IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0036, 0037 and 0039.2016
(On Appeal from Court of Appeal No: AAU 44, 45 and 47.2011)

BETWEEN : 1. **JAYANT LAL**
2. **MOREEN LATA PRAKASH**
3. **BHARAT LAL**

Petitioners

AND : **THE STATE**

Respondent

Coram: **Hon. Chief Justice Anthony Gates, President of Supreme Court**
Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme

Counsel: **1st Petitioner in Person**
Mr. M. Yunus for 2nd Petitioner
Mr. V. Chandra with Ms J. Bancod for 3rd Petitioner
Mr. M. Korovou for Respondent

Date of Hearing: **7th and 11th July 2017**

Date of Judgment: **20 July 2017**

JUDGMENT

Gates, P

[1] I have read the judgment in draft of Marsoof J. I am in full agreement with it. It is clear enlargement cannot be granted for the 1st and 2nd petitioners in that their grounds of appeal lack merit and are unable to meet the criteria for leave. The timely petition lodged

for Bharat the 3rd petitioner, similarly lacks merit and does not meet the criteria. In all 3 cases the petitions are to be refused for the reasons amply set out in the judgment of Marsoof J now following. I do not wish to add anything on the substance of these appeals.

[2] However, I feel it is necessary to say something on the arrangements made, or not made, for representation of the petitioners for the hearing.

[3] Every petitioner in a criminal matter is sent a letter by the Senior Court Officer in charge of the Supreme Court Registry for the Registrar. In it the attention of the petitioner is drawn to what must be done concerning representation in the Supreme Court in readiness for the hearing of the petition. He or she is informed of what must be attended to straightaway.

[4] Three options are put to the petitioner. First the petitioner can engage private counsel for which fees will have to be paid. Second, the petitioner may apply to the Legal Aid Commission for counsel. Third, the petitioner may choose to appear in person and he or she may argue the appeal themselves. Those are the choices available.

[5] Too often months go by and no action is taken, nor a firm decision made. The court would prefer that counsel argue cases for petitioners so that the court's attention is drawn to relevant cases and principles of law arising from the grounds. The Supreme Court is not simply another Court of Appeal. Counsel must argue that the petition meets the criteria of the Supreme Court Act for leave to be granted. Error must be shown in the decision of the Court of Appeal, and that that error requires the intervention of the Supreme Court since the error comes within the criteria.

[6] Counsel of choice needs to be engaged who is available for the sittings in which the case is fixed for hearing. It is unacceptable to engage counsel, or for counsel to accept the brief, when counsel is only available on the last day of the sitting or for a subsequent sittings.

[7] As a general rule counsel should not accept a brief to argue a petition so late in the day that there is insufficient time to master the brief. There will need to be sufficient time to

read the brief, provide written submissions and copy cases, and to serve them within time upon the court and the respondent. If any of the grounds are to be changed, this can only be done if there is sufficient time for the respondent to respond to them. Only in rare cases will a change of grounds be allowed at the last minute. Notices of Motions filed 1 or 2 days before the hearing seeking amendments or an adjournment are in actuality no notice at all.

[8] Counsel should not take on a case with no prior familiarisation of the matter, where there is no reasonable prospect of being prepared to argue the case, or where there is no reasonable prospect of being able to meet the criteria for leave.

[9] Meanwhile petitioners who keep changing counsel, and at the last minute, will not thereby achieve an adjournment. For the business of the court to proceed in an orderly fashion and with fairness to co-petitioners and the respondent, such applications cannot be entertained.

Marsoof, J

Introduction

[10] The applications of the 1st and 3rd Petitioners for leave to appeal and the application of the 2nd Petitioner for enlargement of time for applying for leave to appeal against the judgment of the Court of Appeal dated 30th September 2016 (Calanchini P. Chandra JA and Waidyaratne JA) were taken up for hearing together before this Court because they involved the same incident of murder.

[11] The three petitioners had been charged with, convicted of, and sentenced for the offence of murder contrary to sections 199 and 200 of the Penal Code of Shalesh Prakash between 20th and 21st June 2009 at Sawani, Nausori in the Central Division of Suva, Fiji. Salesh Prakash was the husband of the 2nd Petitioner Moreen Lata Prakash, and the three Petitioners were jointly charged for the offence on the basis that they had acted in furtherance of a joint enterprise to murder the said Shalesh Prakash.

[12] All three Petitioners had been caution interviewed, and the main evidence against them consisted of the confessions they had made in the course of their caution interviews. However, since they challenged the admissibility of the said confessions, a *voir dire* inquiry was held at which 15 witnesses had given evidence for the prosecution, but none of the Petitioners testified nor call any witnesses on their behalf. At the conclusion of the *voir dire* inquiry, the learned trial judge in his ruling held that all three Petitioners had given their caution interview statements to the police voluntarily, and that their statements were admissible in evidence.

[13] At the trial before the High Court of Fiji at Suva, 23 witnesses had testified for the prosecution and the Petitioners did not call any witnesses in defence, despite the Ruling dated 4th March 2011 on no case to answer, that a prima facie case has been made out, requiring the Petitioners to be called upon to make their defence. At the conclusion of the trial, on 9thMarch 2011, the three assessors unanimously found the Petitioners guilty of murder, and the learned trial judge agreeing with their opinion, convicted the Petitioners. On 4th April 2011, the three Petitioners were sentenced to life imprisonment with a non-parole period of 20 years.

[14] By its judgment dated 30thSeptember 2016, the Court of Appeal affirmed the said convictions and varied the sentence imposed on all three Petitioners to life imprisonment with a minimum term of 20 years imprisonment.

[15] To avoid confusion, it must be noted that before the High Court the 1st Petitioner Jayant Lal was the 2nd Defendant, the 2nd Petitioner Moreen Lata Prakash was the 3rdDefendant and 3rd Petitioner Bharat Lal was the 1st Defendant, and in the Court of Appeal the 2nd Petitioner was designated the 1st Appellant, the 1st Petitioner was the 2nd Appellant and the 3rd Petitioner was designated as the 3rd Appellant.

The Appellate Jurisdiction of the Supreme Court

[16] The exclusive jurisdiction of the Supreme Court of Fiji to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 98(3)(b) of the Constitution of the Republic of Fiji. It is noteworthy that section 98(3)(b) of the Constitution follows the language used in the corresponding provisions of the Administration of Justice Decree of 2009 and the now repealed Constitution (Amendment) Act of 1997. Section 98(4) of the Constitution of the Republic of Fiji

provides that an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

[17] While there is no provision in the Constitution or any other law setting out the procedure and time limits for lodging an application seeking special leave to appeal from this Court, Rule 4 of the Supreme Court Rules 2016 (Legal Notice No. 84) published in the Extraordinary Government of Fiji Gazette Supplement bearing No. 34 dated 31st October 2016,provides that an application for leave to appeal "must be by way of Petition" and also prescribes the requisites and format of such Petition, in particular that it "shall be supported by an affidavit verifying the allegations made in the Petition."

[18] Rule 5 (a) of the said Supreme Court Rules also provides that such an application must "be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought."It is noteworthy that the said procedure and time limits are substantially the same as those prescribed in the Supreme Court Rules of 1998, which were applicable previously.

[19] It is noteworthy that the letter dated 3rd October 2016 by which the 3rd Petitioner, Bharat Lal sought to appeal against the impugned judgment of the Court of Appeal dated 30th September 2016 was received in the Registry of this Court and date stamped on 11th October 2016, and was therefore lodged in a timely manner within the period of 42 days prescribed in the aforesaid Rules.

Enlargement of Time

[20] The applications filed by the 1st Petitioner, Jayant Lal and 2nd Petitioner Moreen Lata Prakash were not received in the Registry of this Court within the prescribed period of 42 days for lodging an application for leave to appeal in terms of section 98(4) of the Constitution read with the applicable Supreme Court Rules. This makes it necessary to consider in the first instance, the grant of enlargement of time for these Petitioners.

[21] The 1st Petitioner, Jayant Lal notified his intention "to appeal on the judgment delivered on 30th September 2016 by the Fiji Court of Appeal" by his letter dated 7thOctober 2016, which appears to have been forwarded to the Registry of this Court by the Medium Correction Centre of the Southern Division, where the 1st Petitioner was serving his sentence, with a covering letter dated "November 16" which was date stamped upon receipt by the Registry on 22nd November 2016. Since the period of 42 days prescribed

for lodging the Petition by the relevant Supreme Court Rule expired on 12th November 2016, the delay on the part of the 1st Petitioner was approximately 10 days.

[22] In his said letter of 7th October 2016, the 1st Petitioner has raised only one ground of appeal against his conviction, which shall be adverted to later in this judgment. However, it is significant to note that the 1st Petitioner has not moved for enlargement of time or offered any explanation for his delay in lodging his application to this Court, nor has he formally sought leave to appeal from this Court.

[23] However, since section 98(4) of the Constitution of the Republic of Fiji expressly provides that an appeal may not be brought to this Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal, this Court shall extend to the 1st Petitioner the leniency and indulgence it customarily extends to incarcerated persons with no access to legal advice, and will consider, in the course of this judgment, the grant of enlargement of time for leave to appeal despite the absence of a prayer for enlargement of time to apply for leave to appeal. The learned Counsel for the Respondent does not object to this.

[24] The learned Counsel for the Respondent does not object to the application for enlargement of time made by the 2ndPetitioner, Moreen Lata Prakash, being considered favourably. She purported to give "notice of appeal" against the judgment of the Court of Appeal dated 30th September 2016, by her letter dated 11th October 2016 which letter appears to have been received through the Fiji Corrections Service with a covering letter dated 14th December 2016, date stamped as received in the Registry on that very day.

[25] The said letter of Moreen Lata Prakash did not include a prayer for special leave to appeal, nor did it set out any grounds of appeal, and was in any event technically out of time by approximately 1 month and 2 days. In her aforesaid letter dated 11th October 2016, the 2nd Petitioner had stated that she is not sure who her legal counsel would be, and once confirmed, that her "counsel will liaise with your office and forward necessary submissions."

[26] In the Supreme Court Record there is also another undated letter addressed to the Senior Court Clerk of the Supreme Court by the 2nd Petitioner Moreen Lata Prakash, which was probably received in the Registry along with the aforesaid covering letter dated 14th December 2016, stating that her letter dated 11th October 2016 had been inadvertently

dispatched to the Corrections Paralegal, resulting in delay, and expressing the hope that "the delay caused by the Corrections Department Paralegal should not in any way hinder the progress of my (the 2nd Petitioner's) appeal."

[27] It was also stated in the said undated letter that she would be represented by the Legal Aid Commission. This statement was confirmed by the fact that when this case was first taken up for hearing on 7th July 2017, Mr. S. Waqainabete of the Legal Aid Commission did mark his appearance for the 2nd Petitioner and inform Court that the Petitioner had indicated that she did not wish the said Commission to defend her as she had retained Mr. M. Yunus to represent her, and moved that he be permitted to withdraw from the proceedings, which motion was granted by this Court upon Mr. M. Yunus confirming that he would represent the 2nd Petitioner and that he was ready for the hearing.

[28] Indeed, a formal Amended Petition "to seek enlargement of time for special leave to appeal against the Conviction" dated 23rd March 2017 containing 5 grounds of appeal against conviction, which will be adverted to later in this judgment, has been lodged in the Registry of this Court on behalf of the 2nd Petitioner by Mr. Yunus, along with a supporting affidavit dated 20th March 2017 in which the said Petitioner has sought to explain in the lines set out above, the delay in lodging her initial notice of appeal dated 11th October 2016 in the Registry of this Court by approximately 1 month and 2 days.

[29] Despite the absence of any provision in the Constitution of the Republic of Fiji or any other Act or Decree that seek to confer on the Supreme Court the power to enlarge time, this Court has in decisions such as *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002), *Enele Cama v The State*, [2012] FJSC 4; CAV0003.09 (1 May 2012), *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), *Native Land Trust Board v Khan* [2013] FJSC 1; CBV0002.2013 (15 March 2013), *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), *Volivale v The State* [2015] FJSC 1; CAV0004.2014 (23 April 2015), *Tiritiri v. The State* [2014] FJSC 15 CAV9.2014 (14th November 2014), *Donu v The State* [2015] FJSC 19; CAV0014.2014 (20 August 2015) and *Nabainivalu v State* [2015] FJSC 22; CAV027.2014 (22 October 2015) and *Tukana v State* [2016] FJSC 23; CAV 0024.2015 (22 June 2016)assumed that it possessed jurisdiction to grant enlargement of time in appropriate cases.

[30] In paragraph 4 of his judgment in *Kamalesh Kumar v State; Sinu v State, supra,* Chief Justice Anthony Gates enumerated the factors that will be considered by a court in Fiji for granting enlargement of time 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?

[31] As his Lordship the Chief Justice went on to observe in paragraph 4 of the said judgment, the abovementioned factors "may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court".

[32] It is also necessary to state that when embarking on a detailed assessment of the merits of the applications of Jayant Lal and Moreen Lata Prakash, the 1st and 2nd Petitioners before this Court, in the context of factors (iii) and (iv) outlined in the judgment of this Court in the *Kamalesh Kumar* case, this Court has to be mindful of the following observation of this Court in paragraph 14 of its judgment in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013):-

> "It is remarkable that this Court has in the generality of cases assumed that it possessed jurisdiction to grant enlargement of time in appropriate cases, *but had shown considerable reluctance to grant relief to petitioners seeking enlargement of time for making belated applications for special leave to appeal.* See, *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002); *Enele Cama v The State,* [2012] FJSC 4; CAV0003.09 (1 May

2012); *Kamalesh Kumar v State; Sinu v State*[2012] FJSC 17; CAV0001.2009 (21 August 2012); and *Native Land Trust Board v Khan*[2013] FJSC 1; CBV0002.2013 (15 March 2013)."(*Emphasis added*)

[33] In paragraph 15 of its judgment in *Rasaku v The State*, supra, this Court made it clear that a Petitioner seeking a belated appeal in a criminal case, must *at the lowest*, be able to meet the stringent leave criteria of section 7(2) of the Supreme Court Act, No. 14 of 1998.

1st Petitioner, Jayant Lal's case

[34] It is now convenient to consider the case of the 1st Petitioner, Jayant Lal, in the light of the above factors that need to be taken into account by reason of his belated lodgement of notice of appeal. As regards factor (i), namely the reason for his failure to lodge his application within time, no explanation whatsoever has been offered by him by way of affidavit or otherwise. However, factor (ii), namely the length of the delay, which is also material to be taken into consideration, is only approximately 10 days. Considering the circumstance that the 1st Petitioner was an incarcerated prisoner with no access to legal advice, the period of delay is only slight.

[35] Factors (iii) and (iv) may conveniently be considered together as they go into the merits of the 1st Petitioner's appeal. As for factor (iii) above, it is noteworthy that the only ground taken up by the 1st Petitioner Jayant Lal in the Court of Appeal was that the trial judge failed to consider the two medical reports in deciding the admissibility of the caution interview statement. I find that this ground has been dealt with comprehensively in paragraphs [33] to [37] of the impugned judgment of the Court of Appeal, and needs no further consideration.

[36] In the 1st Petitioner's letter dated 7th October 2016, he has raised another ground as his principal ground of appeal to this Court, namely that the Court of Appeal "erred in not independently assessing the evidence against the petitioner before affirming the High Court verdict", which he moved at the hearing before this Court to refine slightly to read as follows:

> "The learned trial judge and the appellate court erred in not independently assessing the evidence against the petitioner before affirming the High Court verdict."

[37] Jayant Lal was convicted on his confession contained in his caution interview statement that he drove the deceased Shalesh Prakash on that fateful night in the latter's office van to Sawani-Serea Road, and after letting him out of the van, killed him by running the van over him twice, which statement was not only held after a *voir dire* hearing to have been voluntarily made, but the truth of his confession has been corroborated by the several productions marked in evidence in the case as well as the nature of the injuries shown in the deceased's post mortem report, which concludes that the condition directly leading to death was the rupture of the anterior abdominal wall of the deceased due to being run over by a motor vehicle.

[38] The morbid nature of the injuries disclosed in the said pathological report, particularly the fractures of the right 4th, 7th and 8th ribs, contusions of the intercostal muscle between the 5th and 6th right ribs, extensive and multiple fractures of the bones of the skull and extensive haematoma over the frontal, parietal, temporal and occipital areas of the scalp, are all consistent with the said confession that the deceased was run over by the van driven by Jayant Lal twice.

[39] The 1st Petitioner Jayant Lal has referred to the celebrated judgment of this Court in *Praveen Ram v The State* [2012] FJSC 12; CAV0001.2011 (9 May 2012) to stress the duty of the trial judge to independently assess the opinion of the assessors, but in the circumstances of the instant case nothing stands out to demonstrate that the trial judge had failed in his said duty. In paragraph 2 of the judgment of the High Court dated 9th March 2011, the learned trial judge has stated as follows:-

> "I find the verdict of the assessors was not perverse. It was open to them to reach such conclusion on the evidence. Obviously, they are satisfied beyond reasonable doubt on the prosecution version of the events."

[40] Jayant Lal's submission to justify the consideration of a second ground of appeal, namely that the cause of death of the deceased Shalesh Prakash had not been established at the trial, is equally devoid of merit, as this too was not taken up in the lower courts, and in any event, the medical evidence, in particular, the post mortem report referred to earlier in the judgment, has clearly established the cause of death. The 1st Petitioner has referred to the judgment of this Court in *Vulaca v State* [2013] FJSC 16; CAV0005.2011 (21 November 2013) to contend that a ground not taken up in the courts below can be taken up before the Supreme Court, but that was a decision on a review application, the point

taken up in that case arose from the judgment of this Court in *Korovusere v State*[2013] FJSC 2; CAV0005.2011 (24th April 2013) concerning Vulaca's co-accused, and in any event, the application for review was ultimately refused.

[41] Factor (iv) highlighted by his Lordship Chief Justice Anthony Gates in *Kamalesh Kumar*'s case, namely whether where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed, does not arise for two reasons. In the first place, Jayant Lal's delay in lodging his appeal is not substantial, and in any event, as seen already, there is no ground of appeal that has even the remotest possibility of succeeding if enlargement of time and leave to appeal is granted.

[42] In the circumstances, question (v) posed by his Lordship the Chief Justice in *Kamalesh Kumar*, namely whether if time is enlarged, will the Respondent be unfairly prejudiced, can only be answered in the affirmative.

2nd Petitioner, Moreen Lata Prakash's case

[43] The 2nd Petitioner Moreen Lata Prakash has of course satisfied factor (i) of the *Kamalesh* criteria by giving a plausible explanation, by way of affidavit, for her delay in lodging her application for leave to appeal. The period of delay, relevant to factor (ii), was approximately 1 month and two days, and the learned Counsel for the State, in these circumstances had no objection to enlargement of time being granted.

[44] However, it is necessary to consider the other factors outlined in the *Kamalesh Kumar* case in exercising the discretion of Court in favour of granting leave to appeal, and that brings us to factor (iii), which is whether there is a ground of merit justifying the appellate court's consideration. The grounds relied upon by the 2nd Petitioner for enlargement of time and leave to appeal are as follows:-

> (1) That the Appellate Court did not properly consider and/or evaluate the effects of the learned Trial Judges failure to fully direct assessors on the lack of evidence tendered by prosecution on the supposed dried Datura plant (Prosecution Exhibit No.2) which was not support by any form of expert or scientific report or analysis to establish the effects of the plant, such failure impinged on the petitioners right to fair trial allowing substantial injustice to occur otherwise.

(2) That the Appellate Court did not properly consider and/or evaluate the effects of the learned Trial Judges adequately direct the assessors on the length of time spent by the Appellant in police custody giving an oral interview before the commencement of the written caution interview, such failure impinged on the petitioner right to fair treatment thus allowing substantial injustice to occur otherwise.

(3) That the Appellate Court did not properly consider and/or evaluate the effects of the learned Trial Judges failure to adequately direct the assessors on the doctrine of joint enterprise as advanced by the prosecution against the Petitioner, such failure caused a substantial injustice to otherwise occur.

(4) That the Appellate Court did not properly consider and/or evaluate the effects of the learned Trial Judge's failure to adequately direct the assessors by failing to mention that each person had to be jointly involved and not directed or controlled by threat, force, intimidation or put under duress while forming a common intention and acting jointly under the doctrine of joint enterprise, such failure has caused a substantial injustice to otherwise occur.

(5) That the Appellate Court did not properly consider and/or evaluate the effects of the leaned Trial Judges directions the assessors about the elements of the offence of murder by giving examples which were similar to the facts of the case against the petitioner, such failure has caused a substantial injustice to otherwise occur.

[45] It is noteworthy that the first four grounds sought to be raised in appeal before this Court have been taken up before the Court of Appeal, and adequately dealt with by that court. Ground (5) was the only ground that was not raised before the Court of Appeal. This Court will not usually grant leave to appeal on grounds that have been adequately dealt with by the Court of Appeal.

[46] Ground (1) above was taken up in the Court of Appeal as ground 15 along with grounds 16 to 18 raised in the 2nd Petitioner's amended grounds of appeal file in the Court of Appeal dated 22nd December 2014, and this ground was considered by the Court of

Appeal in paragraphs [25] and [26] of its impugned judgment. Mr. Yunus has submitted before this Court that one of the fundamental issues that arose at the trial against the 2ndPetitioner was whether what she was told of the effect of Datura seed mixed with drinks by her accomplices was true in fact. He stressed that this question could have been answered conclusively through an expert opinion and or a scientific test of the plant or substance, but the prosecution had not produced any such evidence at the trial.

[47] Mr. Korovou, who appeared for the Respondent pointed out that the Court of Appeal had carefully considered the point regarding dried Datura and concluded that the prosecution did not rely on the plant having the capacity to stupefy the deceased. Justice Chandra in paragraph [25] of his judgment (with which Calanchini P and Waidyaratne JA had concurred) observed that it was the 2nd Petitioner's "belief that Datura when mixed with rum would bring about severe intoxication……that went to the establishing of her intention to commit the murder", jointly with the other two Petitioners. In those circumstances, there was no need to lead any scientific evidence of the effect that the said plant could have had on the deceased, and very clearly, this ground would not succeed in the event of leave being granted.

[48] What is now raised as ground (2) before this Court was considered by the Court of Appeal as ground 21, along with grounds 19 to 20, 22 and 23, which were connected, relating to the length of time spent by the 2nd Petitioner and about her not being able to consult lawyers. In paragraph 27 of the impugned judgment in the Court of Appeal, Chandra JA had dealt with these matters in the following manner:-

> "The evidence at the *voir dire* was to the effect that the Appellant had been informed about her right to consult a lawyer, that she was given sufficient breaks, she was given her meals and that she was allowed to speak to her relatives from time to time. The learned trial Judge in his summing up detailed the manner in which her statement was recorded and therefore it cannot be said that it was inadequate."

[49] The 2nd Petitioner had not testified at the *voir dire* or at the trial, and the trial judge had been extremely fair in directing the assessors in regard to these aspects of the case. In my view, this ground again is lacking in merit and would not even satisfy the stringent criteria for grant of leave to appeal set out in section 7(2) of the Supreme Court Act.

[50] Through ground (3) urged on behalf of the 2nd Petitioner Moreen Lata Prakash, it is sought to take up the issue of adequacy of directions given by the trial judge in the course of his summing up in regard to the question of joint enterprise, which had been raised by the 2nd Petitioner as grounds 25 to 26 before the Court of Appeal. It has been submitted by Mr. Yunus that the learned trial judge did not adequately direct the assessors on the question of joint enterprise thereby causing substantial prejudice to the Petitioners, and in particular to his client, Moreen Lata. In fairness to the trial judge, I quote below the relevant directions made in paragraphs 15 of the summing up:-

> "There are three accuseds in this case. In order to make them jointly liable for the alleged murder of Shalesh Prakash, the prosecution is relying and running it's case on the concept of "joint enterprise". "Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence". (Section 22, Penal Code, Chapter 17). In considering each accused, you will have to ask yourselves the following questions: Did each of them form a common intention with each other to murder the deceased? If so, did each of them acted together to murder the deceased? If your answer to the above questions for a particular accused was yes, and you are satisfied beyond reasonable doubt that the elements in paragraph 9(i), (ii) and (iii)(a) are satisfied, he's guilty of murder. It is irrelevant whether or not one committed a minor or major role, if they had the common intention to murder the deceased and acted together, they are each liable for murder."

[51] In paragraph 29 of his judgment in the Court of Appeal, Chandra J has very rightly described the summing up of the learned trial judge on joint enterprise as "very balanced", more so because in paragraph 16 of his summing up, the learned trial judge had dealt very carefully of how confessionary statements of accomplices should be dealt with and stressed that the assessors "must consider the position of each accused separately, and come to a separate considered decision on each of them." He had taken pains to explain to the assessors that just because several accused persons are jointly charged, it does not mean that they must all be guilty or not guilty. In particular, the trial judge had warned the assessors that regarding the Petitioners' "police caution interview

statements and charge statements, which may contain their alleged confessions, the statements therein are only admissible against the maker of the statement, and on no other."In these circumstances, I am of the opinion that no purpose would be served by granting leave to the 2nd Petitioner on ground (3) raised on her behalf.

[52] Ground (4) urged on behalf of the 2nd Petitioner, which was her ground 27 before the Court of Appeal, is that in its impugned judgment, the Court of Appeal "did not properly consider and/or evaluate the effects of the learned trial judge's failure to adequately direct the assessors by failing to mention that each person had to be jointly involved and not directed or controlled by threat, force, intimidation or put under duress while forming a common intention and acting jointly under the doctrine of joint enterprise, such failure has caused a substantial injustice to otherwise occur."

[53] I find that paragraph 15 of the summing up of the trial judge quoted when discussing ground (3), did include adequate directions on joint enterprise and the requirement that each person of the enterprise must be jointly involved, but Mr. Yunus's submission was that the question whether the 2nd Petitioner was "directed or controlled by threat, force, intimidation or put under duress" by the 3rd Petitioner Bharat Lal had not been properly and adequately addressed by the trial judge in his summing up.

[54] It is noteworthy that as the trial judge had observed in paragraph 18 of his summing up, that according to the prosecution, Bharat Lal and Moreen Lata Prakash have being having an affair, for over a year and they went together to New Zealand in May 2009 and returned in June. It transpired from the 2nd Petitioner Moreen Lata's caution interview statement that they returned from New Zealand only because they could not bear the cold climate. What is relevant in regard to the position taken up by the Petitioner about the threat, force, intimidation or duress alleged to have been made by Bharat Lal is that it is clear from her statement under caution (answers to question 197) that when they returned from New Zealand they got closer to each other and Bharat Lal (whom the 2nd Petitioner describes as Sanjay) was desperate to stay with her.

[55] Moreen Lata's answers to questions 128 to 130 in her caution interview show that there was an attempt to kill Shalesh Prakash by electrocuting him using a lead wire which was purchased with her money and was peeled by Bharat Lal, but the attempt failed as "the naked wire had shot." Her answers to questions 198 to 203 relate to another attempt made on the life of Shalesh Prakash, on the suggestion of Bharat Lal to get Shalesh drunk and

kill him. Bharat Lal brought Moreen Lata some Datura seeds which she grinded and mixed with her husband's liquor and took him to the civic centre sea wall, but the plan could not be executed as Shalesh did not get drunk enough."

[56] It was the next attempt that became successful. Answers given by the 2nd Petitioner Moreen Lata to questions 264 to 270 in her caution interview statement reveal how Bharat Lal brought a Daura fruits from his tree and gave them to Moreen Lata who grinded them in her garlic pounder and mixed the same with her husband Salesh Prakash's rum, which he drank on 20th June 2009 at about 10.30 pm after returning from Janen's place. According to the evidence, it was on this day after the deceased Salesh Prakash had got very intoxicated that he was transported by the 1st and 3rd Petitioner with the assistance of the 2nd Petitioner in Salesh Prakash's company van to a spot in Sawani-Serera Road, where he was let out of the van and killed by running his company van twice over him on the morning of 21st June 2009. It is significant to note that Moreen Lata answering questions 241 to 243 admitted giving the 1st and 3rd Petitioners two pairs of socks in order to avoid fingerprints as already planned by them.

[57] It is noteworthy that in the course of her caution statement of Moreen Lata Prakash, she identified certain productions that were removed from her house. They were the bottle or rum to which grinded Datura seeds were mixed (answer to question 283), the head wire with which she attempted to electrocute the deceased (answer to question 284) and the pounder with which the Datura seeds were crushed (answer to question 285). These productions corroborate the caution interview statement of Moreen Lata Prakash which was held to have been made voluntarily by her, and cut across the submission that she had been acting under some threat, force, intimidation or duress.

[58] In the written submissions filed on behalf of the 2nd Petitioner as well as the Respondent reference has been made to the "fundamentally different" test for secondary liability for murder as enunciated by the House of Lords in *R v Rahman* [2008] 4 ALL ER 351, and to decisions of other jurisdictions seeking to refine and develop the concept of joint enterprise. None of these decisions need to trouble this Court in this case for the simple reason that in my view, this was a premeditated and gruesome case of murder to which the English test would in any event be inapplicable. Furthermore, for the reasons explained by me in paragraphs [28] and [29] of my judgment in *Praveen Ram v The State* [2012] FJSC 12; CAV0001.2011 (9 May 2012), recent decisions of other common law

jurisdictions should, in any event, be viewed with caution. The law in regard to joint enterprise section 22 of the Penal Code, Cap. 17, which has been reproduced as section 46 of the Crimes Decree 2009 for offences committed after February 2010, remains the touchstone for extended common purpose liability in Fiji, and has been applied in numerous decisions of the courts in Fiji including the Supreme Court.

[59] In these circumstances, it is not surprising that Chandra JA in paragraph 31 of his judgment dealt with ground (4) (which was ground 27 of the 2nd Petitioner's amended grounds of appeal), in the following manner:-

> Counsel for the 1stAppellant [2nd Petitioner before this Court] in his submissions also took up the position that what was stated by the 1st Appellant in her caution interview statement was true and that she had taken up a defence therein that she had acted under threat or duress from the 3rdAppellant Bharat Lal. If what she had stated her was true that establishes her intention to commit the offence and also establishes her role in the commission of the offence. Apart from what she had stated in her statement there was no other evidence to substantiate same. This submission cuts across the earlier submissions made by him regarding the admissibility of the caution interview statement and therefore the grounds of appeal urged by the 1stAppellant lack merit."

[60] It is therefore clear that ground (4) raised before this Court by the 2ndPetitoner is devoid of merit, and would not justify the grant of enlargement of time for leave to appeal.

[61] Ground (5) raised by the 2nd Petitioner, Moreen Lata's Prakash was the only ground urged before this Court that was not taken up before the Court of Appeal. In my view, the 2nd Petitioner cannot as a rule complain that the Court of Appeal "did not properly consider and/or evaluate the effects of the leaned trial judges directions to the assessors about the elements of the offence of murder by giving examples which were similar to the facts of the case against the petitioner" having failed to raise any complaint in this regard before the Court of Appeal.

[62] However, Mr. Yunus, appearing for the 2nd Petitioner, has relied on decisions such as *Dip Chand v State* [2012] FJSC 6; CAV0014.2010 (9 May 2012) and *Suresh Chandra v State* [2015] FJSC 32; CAV21.2015 (10 December 2015) where reference was made with

approval to the exception to the above rule enunciated by the Privy Council in *Kwaku Mensah v the King*(1946) AC 83in the following terms:-

> "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."(*Emphasis added*)

[63] Mr. Yunus invited the attention of Court to paragraph 10 of the trial judge's summing up where the following example was given by the trial judge to explain the meaning of an "unlawful act":-

> "An "unlawful act", is simply an act not justified in law. For example, I had a grudge against someone. I decided that I am going to use a motor vehicle to run him over, and kill him, and make it look like a motor vehicle accident. However, I couldn't do it alone, so I asked a friend to assist me do the above. He agreed. On a Friday night, at the Suva Traps nightclub, we met the person, and later spiced his drink. He was too drunk to remember anything. We put him in our car, and drove towards Korovou in Tailevu. In a quiet area, we let the person out of our car. He wandered aimlessly on the road. We drove our car at him twice, and later fled the scene. He laid on the road motionless. The act of driving the motor vehicle at the person, without any legal justification, is an unlawful act. In fact, it amounts to "dangerous driving", which is an unlawful act. It is also a criminal offence. It is an unlawful application of force to the person of another, and is therefore an unlawful act."

[64] It was Mr. Yunus's submission before this Court that while the example was not an inappropriate example of an "unlawful act", it resembled the case being tried before the High Court so closely, that the example seriously prejudiced the 2nd Petitioner by giving the impression to the assessors that the trial judge was bolstering the case for the prosecution. Applying the test adopted in *Kwaku Mensah v the King, supra,* the question to be answered is whether the use of the particular example caused substantial and grave injustice to the 2nd Petitioner.

[65] Mr. Korovou has attempted to answer the question in the negative, and in doing so he has referred us to a very recent decision of the Court of Appeal in *Balekivuya v*

State[2016] FJCA 16; AAU0081.2011 (26 February 2016), that court observed in paragraph 33 as follows:-

> "It must be stated at the outset that the directions on the elements of murder were correct. Furthermore there is no error in using examples to explain the elements of the offence to the assessors. Certainly kicking and punching are forms of assault and are unlawful acts. However the use of hitting a person on the head with a spade is the same as the conduct that formed part of the case for the prosecution. As a result it may have been perceived as bolstering the case for the prosecution. However the prosecution's case did not need bolstering since there were no apparent deficiencies in the prosecution case. At no stage was it disputed by the Appellants that they were present in Shalimar Street at the time of the incidents. The Appellants disputed the events that were alleged to have occurred. Although the practice of using examples that too closely resemble the facts upon which the prosecution relies is not appropriate, in this case there was nothing added to the prosecution case. There was direct evidence from two witnesses who had survived the assaults as to how Krishneel had met his death. In my judgment the Appellants were not prejudiced by the use of the similar examples in this case. The learned Judge as the ultimate trier of fact and law had no hesitation in indicating his agreement with the opinions of the assessors after reviewing the evidence. There was no miscarriage of justice and this ground does not succeed."

[66] In my considered opinion, the use by the trial judge of somewhat a similar example to explain the meaning of an "unlawful act" would not have been perceived by the assessors as an attempt to bolster the prosecution case since despite the facts in *Balekivuya* were very different from those of this case, as in that case, the prosecution's case did not need bolstering since there was ample evidence for the assessors to return a verdict of guilty. In my view, the use of a somewhat similar example did not prejudice or caused substantial and grave injustice to the Petitioner, and the ground urged does not meet the *Kwaku Mensah* test for granting leave to appeal on a point not taken up in the lower courts. It also would not justify the grant of enlargement of time to pursue the application for leave to appeal to this Court.

3rd Petitioner, Bharat Lal's case

[67] On behalf of the 3rd Petitioner Bharat Lal, his learned Counsel raised two principal grounds for leave to appeal. They were as follows:-

(1) The learned trial judge misdirected the jury on the question of joint criminal enterprise in failing to identify and stipulate what were the features of the case to joint criminal enterprise and more particularly as to how matters to be taken in the record of interview of the Petitioner were to be regard as indicative of a withdrawal from the case of joint enterprise, as a result of which there was a miscarriage of justice and error of law in the conviction of your Petitioner, rending the verdict unsafe, unsatisfactory and unreliable; and

(2) The learned trial judge erred in failing to identify that the caution interview record of the 3rd Petitioner was unsafe, unsatisfactory and, in terms of how it was conducted, an interview that should have been set aside as unfair and involuntary and in respect of which the learned trial judge erred in failing to find on the *voir dire* that the record of interview should be excluded in all the circumstances as involuntary.

[68] Ground (1) had not been urged by the 2nd Petitioner in the Court of Appeal and is being taken up for the first time in this case. In the circumstances, as already noted the principle enunciated by the Privy Council in *Kwaku Mensah v the King, supra,* would apply, and leave would not be granted to pursue the ground unless substantial and grave injustice might otherwise occur.

[69] The first part of ground (1), namely that the learned trial judge misdirected the jury on the question of joint criminal enterprise in failing to identify and stipulate what were the features of the case to joint criminal enterprise. Learned Counsel for the 3rd Petitioner Bharat Lal have submitted that the elements of concept of joint criminal enterprise have been outlined by the High Court of Australia in *McAuliffe v The Queen* [1995] HCA 37; (1995) 183 CLR 108 at 113. As already observed in this judgment, as far as Fiji is concerned, the law in regard to joint enterprise is set out in section 22 of the Penal Code, Cap. 17, which has been reproduced as section 46 of the Crimes Decree 2009, and the summing up of the trial judge on joint enterprise was impeccable.

[70] As for the second part of ground (1) relating to the alleged withdrawal of the 3rd Petitioner from the joint enterprise, Mr. Korovou has very rightly pointed out that in *Korovusere v State* [2013] FJSC 2; CAV0005.2011 (24 April 2013), this Court has held that withdrawal from the joint enterprise can only be put to the assessors if there is evidence showing that the accused has abandoned his initial plan and communicates the same to his accomplice.

[71] In *Nacagilevu v State* [2016] FJSC 19; CAV 023.2015 (22 June 2016)this Court when dealing with a similar appeal ground at paragraph 35 said "the law says that not only the withdrawal must be unequivocal; it must also be effectively communicated to the other participants of a joint enterprise..."

[72] The 3rd Petitioner, answering questions 81 to 163 in the course of his caution interview, has described how he and another person went to Shalesh Prakash's house on 20th June 2009 late at night, got a drunken Shalesh into his company van, drove him from towards Sawani-Serea Road, and in a secluded spot, used the van to run over Shalesh Prakash and kill him. He has also admitted that he and the other person fled to Nakasi, in the same van. It is abundantly clear from these circumstances that there was no evidence of withdrawal from the joint enterprise or that the intention to so withdraw was communicated to any other member of the joint enterprise. On the contrary, the evidence in the case overwhelmingly demonstrates the continued involvement of the 3rd Petitioner in the joint enterprise.

[73] Ground (1) therefore is lacking in merit and does not justify the grant of leave to appeal in this case.

[74] The second ground has been adequately considered by the Court of Appeal in its various aspects, and the decision of this Court in *Maya v. The State* [2015] FJSC 30; CA V009.2015 (23 October 2015) was specifically dealt with in paragraph 47 of the said judgment. In these circumstances there is no basis for granting leave to appeal to the 3rd Petitioner on the basis of ground (2).

[75] I am therefore of the opinion that the application of the 3rd Petitioner for leave to appeal should be refused.

Conclusions

[76] Accordingly, for the reasons set out fully in this judgment, I am of the opinion that the applications of the 1st and 2nd Petitioners for enlargement of time to apply for leave to appeal must be refused and the application of the 3rd Petitioner for leave to appeal has also to be refused. I would therefore make order dismissing the applications of all three Petitioners in this case.

Ekanayake J.

[77] I have read in draft the judgments of Gates, P and Marsoof J, and agree with both judgments, and the proposed orders.

Orders of Court

(1) Applications of the 1st and 2nd Petitioners for enlargement of time for leave to appeal are refused; and

(2) *Application of the 3rd Petitioner for leave to appeal is refused.*

....

Hon. Chief Justice Anthony Gates
President of the Supreme Court

....

Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

....

Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

Solicitors:

1st Petitioner in Person

M.Y. Law for 2nd Petitioner

Messers Bancord-Chandra Lawyers, Barristers & Solicitors for 3rd Petitioner

The Office of the Director of Public Prosecutions for the Respondent