JOSATEKI SOLINAKOROI v STATE (CAV0005 of 2005S)

SUPREME COURT — CRIMINAL JURISDICTION

FATIAKI CJ, HANDLEY and WARD JJ

18, 20 October 2005, 8 June 2006

Evidence — hearsay — murder — life imprisonment — "in the presence of" — "a person … under his immediate care, or to whom he stands in a … fraternal relation" — "substantial and grave injustice" — Constitution of the Republic of Fiji Ch 9, ss 117, 122, 122(1), 122(2), 122(2)(a), 122(3), 122(4), 122(5), 123 — Penal Code ss 203, 204 — Supreme Court Act Pt 3 ss 2(1), 7(1), 7(2), 7(2)(c), 7(3), 14.

The Petitioner and his cousin Ulaiasi were under the influence of liquor. They met the deceased and accompanied him in his car to the beach to continue drinking. The Petitioner was seated at the back and Ulaiasi in the front. The deceased made sexual advances to Ulaiasi during the drive. They continued drinking in the car when they arrived at the beach. The Petitioner got out of the car upon the request of the deceased and sat on the ground in front of the car and continued drinking. Ulaiasi also got out of the car and ran away after the deceased started once again to make sexual advances to him. The Petitioner pulled the deceased out of his car and started punching him to death. He also took jewelries and the car of the deceased. The Court of Appeal ruled that the defence of provocation was not open for consideration by the assessors because Ulaiasi and the Petitioner were not "in a fraternal relation", and because the wrongful act or insult was not done "in the presence of" the Petitioner. Simply being told about it by Ulaiasi was not enough. The Petitioner sought special leave to appeal from the Court of Appeal decision dismissing the Petitioner's appeal from his conviction for murder and sentence of life imprisonment following his trial. The issues were whether: (1) the uninvited homosexual advances of the deceased towards Ulaiasi were done "in the presence of" the Petitioner; (2) that Ulaiasi was "a person … under his immediate care or to whom he stands in a … fraternal relation"; and (3) the judge's premature ruling occasioned "substantial and grave injustice".

Held — Per Fatiaki CJ and Handley J, allowing the appeal:

(1) After Ulaiasi got out of the car, the Petitioner stood up and could have seen both him and the deceased. What happened took place "in the presence of" the Petitioner. He spoke to Ulaiasi as did the deceased, who wanted Ulaiasi to come back to the car. The deceased's request that Ulaiasi return was capable of being understood as an admission of prior unacceptable conduct as well as a renewed homosexual advance. Whether it was such an advance and whether it was also a "wrongful act or insult" likely to deprive the Petitioner of his power of self-control were eminently questions for the assessors.

(2) The Petitioner, who was the elder and Ulaiasi were cousins. The evidence did not reveal whether they were first or remoter cousins or their respective ages. Certainly, Ulaiasi considered that "in Fijian custom" he was like a younger brother to the Petitioner, such that the Petitioner was bound to protect him from anything untoward that was said or done or him. The Petitioner's counsel may also have intended to call evidence on that issue, but was prevented from doing so. Had this been done, the judge would have been bound to leave that question to the assessors, provided there was material which could support the other elements of the defence.

(3) The Petitioner was not tried according to law and the withdrawal of the defence of provocation at the end of the prosecution case was a substantial departure from the course prescribed by the Code. He was prevented from presenting a substantial part of his case, and giving evidence, or calling witnesses in support of it. There was already evidence in the prosecution case which might have supported a defence of provocation, and but for the ruling, there may have been more. As a result, provocation was not properly left to the

assessors and there was no certainty that they or all of them would have rejected the defence, or that, on further evidence being given, the judge would have done so. It will be for the Director of Public Prosecutions, in his discretion, to determine whether, in all the circumstances, he will proceed.

Per Ward J, dismissing the appeal:

(1) There was no ambiguity in the use of "in the presence of" in s 204 of the Penal Code and the court was bound to apply it. Presence must mean informed and knowing presence if it is to be a factor which inflames that person's anger. In the majority of cases, the provocative conduct was directed at the person who was provoked and so presence was not in issue. However, when the provocation was directed at a third person, it must be shown that the assailant was present and aware of the provocative acts when they occurred.

The Petitioner knew nothing of the actions of the deceased to Ulaiasi when they took place. He became aware only after they had finished and he asked where Ulaiasi was going. The Petitioner claimed it was Ulaiasi's reply coupled with the deceased's admission which provoked his anger and caused him to assault the deceased. The Petitioner had no other knowledge of the actions of the deceased in the car at the time and so, although he was physically close when they occurred, he was not present in the sense of knowing what was happening.

(2) The court had not heard enough to be able to give a definitive ruling on this issue. However, if the phrase was to import a wider relationship, it must clearly be defined further — limiting words were of little value if the extent of the limitation was not plain. If such a wider interpretation should be found to be within the definition, it will be a matter of fact for the assessors to determine whether such a relationship existed in the particular case.

(3) In the present case, the judge as a result of his decision on presence and of the relationship of the Petitioner and Ulaiasi, considered there was no evidential basis for a defence of provocation. Whether or not that was correct was not possible to determine at that state in the trial. Clearly, any decision on the evidence must be taken on the whole evidence and, at that stage; the court had not yet heard any evidence from the defence.

Had the whole of the evidence, including that of the defence, shown that the provocative act or words had not been in the Petitioner's presence, the judge would have been right to decide as a matter of law that provocation was not available and withdrawn it from the assessors. As a result of the unfortunate decision to rule before the defence had commenced its case, he could not know whether or not there would be evidence from the accused that he had seen the acts or heard the suggestions of the deceased to Ulaiasi.

Appeal allowed.

Cases referred to

Bharat v R [1959] AC 533; *Bullard v R* [1957] AC 635; [1961] 3 All ER 470; *Davis v R* (unreported, S81/1998); *Mancini v Director of Public Prosecutions* [1942] AC 1; [1941] 3 All ER 272; *Mohamad Kunjo S/O Ramalan v Public Prosecutor* [1979] AC 135; *R v Harrington* (1866) 10 Cox CC 370; *R v Hopper* [1915] 2 KB 431; *R v Langlands* [1932] VLR 450; [1932] ALR 317; *R v Quartly* (1986) 11 NSWLR 332; *R v Selway* (1859) 8 Cox CC 235; *R v Terry* [1964] VR 248, cited.

Cozens v Brutus [1973] AC 854; [1972] 2 All ER 1297; *Director of Public Prosecutions v Walker* [1974] 1 WLR 1090; *Joseph v R* [1948] AC 215; *Kwaku Mensah v R* [1946] AC 83; *Dhalamini v R* [1942] AC 583; *Muhammed Nawaz v King-Emperor* (1941) LR 68 Ind App 126; *Arden v R* [1975] VR 449; *R v Fisher* (1837) 8 C & P 182; 173 ER 452; *R v Yanda Piaua* [1967–68] PNG LR 482; *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, considered.

Hemapala v R [1963] AC 859; *Holmes v Director of Public Prosecutions* [1946] AC 588; [1946] 2 All ER 124, explained.

Petitioner in person [assisted by *F. Hannif* as amicus curiae]

R. Gibson and *D. Gounder* for the Respondent

[1] Fatiaki CJ, Handley and Ward JJ. This is a petition for special leave to appeal from a decision of the Fiji Court of Appeal in the criminal jurisdiction. The Court of Appeal dismissed an appeal by the Petitioner from his conviction for murder and sentence of life imprisonment following his trial before Townsley J and assessors. The Petitioner was represented at his trial, but not in the Court of Appeal.

[2] The facts and an account of the proceedings at the trial and in the Court of Appeal are set out in [39]–[55] of the reasons for judgment of Ward J which we gratefully adopt. His Lordship reviews the provisions of the Constitution and the Supreme Court Act which define the jurisdiction of this court in criminal cases in [56]–[66] which we also adopt.

[3] Importantly his Lordship concludes (at [65]) that this court is not limited to consideration of matters that were raised in the Court of Appeal (at [63], [65], [66]), but may intervene in other cases in accordance with s 7(2)(c) of the Supreme Court Act where "*substantial and grave injustice may otherwise occur*". We respectfully agree.

[4] His Lordship considers the issues raised under s 204 of the Penal Code by the defence of provocation that the Petitioner's counsel foreshadowed at his trial (at [67]–[79]) and concludes (at [80]–[87]) that special leave should be refused and the petition dismissed. We must respectfully differ.

[5] The trial judge was not entitled to withdraw the issue of provocation from the assessors at the end of the prosecution case. At that stage he could not know what might emerge during the case for the accused who was entitled to remain silent, to give evidence on oath, or to make an unsworn statement and call witnesses in his defence. Undoubtedly, the accused had an evidentiary onus but if there was evidence of provocation fit to be submitted to the assessors, the legal onus to negative provocation remained with the prosecution. The judge's pre-emptive ruling was a fundamental irregularity, affecting the trial, which prevented the accused saying anything, on oath or otherwise, in support of a defence which might have reduced murder to manslaughter. In effect, the trial judge denied the accused the right to be heard in his own defence without any statutory authority under the Criminal Procedure Code for the course he followed.

[6] The definition of provocation in s 204 of the Penal Code, so far as relevant in this case, is:

> The term "provocation" means … any wrongful act or insult off such a nature as to be likely, when done … in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a … fraternal relation … to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act of insult is done or offered.

[7] The critical issue was whether there was evidence fit for the consideration of the assessors that the uninvited homosexual advances of the deceased towards Ulaiasi in the car both on the way to the beach and at the beach were done "*in the presence of*" the Petitioner, and, whether Ulaiasi was "*a person … under his immediate care, or to whom eh stands in a … fraternal relation*".

[8] Ulaiasi said in evidence that when the car stopped at the beach he remained in the front seat with the deceased while the Petitioner who was told to get out of the car by the deceased, got out from the back seat and sat down in front of

the car drinking beer. The deceased then continued with his homosexual advances towards Ulaiasi which caused the latter to get out of the car and start running home. This attracted the attention of the Petitioner, and according to Ulaiasi the conversation followed that is recorded (at [42]) by Ward J.

[9] The Petitioner told the police that he then dragged the deceased from the car and assaulted him with what turned out to be deadly force. The homosexual advances were plainly capable of constituting provocation to Ulaiasi and had he reacted in he same way that issue would properly have been one for the assessors.

[10] The trial judge however, withdrew provocation from the assessors because he ruled that Ulaiasi and the Petitioner were *not* "*in a fraternal relation*", and because the wrongful act or insult was *not* done "*in the presence of" the petitioner*". Simply being told about it by Ulaiasi was not enough.

[11] On any view, the Petitioner was nearby and close enough to hear and see what was happening in the car on the way to the beach and even at the beach had he been standing up and looking. His statement to the police was not necessarily a complete account of what he heard and saw and further facts may have emerged in the defence case. The trial judge was not entitled to find that the Petitioner could not add to the evidence given by Ulaiasi or to his statement to the police.

[12] The expression "*in the presence of*" is not a term of art and is made up of ordinary English words. Accordingly, within very broad limits, their meaning and application in any particular case is a question of fact, and thus a question for the assessors. The principles were stated in *Cozens v Brutus* [1973] AC 854 at 861; [1972] 2 All ER 1297 at 1299 by Lords Reid:

> The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the Court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. It appears to me, of r reasons which I shall give later, to be intended to have its ordinary meaning. It is for the Tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the Tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no Tribunal acquainted with the ordinary use of language could reasonably reach that decision.

[13] It is well-established that a confession or hearsay report after the event cannot constitute provocation which reduces unlawful homicide from murder to manslaughter. See *Holmes v Director of Public Prosecutions* [1946] AC 588 at 596–7 and 600; [1946] 2 All ER 124 (*Holmes*). In *R v Fisher* (1837) 8 C & P 182 at 186; 173 ER 452 (*Fisher*), a father searched for and killed the deceased, after being informed that the deceased had had homosexual intercourse with his son. Park J ruled that provocation had not been established because "*in all cases the party; must see the act done*". In *R v Harrington* (1866) 10 Cox CC 370, Cockburn CJ left provocation to the jury where the accused had reacted violently on seeing his daughter physically assaulted by the deceased.

[14] In *R v Terry* [1964] VR 248 at 250–1 Pape J held that provocation offered by the deceased to the wife and sister of the accused "*in his presence*" could constitute provocation at common law, and this decision was followed in *Arden v R* [1975] VR 449 by Menhennitt J who ruled that a hearsay account to the accused by his pregnant de facto wife that she had been raped by the deceased

could not constitute provocation because the conduct of the deceased had not occurred in his presence. Menhennitt J concluded (at 452):

> … for there to be sufficient to constitute provocation, conduct of some kind … on the part of the person killed must take place in the presence of the accused person.

[15] In *R v Quartly* (1986) 11 NSWLR 332 (*Quartly*), the Court of Criminal Appeal held that a hearsay account of the conduct of the deceased towards a young woman with whom the accused had had a sexual relationship could not constitute provocation. Lee J, giving the judgment of the court, said at 338–9:

> The view … that provocation requires a reaction by an accused to conduct of the deceased which occurs in his sight or hearing, appears to have been accepted in the common law from the very earliest times … the policy of the common law has always been that provocation becomes a factor in a murder trial when the killing can be sensibly related to a reaction by an accused person to some conduct of the deceased of which he personally has experience, even though, as I have said, it need not necessarily in every case be directed towards him … The provocative incident relied upon in such cases must still be the conduct of the deceased seen or heard by the accused.

[16] The meaning of "*in the presence of*" has also been considered in relation to the common law crime of robbery which involves the theft of property from the person of the victim. The courts have held that the crime can be committed if the victim is present when the property is stolen although it is not taken from his person. In *R v Selway* (1859) 8 Cox CC 235, the accused stole a money box from a shop in the presence of the shop owner and robbery was left to the jury. In *R v Langlands* [1932] VLR 450; [1932] ALR 317; money was stolen from the till in the shop while the shop keeper was detained in another room behind a closed door. The Full Court of Victoria held that the evidence did not establish the offence of robbery in company because the robbery did not take place "*in the presence of*" the victim.

[17] After Ulaiasi got out of the car the Petitioner stood up and could have seen both him and the deceased. On any view, what then happened took place "in the presence of" the Petitioner. He spoke to Ulaiasi as did the deceased who wanted Ulaiasi to come back to the car. The deceased's request that Ulaiasi return was capable of being understood as an admission of prior unacceptable conduct as well as a renewed homosexual advance. Whether it was such an advance and whether it was also a "*wrongful act or insult*" likely to deprive the Petitioner of his power of self-control were eminently questions for the assessors.

[18] Thus the evidence in the prosecution case established, without more, a basis for leaving these elements of the defence to the assessors. If the issue had not been prematurely withdrawn from the assessors further facts may have emerged in the defence case which strengthened the existing case for the Petitioner on those elements of the defence. Other facts may also have emerged which provided a wider basis for a finding that provocative conduct had occurred "*in his presence*".

[19] The other ground on which the trial judge withdrew the defence from the assessors was that there was no relationship between the Petitioner and Ulaiasi which could make conduct directed to Ulaiasi provocation to the Petitioner within s 204 of the Penal Code.

[20] The other elements of the defence in this case are whether Ulaiasi was "under [the] immediate care" of the Petitioner *or* they were in a "fraternal relation". They were cousins, and the Petitioner was the elder. The evidence does not reveal whether they were first or remoter cousins or their respective ages. In

his ruling at the end of the prosecution case the judge held that the relationship between cousins was not within s 204 but he did not refer to the possibility that Ulaiasi may have been under the immediate care of the Petitioner.

[21] Surprisingly, in view of his ruling, the trial judge referred to provocation at some length in his summing-up. He told the assessors that the relationship between Ulaiasi and the Petitioner was only that of cousins and added *"See, you can't no matter what Fiji custom is, you can't go around saying 'Oh! He's my brother, he's my brother, he's my brother' because you feel kindly or brotherly towards the person"*.

[22] However Fijian customary traditions could have been important in determining whether Ulaiasi was under the "immediate care" of the Petitioner. Certainly Ulaiasi considered that "in Fijian custom" he was like a younger brother to the Petitioner such that the Petitioner was bound to protect him from anything untoward that was said or done or him. The Petitioner's counsel may also have intended to call evidence on that issue, but was prevented from doing so. Had this been done the judge would have been bound to leave that question to the assessors, provided there was material which could support the other elements of the defence.

[23] The Petitioner and Ulaiasi were not brothers of the full blood, but s 204 refers to *"a conjugal, parental, filial or fraternal relation"*. The section does not in terms require parties to be lawfully married before they can be in a conjugal relationship and a de facto relationship would be sufficient. Equally we have no doubt that a person may be in a parental relation to a stepchild, a foster child, and an adopted child. Children brought up in such a family could fairly be regarded as being "in fraternal relation" although there was no blood relationship between them.

Furthermore a parental relationship may possibly exist where another child is staying with the family temporarily.

[24] There is also the possibility of a fraternal relation being recognised where there is neither a blood or extended family relationship. In 2 Samuel 1:26 David, in lamenting the death of Jonathan, who was not his blood brother, says: "*I am distressed for you my brother Jonathan*". In Shakespeare's *Henry V* the King, addressing his troops before the Battle of Agincourt (*Act IV Scene III), says: "we few, we happy few, we band of brothers; for he that today sheds his blood with me shall be my brother*".

[25] In this respect also, there is possible scope for the operation of Fijian customary relationships. We do not decide that such a relationship, properly proved, would establish "*a fraternal relation*" for the purposes of s 204. We do no more than decide that such a finding could not be ruled out in advance of the evidence. This view is supported by *R v Yanda Piaua* [1967–68] PNG LR 482, a case under the Criminal Code of Papua New Guinea, which contained a definition of provocation indistinguishable from s 204. Mann CHJ said at 488:

> The degree of relationship set out in the definition of provocation in s 268 is not necessarily a direct and specific blood relationship. The words used are words in common and general use and are often used to describe relationships falling outside any strict definition. For example, the word "fraternal" has a much wider meaning in common use than could be derived from a reference to a full blood brother. The expression "conjugal" of course goes outside any blood relationship and, generally, the use of adjectives in the context with the suffix "al" in each case tends to give a wider meaning … I can see no reason why s 268 should not extend to the many "fraternal" relationships as subsisting in established native society and which, as a matter of

> common experience, had led to precisely the same behaviour or response as would be encountered in the case of full blood brothers. Should the evidence of the precise relationship involved be somewhat deficient, I conclude that the onus would be on the Crown to eliminate any deficiency on this score.

[26] The remaining issue is whether the court should find that the judge's premature ruling occasioned "*substantial and grave injustice*" within the meaning of s 7(2)(c) of the Supreme Court Act. While this expression must be construed in its context we have no doubt that it was intended to reflect the principles which the privy council applied in criminal cases.

[27] 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 appellant's printed case: *Kwaku Mensah v R* [1946] AC 83 at 94 (*Kwaku Mensah*); *Mohamad Kunjo S/O Ramalan v Public Prosecutor* [1979] AC 135 at 142. A substantial and grave injustice warranting the intervention of the privy council was held to occur where the trial judge did not leave manslaughter to the jury where there was evidence capable of supporting a defence of provocation. Thus in *Kwaku Mensah* Lord Goddard said at 94:

> … the direction to the jury that the question of manslaughter could only arise if they accepted the accused's evidence that the shooting was accidental was wrong. It has resulted in a failure to take the opinion of the jury on a matter which, had they accepted the evidence, might have avoided a conviction for a capital crime … When there has been an omission to place before the jury for their consideration a matter of such grave importance they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal.

[28] That decision was applied in *Bullard v R* [1957] AC 635; [1961] 3 All ER 470 and *Bharat v R* [1959] AC 533 at 539–40 (*Bharat*). Such a miscarriage also occurs where the accused has been shut out from presenting a material part of his case. Thus in *Muhammed Nawaz v King-Emperor* (1941) LR 68 Ind App 126 at 128 Viscount Simon LC said:

> Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice. An obvious example would be a conviction following a trial where it could be seriously contended that there was a refusal to hear the case of the accused … or where he was not allowed to call relevant witnesses.

[29] This statement of principle was applied in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 972 (*Subramaniam*). The defence was duress and the trial judge rejected as hearsay the evidence of the accused of threats to his life by communist insurgents and he was not allowed to give that evidence. The privy council said:

> In this case the appellant has not been allowed to give relevant and admissible evidence, which is a circumstance very similar in its consequences to not being allowed "to call relevant witnesses" … Their Lordships feel unable to hold with any confidence that had the excluded evidence, which goes to the very root of the defence of duress, been admitted the result of the trial would probably have been the same.

[30] The accused is entitled to be tried according to law and a miscarriage of justice occurs if there has been a substantial departure from the prescribed procedure. Thus in *Dhalamini v R* [1942] AC 583 on a trial for murder before a

judge and assessors the latter gave their opinions to the judge in private, and not in open court as required by law. Lord Atkin said at 590:

> What, then, should be the result of a failure … to hold the whole of the proceedings in public? In this country the omission would be a fatal flaw entitling a conflicted criminal to have the conviction set aside … Prima facie, the failure to hold the whole of the proceedings in public must amount to such a disregard of he forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board in dealing with criminal appeals. There may, no doubt, be cases where the guilt of the accused is so apparent that in spite of the disregard of this essential need for publicity this Board would not consider it right to grant leave to appeal, but the present is not such a case …

[31] These principles were applied in *Joseph v R* [1948] AC 215 (*Joseph*) where the Chief Justice of Fiji wrongly treated the assessors as a jury and did not give judgment convicting the accused. At 221 Sir John Beaumont said:

> The appellant was entitled to be tried by the Judge and he has not been so tried and, in the circumstances, the only course open to the Board was to advise his Majesty to allow the appeal and quash the conviction and sentence.

[32] These principles were again applied in *Hemapala v R* [1963] AC 859 at 868 (*Hemapala*). The accused had elected to be tried by an English speaking jury but the trial had been conducted in Sinhala. Sir Kenneth Gresson giving the judgment of the Board said:

> … their Lordships hold that there having been a departure from the provisions of the Code with no certainty that such a departure did not operate to the disadvantage of the appellant the case must be regarded as one in which there has been a miscarriage of justice necessitating the quashing of the conviction.

[33] The privy council intervened in such cases although there was no certainty that the error had affected the result, and even where it was unlikely that it had done so. In *Kwaku Mensah* at 94, Lord Goddard said: *"it is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction*". In *Joseph* at 221, Sir John Beaumont said:

> It is no doubt possible, and even probable, that if the learned Chief Justice had tried the case in accordance with the provisions of the Procedure Code he would have reached the conclusion which the Assessors reached, namely, that the accused were guilty of manslaughter. This, however, is a matter of conjecture.

[34] These principles were applied in *Subramaniam* at 973; *Bharat* at 539–40; and in *Hemapala* at 868.

[35] In *Director of Public Prosecutions v Walker* [1974] 1 WLR 1090 at 1096 Lord Salmon said:

> The proviso can be applied only if the Court of Appeal is satisfied that there is no possibility of any injustice being done. This could hardly ever be so if a defence, however weak, upon which the accused relies at the trial, or which is supported by evidence (although it has not been expressly relied on) has not been left to the jury. In such a case it would, as a rule, be manifestly unjust to deprive the accused of the jury's verdict on that defence.

[36] These principles lead us to conclude that there has been a substantial and grave injustice which requires this court to intervene. The Petitioner was not tried according to law, and the withdrawal of the defence of provocation at the end of the prosecution case was a substantial departure from the course prescribed by the Code. He has been prevented from presenting a substantial part of his case,

and giving evidence, or calling witnesses in support of it. There was already evidence in the prosecution case which might have supported a defence of provocation, and but for the ruling, there may have been more. As a result provocation was not properly left to the assessors and there is no certainty that they or all of them would have rejected the defence, or that, on further evidence being given, the judge would have done so. We propose therefore to allow the appeal and order a new trial. It will be for the Director of Public Prosecutions, in his discretion, to determine whether, in all the circumstances, he will proceed.

[37] We make the following orders:

(1) Special leave granted limited to the issue of provocation.
(2) Appeal allowed.
(3) The conviction and sentence for murder are quashed.
(4) Proceedings remitted to the High Court for a new trial of the Petitioner according to law on a charge of murder or manslaughter.

[38] **Ward J.** This is a petition for special leave to appeal from a judgment of the Court of Appeal.

[39] The Petitioner was charged with one count each of murder, robbery with violence and unlawful use of a motor vehicle. He pleaded not guilty and was convicted of murder and unlawful use of a motor vehicle but acquitted of robbery with violence; the judge having accepted the unanimous opinion of the assessors.

[40] The facts of the case were that, in the evening of 12 September 1998, the Petitioner and his cousin, Ulaiasi, had been drinking and were under the influence of liquor. They met the victim, an Indian man named Naicker, (the deceased), at a local shop and accepted his invitation to accompany him in his car to Saweni Beach in order to continue drinking.

[41] The Petitioner was sitting in the back seat of the car and Ulaiasi in the front. Ulaiasi told the court that during the drive to Saweni Beach, the deceased touched his thigh. Ulaiasi pushed his hand away and told him to stop.

[42] When they arrived at the beach, they all sat in the car drinking. After two glasses of beer, the deceased asked the Petitioner to get out of the car which he did. Ulaiasi's unchallenged evidence was that the Petitioner sat on the ground in front of the car and continued drinking beer. When he was out of the car, the deceased started, once again, to make sexual advances, to him. The record of Ulaiasi's evidence in chief was:

> Then the [Petitioner] went outside to drink, whilst in the meantime the Indian man was touching my private parts. He was pulling my head towards him, for us to kiss. In doing so, I then pushed him away.

And in cross-examination:

> The [Petitioner] got out and the Indian man started to make advances to me again. He put his left hand on my penis. He got hold of my right arm and put it on his chest. This frightened me again.
>
> I got out of the car and ran away. Then the [Petitioner] called out "Where are you going?" I was running away when he called this out. I was walking fast not running away.
>
> I replied to the [Petitioner's] question "That one wanted me to fuck his arse". The Indian man then called to me to return and said he would not repeat what he had done. I said "Fuck you, why are you doing this to me?" in English. I then ran home following the tramline … I did not see what happened with the [Petitioner] after I left.

[43] The Petitioner described what happened in his interview with the police. He told how Ulaiasi had told him the Indian man had told Ulaiasi "*to fuck his arse*" and the interview continued:

> Q — Then what you did?
> A — I pulled him out of the car and started punching him.
> Q — Can you tell me how many punch you gave him?
> A — I don't know I was drunk.
> Q — After punching then what you did?
> A — When I saw him lying on the ground, I took his wrist watch, golden bracelet, gold necklace and a gold ring from his hand and neck
> Q — After taking all these items then what you did?
> A — I saw the key still in the car and I drove his car from the Beach towards Queens Road through Saweni Beach road.

[44] The victim was found in the early hours of the morning and taken to hospital. He died on 30 September 1998.

[45] At the end of the prosecution case, the record shows that the judge, in the absence of the assessors said:

> Now let us turn to certain matters of law before the Accused is advised of his options to stay silent or put material before the Court. Mr Patel [defence counsel] there are two matters I should draw to your attention:
>
> 1. whether provocation is not available as a reducing factor from murder to manslaughter, and
> 2. whether the defence ought to be allowed to make submissions on the chain of causation.

This petition is only concerned with the first of these issues.

[46] Section 203 of the Penal Code provides:

> 203. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter.

[47] Provocation is defined in s 204:

> The term "provocation" means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault. …

[48] The case was adjourned to the next day to allow counsel to consider the position and, after hearing submissions, the learned judge gave a short ruling. In relation to the issue of provocation, he ruled (a) that the Petitioner and Ulaiasi did not fall within a fraternal relation and that Ulaiasi was not under his immediate care and (b) that the wrongful act or insult was not done in the Petitioner's presence. He then concluded:

… a Judge takes a heavy responsibility in withdrawing questions of provocation from assessors but I believe I am compelled to do so, in the state of the evidence in the present case.

I rule that merely hearing of what had been done to the Accused's cousin accompanied by the deceased's offer to behave himself, and calling Ulaiasi to come back, (even if the accused distrusted what would happen if Ulaiasi did return) cannot be left to the assessors as a basis of provocation of the Accused himself.

[49] When the trial resumed, the Petitioner made a short unsworn statement. In it he did, in fact, refer to a possible defence of provocation in the following passage:

What the deceased had done to Ulaiasi I was disturbed and angered and that led me to do what I did.

When Ulaiasi had left immediately after this Indian man had done this, then the Indian man called him back. I knew had Ulaiasi returned, the Indian man would have done the same thing again to Ulaiasi.

At that time I got angry. Then I stood up. Then I punched him. So when I had punched him I then took something from the India man. Sir, also Sir, whilst I was punching him and taking those things I was really angry at the time and did not know what I was doing.

Right up till that time, I was angry and took his car and drove it off the road.

[50] Although the trial judge had decided that provocation was not available in this case, he referred to it in his summing-up. In a confusing direction he advised them it was not available but still gave a lengthy account of the defence:

Now, provocation is the other thing you might think comes into the case. That what the accused said, or says from the dock when he heard what Ulaiasi had to say, well you know that caused him to not know what he was doing. In effect he was so incensed that he pulled the fellow out of the car. He wouldn't have done that if he hadn't been angry like that.

Well I direct you in law that provocation is not available to this accused as a matter of law. Because he is not, he is only a cousin, he is not in one of the relationships necessary for provocation. When a wrongful act or insult is done to your father or to your son, or to your actual brother or sister, or to a person to whom you have been given the care of, only those people if the insult is done to them, and in your presence, that is if you see and hear it, then and then only can there be a provocation. It's no good if you didn't see it or hear it and are only told about it afterwards. It's not done in your presence and in this case it's only a cousin anyway. See, you can't, no matter what Fiji custom is, you can't go around saying, "Oh! He's my brother, he's my brother, he's my brother", because you feel kindly or brotherly towards the person. I mean, that gives you a legal defence which you don't have. You cannot do that. The law is very specific saying the relationship must be a fraternal one. And its no good being told about the insult, if you didn't see or hear it, it's not done in your presence. There is an old English case on this topic where a father heard from the landlord of an inn that his boy, his son, was being sodomised by another fellow. So the father came to the landlord and said, "Who is he? Where can I find him?" And being given information, he found the fellow and stabbed him to death. That was held not to be provocation to the father because it was not done in his presence. No good getting angry on a report of something which wasn't done in front of your eyes. That and that only allows you to be looking at provocation.

And, you see, was there any provocation directly to the accused? Well again, I direct you in law there wasn't, there's just no evidence of a wrongful act or insult done to the accused. It wasn't done to him at all. He only got wind of what had happened to Ulaiasi. And he said in his statement from the dock that he heard this deceased saying to Ulaiasi to come back, and he thought there would just be more of the same if Ulaiasi came back,

> and that stirred him up. Well see, that is not an insult done to him, that is not a wrongful act done to him. I hope you understand that. That in this case, you cannot let the accused have the benefit of provocation.
>
> And in any event, in the law provocation only operates to reduce murder down to manslaughter. Its not a case of letting the accused off altogether even if there is provocation, which there's not in law, I direct you. So, those are important things for you to realise.

[51] It is not apparent why, after his ruling, the judge considered it necessary to refer to provocation at all. Both counsel, no doubt in deference to his ruling, appear to have avoided any reference to it in their final addresses to the assessors. It would have been better if the judge had done the same and it certainly would have been better than the confused and confusing account set out above.

[52] The defences at the trial were, first, that the prosecution had not established malice aforethought because the accused was too drunk to form the necessary intent and that the evidence he only punched the deceased was insufficient to establish that intent and, second, that the cause of death was not the result of his assault.

[53] The Petitioner was unrepresented in the Court of Appeal and provocation was not included as a ground of appeal. However, the Court of Appeal made a short reference to it while describing the course the trial had taken. Following a (mistaken) statement that the questions regarding provocation and causation were raised by Mr Patel, the judgment continued, at [11]:

> After hearing submissions from both counsel the Judge ruled that the defence of provocation was not open for consideration by the assessors. The basis of his ruling was first, that the words to which the appellant had taken objection were not addressed to a person in any one of the statutory degrees of relationship to the appellant set out in section 204 of the Penal Code. Secondly, he ruled that the words were not uttered in the presence of the appellant. In our view the ruling was correct. We add that although the words complained of were undoubtedly distasteful we do not consider them to have been of such a violently provocative character as to be capable of providing extenuation (see *Holmes v Director of Public Prosecutions* [1946] AC 588 at 600; [1946] 2 All ER 124 at 125). Following delivery of the judge's ruling the appellant gave his unsworn statement.

[54] The Petitioner was still not represented for the preparation of his petition to this court and, in his detailed grounds, does not include the issue of provocation. However, in his submissions dated 4 August 2005, he does raise provocation and the manner in which the judge ruled on that aspect of the case.

[55] At the first hearing of the application, the court drew attention to this aspect of the case and asked the Law Society to find a lawyer to assist the Petitioner. We are grateful to Mr Hannif for taking the case at short notice and for the obvious care with which he prepared his submissions. The court is always assisted by counsel and in a case such as this, where issues of law and procedure are involved, it is particularly important for a Petitioner to be represented.

Special leave to appeal

[56] Counsel for the Respondent takes the preliminary objection that the court cannot or should not entertain matters which have not been part of the appeal to the Court of Appeal. The Supreme Court is the ultimate appeal court and its functions are stated in the Constitution and the Supreme Court Act. It has an

advisory function but its jurisdiction otherwise is to hear appeals from the Court of Appeal. It is, he suggests, therefore confined to the issues raised in the appeal to the court below.

[57] The Supreme Court is established under ch 9 of the Constitution. Section 117 provides that it is the final appellate court of the State. Its jurisdiction is stated in s 122:

> 122. — (1) The Supreme Court has exclusive jurisdiction, subject to such requirements as the Parliament prescribes to hear and determine appeals from all final judgments of the Court of Appeal.
>
> (2) An appeal may not be brought from a final judgment of the Court of Appeal unless;
>
> (a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or
>
> (b) the Supreme Court gives special leave to appeal.
>
> (3) In the exercise of its appellate jurisdiction, the Supreme Court has power to review, vary, set aside or affirm decisions of the Court of Appeal and may make such orders (including an order for a new trial and on an order for award of costs) as are necessary for the administration of justice.
>
> (4) Decisions of the Supreme Court are, subject to subsection (5), binding on the courts of the State.
>
> (5) The Supreme Court may review any judgment, pronouncement or order made by it.

Section 123 describes the court's advisory jurisdiction.

[58] Section 2(1) of the Supreme Court Act acknowledges that one of the roles of the court is to hear and determine appeals from final judgments of the Court of Appeal and Pt 3 of the Act deals further with the jurisdiction the court:

> 7. — (1) In exercising its jurisdiction under section 122 of the Constitution with respect to special leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case-
>
> (a) refuse to grant special leave to appeal;
>
> (b) grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
>
> (c) grant special leave and allow the appeal and make such other orders as the circumstances of the case require.
>
> (2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless —
>
> (a) a question of general legal importance is involved;
>
> (b) a substantial question of principle affecting the administration of criminal justice is involved; or
>
> (c) substantial and grave injustice may otherwise occur.

Subsection (3) states the grounds for grant of special leave in civil cases.

[59] Section 14 also provides:

> 14. For the purposes of the Constitution and this Act, the Supreme Court has, in relation to matters that come before it, all power and authority of the Court of Appeal and that power and authority may be exercised, with such modifications as are necessary, according to the circumstances of the case.

[60] It is clear from these provisions that the appellate jurisdiction of the court is limited to hearing and determining appeals from the judgments of the Court of Appeal. The question raised by counsel is whether the court is, in considering whether to grant special leave, limited to matters which formed part of the ratio of the lower court's decision.

[61] The provisions set out above limit the grant of special leave to appeal to cases where there are matters which fall into one or more of the categories in s 7(2). It is a limiting section and is clearly, in our opinion, intended by the legislature to confine, in general terms, the nature of cases that can be brought to the court to those of importance beyond the specific considerations of an individual criminal case. To read the provisions otherwise is, as counsel for the Respondent suggests, simply to provide another level of appeal which can be pursued at least to a hearing to seek special leave even if the matter raised has not been considered by the Court of Appeal or where that court, applying, of course, a different test under s 122(2)(a), has declined to give leave.

[62] As s 7(2) allows the Supreme Court to give special leave where it considers substantial and grave injustice may occur, the power must extend to any issue which it perceives carries such a risk. It would seem that, where the Court of Appeal has made substantial error, such a risk will be apparent. Mr Gibson challenges whether s 7(2) means the court is entitled to consider matters which were not part of the Petitioner's case in the previous appeal. The danger of such an approach would appear to be that any unsuccessful appellant before the Court of Appeal can seek special leave to raise new matters on which he has not sought the Court of Appeal's judgment or, alternatively, place it all again before the Supreme Court in the hope that the judges, when considering the application for special leave, will find some other ground that has not been considered previously but which carries a risk of serious injustice.

[63] The Supreme Court is the final appellate court and, if it does not deal with such matters, there will be no other avenue for the Petitioner to avoid injustice. The terms of s 7(2)(c) are not qualified by any specific limitation and we consider there are strong arguments for the view that the duty of the court is to act whenever it considers there are matters which, unresolved, may give rise to substantial and grave injustice even if they were not part of the previous appeal.

[64] In *Kwaku Mensah*, Lord Goddard dealt with a failure to raise the issue of provocation in the lower courts and concluded that "*the failure to do so on the part of the trial judge and failure to consider it by the Court of Appeal was enough to justify the Board in entertaining the appeal on the ground that there had been a failure of justice in this respect*". He added, at 94, "*[Their Lordships] would add that it must be seldom that they consider a matter which was not only not mentioned in the court below, but was not included in the reasons given by the appellant in his case*".

[65] I am satisfied this court is not limited to a consideration of matters already raised in the Court of Appeal but it is only in rare cases that it will grant special leave on such grounds. The Respondent's preliminary objection fails.

[66] As I have pointed out, the test under s 7(2) is not simply that there will be injustice; the risk must be of substantial and grave injustice and the court must still determine whether the present case does involve such a risk. That will include a consideration of the evidence and the grounds raised by the Petitioner and so we shall return to the question of leave after they have been considered.

The issues

[67] There are three issues raised by the court's concern over the manner in which provocation was dealt with in the High Court trial, namely, (a) the meaning and effect of the phrase "*in the presence of*" in s 204, (b) the meanings of "*under his immediate care*" and "*fraternal*" in the same definition and, (c) the effect of the judge giving his ruling at the close of the prosecution case.

(a) … *in the presence of* …

[68] It is a well-established rule of statutory interpretation that, where words are unambiguous they should be given their natural and ordinary meaning. There is no ambiguity in the use of this phrase in s 204 and the court is bound to apply it. Counsel assisting the court suggests that presence is a question purely of physical location and so, in this case, the presence of the Petitioner on the ground at the front of the deceased's car at the time the provocative actions took place is sufficient. We cannot accept that is the intention of the definition. Presence must mean informed and knowing presence if it is to be a factor which inflames that person's anger. In the majority of cases the provocative conduct is directed at the person who is provoked and so presence is not in issue. However, when the provocation is directed at a third person, it must be shown that the assailant was present and aware of the provocative acts when they occurred.

[69] The prosecution evidence in this case was that the Petitioner knew nothing of the actions of the deceased to Ulaiasi when they took place. He became aware only after they had finished and he asked where Ulaiasi was going. The Petitioner claimed it was Ulaiasi's reply coupled with the deceased's admission which provoked his anger and caused him to assault the deceased. The Petitioner had no other knowledge of the actions of the deceased in the car at the time and so, although he was physically close when they occurred, he was not present in the sense of knowing what was happening.

[70] The record shows that fact was not challenged by counsel representing the Petitioner at the trial and, on the evidence as it stood at the close of the prosecution case, there was no evidentiary basis for a conclusion that he was present. The judge's error was to make his decision before the defence had an opportunity to present any evidence. Until that occurred, he was not in a position to make such a decision and should not have done so.

[71] Mr Hannif referred the court to the discussions recorded in the transcript of proceedings in the High Court of Australia in *Davis v R* (unreported, S81/1998), dismissing an application for special leave. In that discussion, McHugh J expressed a view that the decision of the NSW Supreme Court in the earlier case of *Quartly*, might have been wrongly decided on the need for presence in cases of provocation. We cannot accept that bears on the law in Fiji. *Quartly* was decided under the law in New South Wales where the definition of provocation, does not include a reference to presence; unlike s 204 of the Penal Code where presence is specifically included.

[72] Since the case of *Fisher* (reported in 173 ER [Nisi Prius] 452), the courts have accepted that an accused may not rely on provocation unless he actually saw or heard the provocative acts or words. In that case Park J commented to the jury:

> In all cases, the party must see the act done. What a state should we be in if a man, on hearing that something had been done to his child, should be at liberty to take the law into his own hands, and inflict vengeance on the offender. In this case the father only heard of what had been done from others. I say, therefore, … that there is not enough to reduce the offence from murder to manslaughter.

[73] With respect to the opinion of Mc Hugh J, we have considerable reservations about the concept of "hearsay provocation", as it has been described. The difficulty in such cases is the accuracy of the reported account of the provocative acts. This case is an example. While the deceased's attentions to Ulaiasi were unpleasant and offensive, his evidence of what actually took place fell far short of the description he gave in answer to the Petitioner's query yet it was that inaccurate and exaggerated description which is suggested to have provoked the Petitioner.

… under his immediate care … and fraternal

[74] Mr Hannif addressed the court on the scope of these phrases and suggested that to take the meaning of fraternal in isolation was too restrictive. If, as he points out, the word is read in the phrase "*to whom he stands in a … fraternal relation*" there is some ground for a wider interpretation based on the fraternal beliefs or traditions of wider family or tribal ties or other loyalties. A similar argument can be advanced in relation to the alternative question of who is under a persons' immediate case.

[75] This court has not heard enough to be able to give a definitive ruling on this issue. However, if the phrase is to import a wider relationship, it must clearly be defined further — limiting words are of little value if the extent of the limitation is not plain. If such a wider interpretation should be found to be within the definition, it will be a matter of fact for the assessors to determine whether such a relationship exists in their particular case.

The timing of the ruling

[76] There is no doubt that, where a judge is satisfied there is no evidentiary basis for a defence of provocation, he should withdraw it from the assessors. In *Holmes* at 597, Viscount Simons giving the decision of the House of Lords explained:

> In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as matter of law, and what the jury decides as matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. … The distinction, therefore, is between asking "Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?" (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury: "Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did?" and, if so, "Did the accused act under the stress of such provocation?"

[77] In the present case the judge, as a result of his decision on presence and of the relationship of the Petitioner and Ulaiasi, considered there was no evidential basis for a defence of provocation. Whether or not that was correct was

not possible to determine at that state in the trial. Clearly any decision on the evidence must be taken on the whole evidence and, at that stage, the court had not yet heard any evidence from the defence.

[78] It is true that the Petitioner then made an unsworn statement but that was made in the light of the judge's ruling that provocation was not available as a defence. As has been pointed out, despite the ruling, the Petitioner did state matters which could be seen as raising a defence of provocation but this court has no idea what he might have said or what evidence he might have called if the judge had not made the ruling. The timing was such that this court cannot be certain whether such evidence might have been called nor can it, or should it, speculate as to the nature or effect of any such evidence if presented.

[79] The effect of the phrase "in the presence of" the Petitioner illustrates the point. Had the whole of the evidence, including that of the defence, shown that the provocative act or words had not been in the Petitioner's presence, the judge would have been right to decide as a matter of law that provocation was not available and withdrawn it from the assessors. As a result of the unfortunate decision to rule before the defence had commenced its case, he could not know whether or not there would be evidence from the accused that he had seen the acts or heard the suggestions of the deceased to Ulaiasi.

Conclusion

[80] The judge clearly erred in failing to hear any defence evidence before determining the questions of presence or relationship. However, this is an application for special leave to appeal and the court has to consider whether this may have led to a substantial and grave injustice; a decision which involves an evaluation of the case as a whole.

[81] Having considered the evidence, we do not consider this is a case where the court should grant special leave. As we have stated, the court cannot speculate on the possibility that the defence, unfettered by the premature ruling, would have called evidence of the Petitioner's presence or that he had Ulaiasi under his immediate care or was otherwise bound to protect him.

[82] A defence of provocation would be inconsistent with the defence, raised at the trial, that he had no malice aforethought because provocation only assists the accused if the intent for murder has been established. However, that does not mean that both defences cannot be placed before the assessors; *R v Hopper* [1915] 2 KB 431 as explained in *Mancini v Director of Public Prosecutions* [1942] AC 1; [1941] 3 All ER 272.

[83] However, even if evidence was called to say that the Petitioner saw the events in the car, we do not find there is sufficient evidence for the assessors, in the role of a reasonable jury, to consider that the nature of the acts was such as would cause a reasonable person, not one as drunk as was the Petitioner, to lose his self-control such that he intended to kill the deceased. That is the first test they must apply before they move on to consider whether the Petitioner may, in fact, have been so provoked.

[84] The evidence is that Ulaiasi was able simply to get out of the car and leave. If, on a retrial, the Petitioner should tell the court that he saw what happened, it would also follow that he must have known the statement made by Ulaiasi as he left was greatly exaggerated. Yet it was that statement which the Petitioner claims provoked him to attack the deceased. His defence put at the trial was that the attack consisted only of punches and the medical evidence appears to be

consistent with that. It does not support a frenzied attack by a man out of control through extreme anger. Indeed, far from being in such a transport of passion that he had lost all control, the evidence is that, once he knocked the deceased unconscious, he immediately proceeded deliberately to remove a number of items of value from the unconscious man before driving away in his car. Such undisputed actions are not consistent with extreme loss of control through anger and disgust.

[85] I do not consider that, should a retrial be ordered, there is any possibility the assessors, properly directed on provocation, would accept it could have provoked a reasonable man or that it did so provoke the Petitioner.

[86] In the privy council in (*Hemapala*), it was explained at 867:

> It has often been held that the adoption of a procedure other than that authorised by the Code under which an accused person is being tried can constitute a miscarriage of justice; but it is a well established principle that this Board will not recommend Her Majesty to review or interfere with the course of criminal proceedings unless there had been such a disregard of the procedure laid down as to occasion substantial injustice. The question is whether there was, in the trial of the appellant, such a departure from the normal or proper procedure as to amount to a miscarriage of justice.

[87] As I have said, the test under s 7(2) is more demanding in that this court may not interfere unless there may otherwise be a substantial and grave injustice. I do not consider that such a situation applies in this case and I would refuse special leave to appeal.

Appeal allowed.