IN THE SUPREME COURT OF FIJI
APPELLATE CRIMINAL JURISDICTION

Criminal Petition No. CAV 0015 Of 2016
(On appeal from Court of Appeal No. AAU 0042 of 2000)

BETWEEN	:	**ILIBERA VEREBASAGA**
		Petitioner
AND	:	**THE STATE**
		Respondent
CORAM	:	**Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court** **Hon. Justice Priyasath Dep, Judge of the Supreme Court** **Hon. Madam Justice Anjala Wati, Judge of the Supreme Court**
COUNSEL	:	**Mr. J. Savou and Mr. Chand for the Petitioner** **Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**15 August 2016**
Date of Judgment	:	**26 August 2016**

JUDGMENT OF THE COURT

Chandra Ekanayake J

Introduction

1. The petitioner, Ilibera Verebasaga, by her document dated 15/3/2016 (received by the Registry on 16/3/2016) has sought justice and fairness against the judgment of the Court of Appeal pronounced after hearing the appeal preferred by her to Court of Appeal against her conviction and sentence for murder. Following grounds have been submitted in paragraph 2 of the above document:

    i) Court erred in law in not taking into account her medical anti natal clinic report;

    ii) Court erred in law in considering the other cases similar to the petitioner as Infanticide rather than murder;

    iii) Court erred in law in not allowing a chance for mitigation;

    iv) Court erred has granted Suspended sentence to cases similar to the petitioner, such as:

        a. State v Merewalesi Baleiniusiladi
        b. State v Asena Senimoli
        c. State v Ronika Devi

2. The petitioner was charged in the High Court at Suva on one count of murder contrary to sections 199 and 200 of the Penal Code. Particulars of offence as follows:-

Particulars of Offence

ILIBERA VEREBASAGA, *on the 24th day of September 1999, at Tailevu in the Central Division, murdered a male infant.*

3. The petitioner having pleaded not guilty to the charge in the High Court, following a trial, the assessors had expressed a unanimous opinion of guilty for murder as charged. By the judgment of the learned High Court Judge dated 9/11/2000, having concurred with the opinions of the assessors had convicted the petitioner for murder as charged and sentenced to life imprisonment.

In the Court of Appeal

4. Being aggrieved by the above the petitioner had preferred an appeal to the Court of Appeal against conviction and sentence by petition dated 6/12/2000.

5. As per paragraph 1 of the impugned judgment of the Court of Appeal considered by that Court were as follows:

> "1. *That the Learned Judge erred in law in not adequately and/or sufficiently and/or misdirected herself and/or the assessors on law or purpose of the offence of infanticide.*
>
> 2. *That the Learned Judge erred in that she did not properly and/or adequately and/or misdirected herself on the issues of the Standard and Burden of proof*".

The above grounds appear to be the grounds embodied in the document of the Petitioner dated 24/10/2001. Perusal of the Court of Appeal judgment reveals that the respondent had not raised any objection for considering the above grounds.

6. After hearing of the appeal learned Judges had dismissed the appeal. This is the judgment that is now challenged by the petitioner by her abovementioned document received by the Registry on 15/3/16.

Special Leave to Appeal

7. Under Section 98(3) of the Constitution, the Supreme Court derives exclusive jurisdiction, to hear and determine appeals from all final judgments of the Court of Appeal. Section 98(3) thus reads as follows:-

> *"98(3).— In the exercise of its appellate jurisdiction, the Supreme Court has power to review, vary, set aside or affirm decisions or orders of the Court of Appeal and may make such orders (including an order for a new trial and an order for award of costs) as are necessary for the administration of justice".*

8. Section 7 of the Supreme Court Act No.14 of 1998 also becomes relevant.

"Section 7 (1) of the above Act provides that:-

7 (1). In exercising its jurisdiction under Section 98 [formerly 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 circumstance 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.

Section 7(2) thereof sets out as follows:-

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.

Section 7(3) – In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-

(a) a far-reaching question of law;

(b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice.

9. A plain reading of the above Section 7(2) which relates to criminal matters would show that the Supreme Court must not grant special leave to appeal in a criminal matter unless the court is satisfied that a question of general legal importance is involved, or a substantial question of principle affecting the administration of criminal justice is involved or substantial or grave injustice may otherwise occur.

10. It would be pertinent to cite the observations made by this Court in **Dip Chand vs. State** CAV 004 of 2010 (9 May 2012) when dealing with special leave to appeal applications, which were to the following effect:

> *"....Given that the criteria is set out in Section 7 (2) of the Supreme Court Act No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course the fact that the majority of the 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 satisfying (sic) the threshold requirements for special leave even more difficult."*

11. The criteria set out in Section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent and special leave to appeal should not be granted as a matter of course.

12. Granting of special leave to appeal is a matter that lies solely with the Court. This Court is the final Appellate Court. The line of authorities in this jurisdiction amply demonstrates that special leave to appeal could be granted only in cases which fulfill the threshold criteria

enumerated in Section 7(2) of the Supreme Court Act or in a rare case where there is an irremediable injustice compelling the intervention of the Supreme Court.

Enlargement of Time

13. The petitioner's document seeking special leave to appeal against the impugned judgment of the Court of Appeal dated 22/11/2001 was received by the Registry of this Court on 16/3/2016. Time period prescribed for lodgment of a petition for special leave to appeal is 42 days from the date of the impugned judgment (as prescribed in Rule 6 of the Supreme Court Rules 1998). The aforementioned 42 days had expired on 3/1/2002. The present application is therefore late by about 14 years, 2 months and 13 days.

14. It is clear that depending on facts and circumstances of each case the court has discretion to enlarge time so as to hear a meritorious appeal or petition. Per Gates, P in **Mohammed Sahid v The State**; CAV 0025.2015(21/4/16) in paragraph 14 to the following effect:

> *"[14] The courts in these circumstances possess discretion to enlarge time so as to hear a meritorious appeal or petition. Several cases in this jurisdiction have dealt with the way the courts should evaluate these applications. Though the courts will not be rigid in examining certain factors, it has been established that fairness is best observed by following a principled approach:* ***Kumar v. The State****;* ***Sinu v. The State*** *CAV0001/09, CAV0001/10 21st August 2012."*

16. In an enlargement application to determine whether the interests of justice require allowing extension of time certain factors have to be examined. Those factors as laid down in the case of **Kamlesh Kumar vs. State** Criminal Appeal No. CAV 001/2009**;** by His Lordship the Chief Justice, Gates are as follows:

> *(i) The reason for the failure to file within time;*
>
> *(ii) The length of the delay;*

(iii) Whether there is a ground of merit justifying the appellate court's consideration;

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

17. What has to be determined now is whether the petitioner has offered any explanation for this delay. In other words reasons for not filing within time. The delay appears to be more than 14 years. It is noted that the petitioner's document received by the Registry on 16/3/2016 is silent about any explanation for the delay. Even in the written submissions tendered to this court no reason has been offered for the delay. At the hearing before this court, when inquired from the counsel representing the petitioner, his response was that delay was occasioned due to incarceration and also that the petitioner came to know about the result of the appeal while in prison.

18. Incarceration cannot be considered as an acceptable excuse. Majority of the petitioners who come before this Court in Criminal appeals are serving prisoners. Our observation is that, considerable number of those cases are being successfully argued by them in court. Further according to the petitioner's counsel, the petitioner had already become aware of the Court of Appeal judgment while in prison. In those circumstances I am convinced that the above reasons cannot be considered as good and exceptional reasons to be accepted by court to grant enlargement of time.

19. Further I wish to cite the following observations made by His Lordship Gates, P in **Eddie McCaig v Abhi Manu** FJSC 18;CBV 002.2012 [27 August 2012] at paragraph 31:-

"31..... The rules were there not simply for perverse reasons but to enable the court to manage its business in a proper manner. If cases were allowed to come in late that meant that other cases, which had been filed in time, would be held back.

Accordingly, the court had to insist that the time limits were obeyed unless there was some very good, exceptional reason for their not being obeyed."

20. The length of the delay being more than 14 years it is not only very long but also an inordinate delay. Such a lengthy period as in this case weighs against the exercise of a discretion in petitioner's favour.

21. When considering the length of the delay, the pronouncement in the case of **Edwin Rhodes** [1910] 5 Cr. App. R.35 at p36, would lend assistance. This being a case where an application for extension of time for leave to appeal was made by an applicant who was convicted for manslaughter, it was observed that;-

"it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."

22. Further, in a Full Court decision of New South Wales namely – **R. v Albert Sunderland** [1927] 28 SR (NSW) 26; which also being a case involving an application for extension of time after conviction, the court held as follows:

"(1) – that want of means was not a sufficient ground on which to base the application, and

(2) – that in view of the delay in applying "very exceptional circumstances would have to be established before the court would be justified in granting the application."

23. If the delay was very short and the petitioner had offered an acceptable excuse for the same, as a general rule the appellant should not be deprived of his right of appeal. However as observed in **R v Albert Sunderland** above, 'very exceptional circumstances would have to be established.' Thus whether to grant an enlargement of time would mainly depend on facts and circumstances of each case.

24. What needs to be examined now is whether there is a ground of merit justifying the Appellate Court's consideration. At the trial before High Court, at the conclusion of the prosecution case, defence was called for.

25. The petitioner (accused) had testified. Her evidence was that she was living with her partner (Viliame) at her mother's house with a child born to her out of another defacto relationship said to have been had prior to this with a person by the name of Isikeli. When she met her 2nd partner, Viliame and commenced living together, she had been 3 months pregnant. She had not divulged to Viliame that he was not the father of the child. Not even disclosed to her mother about her pregnancy as the mother had already told her that she could not look after the baby because she is old and poor and she would become a burden to the mother. In the early hours of 22/9/1999, she had delivered the baby at a place little away from their house. Thereafter having carried the baby for about 1 hour, she had taken to a mangrove swamp and covered the baby with mud.

26. She has further said that having informed her partner that she miscarried the baby, she was taken to Korovou Health Centre in that morning.

27. The accused was not contradicted in cross-examination. In re- examination also the reason for killing the child and burying the child was admitted.

28. The body of the baby had been exhumed and a post mortem examination was conducted by Dr. R.B. Cayari. At page 2 of the above report it is stated that – "findings suggests that baby was buried alive."

29. A careful examination of the Court of Appeal judgment reveals that the first ground of appeal urged in the Court of Appeal as reproduced in preceding paragraph 5 had been well

considered by the Judges and arrived upon the conclusion that there is no merit in that ground. When considering the learned High Court Judge's summing up on law with regard to the offence of infanticide, the Court of Appeal had proceeded to observe at pages 3, 4 and 5 of their judgment as follows:

"In summing up the Judge gave the assessors the definition of infanticide, from which it is self evident that what is required is that at the time of her act the balance of the appellant's mind was disturbed because she had not fully recovered from the effects of childbirth. The Judge chose not to put any gloss on or give a further explanation of those provisions nor did the nature of the case require it. A Judge is free to explain to the jury that the purpose of the legislation creating the offence was to afford women mitigation from the consequences of murder where the balance of their minds had been disturbed through childbirth, but it is not obligatory for Judges to give such an explanation..."

The Judge in the summing up had further said this:-

"In considering these matters, you may consider the accused's statement to the police, in which she told the police she had killed the child because it was not her partner's, the evidence of her partner of her depressed and withdrawn behaviour before the child was born, the poverty and deprivation of her home circumstances, her mother's attitude to the possibility of her pregnancy, the lack of support from the real father of the child and her own lack of education and resources. You may also consider that both Doctors gave evidence that the accused was depressed a few hours after childbirth."

30. In the Penal Code (Cap.17) Infanticide is defined as follows:

"205. Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of felony, to wit, infanticide and may for such offence be dealt with and punished as if she had been guilty of manslaughter of the child."

31. At pages 3 to 5 of the Summing up the learned High Court Judge had proceeded to explain the following: murder, malice aforethought and the elements of murder the prosecution has to prove beyond reasonable doubt. Likewise with regard to infanticide also at p-4 of the summing up has stated that:-

> *"As you know this case involves the alleged killing of an infant by it's mother. As such I must also direct you that you must consider whether the accused is guilty of murder or of the lesser offence of infanticide. The offence of infanticide is defined by the Penal Code. The Code says that where a woman by any willful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed because she had not fully recovered from child birth, or by reason of lactation as a result of child birth, then she is guilty not of murder but of the offence of infanticide."*

In addition the factors that have to be satisfied beyond reasonable doubt to find the accused guilty of infanticide also has been carefully explained by the Judge.

32. Always a summing up has to be objective and balanced as it was observed in **R v Fotu** (1995) 3 NZLR 129. I am of the view that summing up by the Trial Judge in this case is not only a balanced and adequate one but also one which succinctly deals with the correct legal principles.

33. In view of the above I am satisfied that the 1st ground of appeal cannot succeed and the Court of Appeal was correct in concluding that there is no merit in the 1st ground.

34. The second ground of appeal urged before the Court of Appeal was that the learned Judge erred in that she did not properly and/or adequately and/or misdirected herself on the issues of the standard and burden of proof. The Court of Appeal in their analysis had observed that this ground was based on 2 different propositions namely:-

i) Judge's discretion regarding the assessment of appellant's own evidence.;

ii) *Relating to a passage to the effect that the issue was whether the appellant killed her child intentionally or knowingly, and whether at the time she did so, the balance of her mind was disturbed as a result of the effects of childbirth.. The complaint was that the Judge did not immediately tell the assessors there was no onus on the appellant to prove that her mind was disturbed at the relevant time.*

35. The Court of Appeal whilst citing the following passages from the summing up has concluded that no possible ground for complaint can arise on the above grounds.

> ***"The Accused gave evidence on her own behalf. She was not obliged to do so. The burden of proving this case lies squarely on the Prosecution and never shifts to the accused."***

In fact the summing up continued as follows:

> ***"You must remember that it is the Prosecution's duty to prove malice aforethought, and failing proof beyond reasonable doubt of that, the Prosecution's duty to prove that the accused did a willful act thus causing the death of her child whilst suffering from the effect of childbirth."***

A little later the Judge said:

> ***".....you must consider all the circumstances of the case to decide whether the accused killed her child with malice aforethought or whether she did so whilst the balance of her mind was disturbed. You must remember that it is for the Prosecution to prove that the accused was not mentally disturbed by childbirth, it is not for the defence to prove that she was."***

36. Further the following observations of Cooke P, in **R v Fotu** (1995) 3 NZLR 129, p138, also would be of importance:-

> *"New Zealand practice has generally accorded with and we cannot do better than adopt the following passage in the speech of Lord Hailsham of St Marylebone LC in R v Lawrence [1982] AC 510, 519:*
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> *"It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definition is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."*

37. For the above reasons, the 2nd ground of appeal also lacks merit. In view of the above I am convinced that there is no ground of merit justifying the appellate court's consideration and there exists no ground of appeal that will probably succeed.

38. What needs consideration now is if time is enlarged, will the respondent (State) be unfairly prejudiced? When considering this, one has to be mindful of the long, inordinate delay of over 14 years. In view of the above analysis it is already concluded that there are no grounds of appeal that would probably succeed. In this backdrop after a delay of over 14 years, without an acceptable explanation for the delay, if time is enlarged grave prejudice will be caused to the respondent.

38. The petitioner in her document (received by the Registry on 16/3/16) has raised four new grounds of appeal not raised in the Court of Appeal. In the aforecited case of **Kamlesh Kumar v State**, Chief Justice, Gates P has observed in paragraph 20 as follows:-

> *"[20] The applicant in his petition for special leave to this court purported to raise numerous grounds, not raised in the court below. Such an approach will not find favour with this court unless the omitted ground is compelling and meets the criteria for special leave of section 7(2). The court finds nothing compelling, or of that category, in the informal petition."*

39. The grounds of appeal submitted to this court by the petitioner's document seeking special leave, are new grounds not taken up or argued in the Court of Appeal. In this regard I wish to quote the following observations made by this court in **Anand Abhay Raj v The State**; FJSC 12; CAV 003.2014[20 August 2014], citing with approval the principle of law enunciated in **Dip Chand v The State**, at paragraphs 27 and 28 thereof:

> "27] In **Dip Chand v The State** *CAV0014/2012, 9th May 2012* this Court [at paragraph 34] held that:
>
> *"Given that the criteria set out in section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course, the fact that the majority of the 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."*
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> [28] The Court continued at paragraph 36:
>
> *"The Supreme Court has been even 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. CAV 0005 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."

40. The new grounds submitted do not satisfy that if not entertained substantial and grave injustice may occur. Further those new grounds have not fulfilled the standard enumerated in the case of of **Eroni Vaqewa v The State**; FJSC 12; CAV 0016.2015 (22 April 2016) – namely 'its significance upon special leave criteria must be compelling'. For the above reasons I conclude that the new grounds of appeal urged cannot be allowed.

41. For the reasons given in the preceding paragraphs, the application for enlargement of time lacks merit and same is refused.

42. Having considered facts and circumstances of this case together with submissions advanced before Court, we are not satisfied that the grounds submitted meet the threshold criteria spelt out in Section 7(2) of the Supreme Court Act. No. 14 of 1998. Thus the application for leave to appeal also should fail.

43. However, having given due regard to facts and circumstances, the issues involved in this case and the period of incarceration of the petitioner, we are of the view that this is a fit matter for the petitioner to seek relief from The Commission on the Prerogative of Mercy, established under the State Services Decree 2009 - (Section 119(3) of the Constitution).

Dep, J

I agree with the reasons and conclusions of Ekanayake, J.

Wati, J

I have read the draft judgment of Ekanayake, J and I agree with the reasons and conclusions that application for enlargement of time and petition for special leave must be dismissed.

Orders of the Court:

1. The application for enlargement of time is dismissed.
2. The application for special leave to appeal is also dismissed.
3. The judgment of the Court of Appeal dated 22/11/2001 is affirmed.

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Hon. Justice Chandra Ekanayake
Justice of the Supreme Court

SUPREME COURT OF FIJI
FIJI

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Justice of the Supreme Court

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Hon. Justice Anjala Wati
Justice of the Supreme Court

Solicitors:
Petitioner in Person
Office of the Director of Public Prosecutions for the Respondent.