding the right of appeal granted to an aggrieved party to seek special leave.
25. The exclusive jurisdiction conferred upon the Supreme Court which is meant to deal with more important issues involving questions of law of general importance by the provisions in section 98 (3) of the Constitution will be exercised sparingly and in furtherance of justice in cases where the greater burden on the petitioner to satisfy the threshold requirements under section 7(2) is fulfilled.
26. Now I will consider the original grounds of appeal and the amended grounds of appeal of the petitioner referred to paragraphs 12 and 13 above given the criteria set out in section 7(2) of the Supreme Court Act which are extremely stringent.

27. It is to be noted that the original grounds of appeal nos. 1 and 2 and the amended 4 grounds of appeal filed on the 19<sup>th</sup> February 2016 can be dealt with together as they relate to the admissibility of caution interview statement of the petitioner as was submitted by the counsel for the respondent.
28. It is also relevant to mention that the 4 amended grounds of appeal were not raised in the Court of Appeal. The petitioner also admitted in court when this matter was heard on 5<sup>th</sup> April 2016 that amended grounds of appeal were fresh grounds of appeal.
29. With regard to the original grounds of appeal one and two, the learned counsel for the respondent submitted drawing the attention of court to the proceedings at page 317 of the High Court record (Vol.2) that the petitioner was not disputing the caution interview statements. The learned trial delivered the ruling at 2.15 pm on 25<sup>th</sup> April 2008.
30. The learned trial Judge's notes of trial as referred to by the Court of appeal at paragraph 6 of the Court of Appeal Judgment discloses the following "Trial within trial held and completed" and then "*Ruling at 2.15 pm : Caution and Charge Statement admissible evidence in trial*"
31. It can be seen on a reading of paragraphs 6 and 8 of the Court of Appeal judgment at page 6 of the Supreme Court record the Court of Appeal has considered carefully the evidence on the trial Judge's ruling after the trial within trial at the trial court, which is reproduced as follows:

*“The Judge’s notes of trial, while seeming to be exceedingly parse, disclose that the trial started on 21<sup>st</sup> April 2008. It was not until 25<sup>th</sup> April after fourteen witnesses had been called for prosecution.....” and paragraph 8 thereof states that “it can be assumed then that the proceedings on the 25<sup>th</sup> April did not concern the appellant and his caution interview(s) because their admissibility was not disputed.”*

32. On perusal of paragraph 9 of the Judgment of the Court of Appeal it can be seen that Court of Appeal had referred to the fact that the counsel for the petitioner had overlooked the fact that the petitioner had not disputed the admissibility of the caution interview statement. On being pointed out of this fact, the counsel had withdrawn the first and the second grounds of appeal urged before the Court of Appeal.
33. In the light of the above we are of the opinion that the original appeal grounds 1 and 2 of the petition have no merit and leave should not be granted.

#### **Ground of Appeal 2 on Intoxication**

34. The original ground of appeal on the issue of intoxication and the amended grounds of appeal nos. 5 and 6, on the failure of the trial Judge to apply the correct test for intoxication and the intention to kill was not established, can be considered together as both grounds relate to the same issue, ie. intoxication.
35. The learned counsel for the respondent submitted that this particular issue of intoxication was never raised at the trial in the High Court though there was evidence put forward before the trial court to the effect that the petitioner and co-accused had been drinking. We do not agree with the submissions of the

petitioner that the trial Judge failed to apply the correct test for intoxication. It may be that what the petitioner meant by urging the above ground of appeal is that trial judge failed to explain the elements of the offence with which he was charged correctly when directing the assessors with regard to the criminal intent. The petitioner has admitted that he had punched the deceased 6 times but disputing that he had the intention to kill or cause serious harm to the deceased.

36. The learned counsel for the respondent submitted that the issue of intoxication did not really arise for consideration as there was clear evidence in the caution interview statement which was held to be admissible in evidence at the trial. (Please see the evidence put forward by the prosecution that the petitioner punched the deceased until he fell down) .( Pages 164 and 165 of the Supreme Court record). The petitioner however, submitted at the hearing that he was heavily drunk at the time of act but he was aware of what he was doing. In fairness to the petitioner we will consider the relevant law briefly and whether the issue of intoxication amounts to a partial defence in this case as urged by the petitioner.

37. The intoxication as a defence to a criminal charge is governed by Section 13 of the Penal Code, Cap. 17 which provides as follows:

Section 13 (1) “ *Save as provided in this section, intoxication shall not constitute a defence to any criminal charge*”.

Section 13 (2) provides that “ *Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –*

- (a) *The state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
- (b) *The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission .*

Section 13 (3) reads as follows:

*“Where the defence under subsection is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply”.*

Section 13 (4) provides that *“ Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*

Section 13 (5) provides that *“ For the purpose of this section “intoxication shall be deemed to include a state produced by narcotics or drugs.”*

It appears from the evidence elicited at the trial that this is a case involving voluntary intoxication. Furthermore we observe that the petitioner seems to have relied upon section 13(4) of the Penal Code. However, the petitioner in this case knew at the time committing the offence, what he was doing and he admits to have formed some intention to cause grievous harm to the deceased. Therefore this ground of appeal cannot succeed. We refuse to grant leave on this ground of appeal.

38. The Court of Appeal in its judgment at paragraph 10 stated that:

*“On the issue intoxication it could be perhaps a partial defence to the specific intent of murder if it was actually an issue at trial. There was evidence from PW 5 a taxi driver who had carried them earlier that they smelt of liquor and one of them (and PW 5 identified a co - accused in court) was vomiting. The appellant ( the first accused at trial ) gave sworn evidence in his own defence . the only reference he made to alcohol in his evidence was that on the day of the murder/ robbery “ I was drinking at Royale “. There was no reference to time spent or quantity consumed and certainly no reference by him to alcohol a possible defence to his actions to his actions later that evening. In fact the appellant in his evidence gave a very detailed account of his actions at the scene that night, details that he would not have been able to recall if he were inebriated”*

At paragraph 11 thereof the court said:

*“The third accused at trial (Manoa Koroï) in giving sworn evidence said that at Royale , he was drinking with the appellant” a few glasses”*

At paragraph 12 of the Court of Appeal judgment it is stated that

*“The evidence of intoxication not being present and not being relied upon to any extent at trial , there was no need what so ever for it to be the subject of a direction to the assessors.”*

It is to be noted that the intoxication in this case is voluntary.

It appears that the petitioner relied on the provisions in section 13 (4) of the Penal Code wherein it states that the intention shall be taken into account for the purpose of determining whether the person charged had formed any intention , specific or otherwise, in the absence of which he would not be guilty of the offence. In the present case the petitioner knew what he was doing at the time of the act committed. As such we do not see any merit in this ground of appeal and we conclude that section 13 (4) does not apply.

39. It is also pertinent to state that the learned trial Judge in his summing up to the assessors in 4<sup>th</sup> paragraph at page 37 of the High Court record (Vol. 2) has referred to the sworn evidence of the petitioner who had demonstrated in graphic detail how he tied the deceased with the singlet to cover his mouth , which secured tightly behind his neck with the singlet. This was followed by a white plastic flour sack being pulled over his head , before he was pushed into the river. This piece of evidence of the petitioner was put to the assessors by the learned trial Judge.
40. In the light of the sworn evidence given by the petitioner the pathologist’s unchallenged evidence given in court had been considered by the trial Judge and directed the assessors accordingly . The pathologist’s evidence on the cause of the

death of the deceased had been that the death of the deceased had been due to asphyxia by suffocation and explaining how that may have been caused he had confirmed the suffocation to the deceased could have been caused by blocking of the mouth and nose with pressure.

41. It appears from the above evidence of the petitioner, the caution interview statements and the pathologist's unchallenged evidence in court the assessors had been satisfied as to whether the petitioner had the required criminal intent to commit the offence of murder as the petitioner had clearly remembered what he did and intended on the night in question.

42. I have carefully considered the what the petitioner said under oath and how he answered the questions that were put to him under cross - examination in court as at page 329 of the Supreme Court record which are reproduced as follows:

*"I recall telling the police that I was drinking."*

*"I said that I punched the deceased at riverbank at Bocalevu"*

*"I confirm that I punched the deceased 6 times. I confirm the injuries shown by the pathologist.- I confirm I caused those injuries . .....I just wanted to render him unconscious"*

43. It is relevant to consider the facts and the decision In **Baram Deo v State** (1990) FJCA 5; AAU 10/1988 18 May 1990 (Per Tuivaga P, Kemode and Sir Tikaram , JJA) wherein court observed that *where the appellant said although he was drunk and annoyed he knew what he was doing , remembered with clarity what he had done and did not appear to be drunk to witnesses. The summing up on evidence relating to drunkenness was adequate and fair.* The appeal was dismissed.

In that case when the intoxicated appellant asked the wife to serve his meal and she refused , the appellant then poured kerosene on the floor of the house and set fire to the house killing 4 sleeping children , the Judge very properly left the

question as to extent of drunkenness and its effect as questions of fact for the assessors to decide.

44. Similar view was taken in the Sri Lanka Supreme Court Judgment in **The King v Rengasamy** 25 NLR page 438 ( Vol.25) (1924) Bertram C.J. , De Sampayo J and Garvin A.J. observed that in all cases of self-induced intoxication it is a question of fact for jury, whether the accused actually entertained the intention necessary to constitute the crime.

In this case judgment and the sentence of the lower court were confirmed by the Supreme Court.

It was further observed in a case of murder the law will not allow an offender to say that owing to his intoxication he did not know that act which he was committing was likely to cause death .But whether he did so with any particular intention is a question of fact for the jury. (This was a case where the murder was committed while the accused was in a state of drunkenness- self-intoxication . The provisions in sections 78 and 79 of the Penal Code of Sri Lanka were discussed in detail.)

45. In the trial court the issue of intoxication was never raised and therefore the need did not arise for consideration by the trial Judge to direct the assessors. However, one can argue that notwithstanding failure to raise it at the trial, it would have been prudent for the trial Judge to warn the assessors as reference was made to intoxication in evidence.

46. In the case of **Tej Deo v The State** (2008) FJCA23; AAU0045.2006. (23 June 2008) the court observed that the law on intoxication as a defence is settled. Self-induced intoxication is usually no defence except to offences requiring a specific intent

such as the offence of murder. In Fiji the common law position on intoxication as a defence has been codified in the Penal Code.

47. The court further observed in paragraph 36 of the same judgment that “ *Given the appellant’s evidence that he was not so drunk, that he knew what he was doing, that he had accidentally hit the deceased with a frozen chicken and that he had not assaulted her, we are satisfied that there was no evidential basis requiring directions on the appellant being unable to form the specific intent required for murder due to the influence of alcohol, and we are satisfied that there is no risk of miscarriage of justice having resulted.* This ground of appeal fails.”
48. It is important to note that in the light of the observations made in the above judgments we can reach the conclusion that if the issue of self-induced intoxication has not been raised at the trial and if the petitioner was able to remember what he was doing at the time of committing the offence, the intoxication cannot be taken as a defence or partial defence. Therefore this ground of appeal fails accordingly we dismiss the leave to appeal on this ground of appeal.

#### **Amended Appeal Ground 7.**

49. The petitioner urged that the Judge should have told the assessors that the appellant was charged with murder and he would not be convicted unless he was found beyond reasonable doubt that he inflicted the blows with intent to murder or cause bodily harm. If neither is established the appellant is acquitted of murder. At page 317 of the Supreme Court record the counsel (L.A.C.) for the appellant had submitted that he has not disputed the caution interview statement based on the decision in **Tamaro v Reginam** (1970) FJCA 1 ; (1977) GILR 108 ( 27 July 1970.)

Wherein the court observed that:

*“the learned trial Judge immediately proceeded with what is referred to in the record as the voir dire investigation. When that had been concluded the learned trial Judge ruled that the statement was admissible in evidence, and in our view there were ample grounds to support that ruling. At the hearing of the appeal counsel for the appellant contended that the trial Judge should have given the reasons for his decision., but in the circumstances we can see no necessity for him to have done so. In any event there was nothing in the evidence given on voire dire to show that the appellant had in fact still been in a state of shock four days after the incident had occurred.”*

This ground of appeal was not raised in the Court of Appeal. The petitioner in his sworn evidence has admitted punching the deceased and pulling the empty sack over the deceased's head before the deceased was thrown into the river. The petitioner could clearly remember this evidence. Accordingly the assessors were directed by the learned trial Judge on the petitioner's sworn evidence. The assessors were satisfied with the evidence that the petitioner had the required mensrea when committing the offence of murder. We cannot permit a new point which was not raised in the Court of Appeal to be argued.

50. In **Lucke v Clearly & Otrs** ( 2011 iii SASR 134) the Supreme Court of South Australia has held that in regard to a point abandoned at trial, it would not be in the interests of justice to allow it to be raised on appeal.

The court further observed that

- (i) The threshold test to be met by a party seeking to raise an argument for the first time on appeal is high. An appeal court will only permit a party to do so in the most exceptional circumstances.....”

51. In the case **Whisprun Pty Ltd. v Dixon** (2003) ARI 447 the High Court of Australia observed that

*“ It would be adverse to the due administration of justice if, on appeal a party could raise a point that had not been raised at trial. Nothing is more likely to give rise to a sense of injustice in a*

*litigant than to have a verdict taken away on a point that was not raised at trial or might possibly have been met rebutting evidence or cross-examination.”*

52. In **Dip Chand v State CAV 0014/2012** (9<sup>th</sup> May, 2012) Supreme Court observed in paragraph 36 of the judgment that:

“The Supreme Court has been more stringent in considering the applications for special leave to appeal on the basis of grounds of appeal not taken up or argued in the Court of Appeal . In **Josateki Solinakoroi-v- The State** Criminal Appeal No. CAV0005 of 2005 the Supreme Court of Fiji in an exceptional case took into consideration the principles developed by the Privy Council in similar situations and in particular relied on the following observation in **Kwaku Mensah v- the King** ( 1946) AC 83

*“where a substantial and grave injustice might otherwise occur the Privy Council would allow a new point to be taken which had not been raised below even when it was not raised in the petitioner’s printed case.”*

53. It can be seen from a catena of cases in Fiji and other jurisdictions that the Supreme Court was reluctant and have refused to excise its jurisdiction in allowing the new points to be taken up or to be argued in the Apex court if the new point had not been argued in the court below.

As such we refuse and dismiss leave to appeal on this ground of appeal.

#### **Amended Ground of Appeal 8.**

Misguided representation by Legal Aid counsel.

54. It was submitted by the State that the petitioner was represented by the counsel of the Legal Aid Commission during the trial in the High Court and informed

court that acting on instructions from the petitioner, that the petitioner was not disputing the caution interview statement. The counsel for the respondent further submitted the petitioner cannot now shift the blame to his counsel who represented him both in the High Court and in the Court of Appeal alleging misguided representation. (Mr. J. Savou L.A.C) had appeared for the petitioner in the Court of Appeal.) The petitioner seems to have alleged incompetence or failure on the part of the counsel which we cannot agree since the ground of appeal on misguided representation does not fall within the provisions in section 7 (2) of the Supreme Court Act No.14 of 1998.

55. The counsel for the respondent cited in his written submission the relevant judgment in Silatolu v State (2008) FJSC 48 ; CAV2.2006 (29 February, 2008) which is useful to support this position.

*“In general a tactical election which turns out badly for the accused cannot, in itself, occasion a miscarriage of justice. It may only have contributed to the conviction of the guilty. Special leave on this ground should fail.”*

56. It is obviously clear that the counsel from the Legal Aid Commission had appeared in the trial court and in the Court of Appeal and had acted on the instructions of the petitioner and finally the petitioner did not get the decision or relief in his favour. The petitioner cannot shift the blame to the counsel. This kind of contention cannot be permitted to be taken up as a ground of appeal. Accordingly this ground of appeal has no merit and should fail.

### **Conclusion**

57. In considering the facts and evidence and written submissions of both the petitioner and the State Counsel in this case both in the trial court, Court of

Appeal and Supreme Court we do not find that the Court of Appeal had fallen into any error as alleged by the petitioner and there is no miscarriage of justice suffered by the petitioner. We also do not find that the petitioner has sustained any substantial and grave injustice. The petitioner has failed to satisfy the threshold requirements encapsulated in section 7 (2) of the Supreme Court Act of 1998 and in the result the petitioner has failed to satisfy this court on any of the grounds of appeal urged before this court and we reach the conclusion that the petitioner's application should be dismissed.

58. For the reasons set out above this court in exercising its extra ordinary power under section 98 (3) of the Constitution would not be justified in granting special leave to appeal in this case.

**Aluwihare, J**

59. I concur with the judgment of Hettige J and agree with the reasons and Orders proposed.

**Orders of the Court:**

- i) Special leave to Appeal is refused.
- ii) The judgment of the Court of Appeal dated 29<sup>th</sup> May 2014 is affirmed.



.....  
Hon. Chief Justice Anthony Gates  
**President of the Supreme Court**



.....  
Hon. Mr. Justice Sathya Hettige  
**Justice of the Supreme Court**



.....  
Hon. Mr. Justice Buwaneka Aluwihare  
**Justice of the Supreme Court**