

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

**CRIMINAL PETITION No: CAV 0004 of 2017**  
**(On Appeal from Court of Appeal No: AAU 0060.2011)**

**BETWEEN** : **LUKE DIKEVI TUKANA**

*Petitioner*

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

*Respondent*

**Coram** : Hon. Chief Justice Anthony Gates, President of the Supreme Court  
Hon. Mr. Justice Sathya Hettige, Judge of the Supreme Court  
Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court

**Counsel** : Mr. M. Fesaitu for Petitioner  
Mr. M. Korovou for Respondent

**Date of Hearing:** 12 October 2017

**Date of Judgment:** 26 October 2017

**JUDGMENT**

**Gates, P**

[1] I have read in draft the careful and thorough judgment of Hettige JA analysing the argument in this petition. I agree with its conclusion and orders, and the reasons for the decision.

**Hettige, J**

- [2] This is an application seeking special leave to appeal against the judgment of the Court of Appeal dated 23<sup>rd</sup> February, 2017 dismissing petitioner's appeal.
- [3] On an Information filed by the Director of Public Prosecutions on 29<sup>th</sup> July 2009 the petitioner was charged with the offence of murder of Naelisoni Vunivi Nadumu (Nelson) in the High Court of Fiji at Lautoka contrary to sections 199 and 200 of the repealed Penal Code (Cap. 17) on 26<sup>th</sup> February 2009 at Votua Housing, Korolevu, Sigatoka in the Western division.
- [4] After trial which was held on 2<sup>nd</sup> and 3<sup>rd</sup> May 2011 before the assessors two out of the three assessors found the petitioner guilty of murder and one assessor found the petitioner guilty of manslaughter. The learned High Court Judge agreed with the majority opinion of the assessors and found the petitioner guilty of the offence of murder and convicted the petitioner accordingly on 4<sup>th</sup> May 2011.
- [5] The petitioner was sentenced to the mandatory sentence of life imprisonment with a minimum period of 11 years to be served before being eligible for parole.

**Background Observations**

- [6] On 3<sup>rd</sup> of June 2011 the petitioner filed an appeal in the Court of Appeal within the 30-day appeal period against the conviction with six grounds of appeal which was deemed to be abandoned due to administrative reasons in that the petitioner's solicitors failed to file the affidavit of service after the notice of appeal as required by the Rules of the Court of Appeal.
- [7] The single Judge of the Court of Appeal on 14<sup>th</sup> March 2014 refused the second notice of appeal seeking leave to appeal out of time as the delay in filing the second notice of appeal was out of time by one year and one month. The application for leave to

appeal against the conviction and sentence was also refused by the single Judge as the grounds of appeal were not arguable before the Full Court of Appeal.

- [8] The petitioner filed a letter dated 24<sup>th</sup> of March 2014 addressed to the Registrar of the Court of Appeal renewing his application before the Court of Appeal to consider his grounds of appeal and reserving his right to amend and or to file further grounds of appeal.
- [9] The Counsel for the petitioner filed notice of appeal limiting his appeal grounds to 4 grounds of appeal against conviction on 18<sup>th</sup> September 2014 before the Court of Appeal seeking extension of time for Leave to appeal .
- [10] The Court of Appeal having regarded the proceedings before Court of Appeal as a renewed application for enlargement of time to seek leave to appeal against the conviction and sentence delved into the four (4) grounds of appeal urged by the petitioner and dismissed the petitioner's appeal against the conviction and sentence on 23<sup>rd</sup> February 2017.
- [11] The petitioner filed the application for special leave to appeal dated 17<sup>th</sup> March 2017 in the Supreme Court on 20<sup>th</sup> March 2017 against the conviction only on one ground of appeal though the petitioner advanced 4 grounds of appeal in the Court of Appeal.

### **Jurisdiction of the Supreme Court**

- [12] The Supreme Court derives exclusive jurisdiction to hear and determine appeals from all judgments of the Court of Appeal under Section 98 (3) (b) of the Constitution of the Republic of Fiji. Section 98 (4) of the Republican Constitution of Fiji also 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.

- [13] Section 7 (2) of the Supreme Court Act No. 14 of 1998, sets out the stringent criteria for grant of special leave which is 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.”*

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

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

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

- [16] As stated above the stringent threshold criteria in Section 7 of the Supreme Court has been discussed and decided in a line of authorities in the Supreme Court of Fiji. See **Bulu v Housing Authority** (2005) FJSC 1 CBV 0011.2004S 8 April 2005.
- [17] It can be observed from the above decisions that special leave is not granted unless the case is one of gravity involving a matter of public interest, or some important question of law.
- [18] In **Dip Chand v State** CAV0014/2012 9<sup>th</sup> May 2012, the Supreme Court observed that; “given the criteria set out in Section 7 (2) of the Supreme Court Act 14 of 1998 are extremely stringent and special leave to appeal is not granted as a matter of course.”
- [19] Having examined the stringent criteria set out in the above provisions in Section 7 (2) and as discussed in the above cases in Fiji the petitioner has an arduous task to satisfy this court when seeking special leave.

### **Ground of Appeal**

- [20] The Petitioner, even though he advanced 4 grounds of appeal in the Court of Appeal, has urged only one ground of appeal in this Court for special leave which is as follows:
- “The Court of Appeal erred in law and misdirected itself when it took into account the post-mortem photos from the disclosure within the Court record when the said post-mortem photo were not tendered in Court nor were they part of the prosecution case”*
- [21] Before I deal with the ground of appeal advanced by the Petitioner seeking special leave I proceed to outline briefly the facts in the instant case.

### The Factual Matrix

- [22] On 25<sup>th</sup> February 2009 the petitioner joined a drinking party at Sanaila's House at Votua Housing Block which started at about 8 pm and continued till early morning following day. At the drinking party there were others present namely, Sanaila, Anasa, Emori, a European girl, Maureen, Vitalina (Vita), Josephine (Petitioner's cousin) and the deceased. All attendees were drinking beer, and methylated spirits and the party went on in full swing with drinks.
- [23] While the drinking party was going on an altercation arose between the Petitioner and the deceased over two matters namely that:
- (i) That the deceased accused blamed the Petitioner for stealing his mobile phone.
  - (ii) That the deceased was trying to court two girls who attended the party which annoyed the petitioner.
- [24] The deceased and the Petitioner met outside when the Petitioner was returning from buying cigarettes and after the deceased swore at the Petitioner for stealing his mobile phone they had a fist fight. The deceased fell to the ground after being punched by the Petitioner. The Petitioner continued to punch the deceased after he fell on the ground. After that the Petitioner went back to the drinking party. After a while the petitioner went outside and he heard the deceased coughing . The Petitioner went and punched the deceased again. The Petitioner lifted him up and dropped him on the ground and kicked the deceased on the back of the head ,on the jaw and on the ribs when the deceased was unconscious and lay defence-less. The deceased suffered internal and external injuries and he was bleeding from the nose and the mouth due to serious and fatal blow on the head and he died at the crime scene. The facts of the case have not been disputed by the Petitioner.

[25] It is important to note before considering the ground of appeal urged by the petitioner that the petitioner was represented by a counsel from the Legal Aid Commission both in the trial court and the Court of Appeal.

**Agreed Facts at the Trial**

[26] In the agreed facts at the trial the Attorneys for the Petitioner and the State have agreed that:

- (i) *The petitioner and the deceased with others were drinking liquor on 25th February 2009 in Block 2, Flat 3 at Votua Housing, Korolevu.*
- (ii) *That the accused and the deceased had an argument and had a fight.*
- (iii) *That Manasa Vatuloka found the deceased at the corner of Block 5 , Flat 4 of Votua Housing on 26 February, 2009.*
- (iv) *That the deceased died on 26<sup>th</sup> February 2009.*
- (v) *Cautioned Interview of the Petitioner dated 27<sup>th</sup> February 2009.*
- (vi) *Petitioner's charge statement dated 27<sup>th</sup> February 2009.*

[27] It is relevant to refer to the agreed facts as most of the agreed facts were part of the evidence adduced at the trial including the cautioned interview wherein the petitioner has admitted the incident of assault on the deceased and the charge statement of the Petitioner.

[28] The evidence at the trial shows that the Petitioner has admitted the assault on the deceased. Under cross-examination by the State the Petitioner testified and said that he relies on his caution interview which was uncontested at the trial at page 292 of the SC case record as follows:

*Q: Nelson was serving drinks?*

*A: Don't know can't recall.*

*Q: 2 girls there?*

- A: Yes.
- Q: You trying to Court one of them?
- A: No just talking.
- Q: In your interview you said that Nelson serving drinks?
- A: Yes.
- Q: Giving more to the girls than the boys?
- A: Yes.
- Q: You didn't like that?
- A: Correct it was unfair.
- Q: At Page 293 " put it to you , you angry at Nelson because of less drinks to boys and more to girls?
- A: One reason."

Court:

- Q: "Annoyed because Nelson stopping you chatting up Vita?
- A: Yes.
- Q: At Page 294 of the SC record, the Court, during re- examination of the Petitioner asked, "kicked him on jaw?
- A: Yes.
- Q: Kicked him on back of head?
- A: Yes.
- Q: Annoyed because Nelson stopping you chatting up Vita?
- A: Yes.
- Q: As soon as he was unconscious you went back and sex with her?
- A: Yes.

[29] It can be seen from the evidence transpired in Court that the Petitioner was annoyed because the deceased was trying to court girls specially Vita. The motive of the Petitioner was to cause serious harm on the deceased because he was trying to court Josephine and he was preventing the Petitioner from trying to court Vitalina (Vita). The Petitioner hated the deceased because he wanted to take charge of the girls and drinks. (Question Nos. 103 and 107).

[30] It is clear from the answers the petitioner has given in the caution interview that the petitioner was angry and hated the deceased as the petitioner was prevented by the



deceased from talking to Vitalina which is obvious from the caution interview of the petitioner (at page 264 of the SC record).

*Q: Why did you hate Nelson in regard to the girls and drinks?*

*A: Because I didn't like him talking to Josephine and he was trying to pull Vita away when I was trying to talk to her.*

*Q: Why did you want to talk to Vita?*

*A: I wanted to have sex with Vita."*

### **Proceedings before the Supreme Court**

[31] The only ground of appeal urged by the petitioner in the instant case before this Court appears to be relating to the second ground of appeal advanced before the Court of Appeal. The petitioner alleges in the ground of appeal before the Supreme Court that the Court of Appeal erred in law and misdirected itself when the Court of Appeal took into consideration the post mortem photos from the disclosure within the court record when the said post mortem photos were not tendered by the prosecution in evidence at the trial.

[32] The Petitioner advanced four grounds of appeal before the Court of Appeal which are reproduced as follows:

“(i) That the learned judge erred in law when he failed to direct the assessors properly in regard to the inherent weakness of the prosecution case.

(ii) That the learned Judge erred in law and in fact when he failed to direct the assessors about the inconsistencies in regard to the post mortem report and testimony evidence given in court which resulted in miscarriage of justice.

(iii) That the learned judge erred in law and fact when he failed to assist the appellant given the incompetence of the defence counsel which was obvious in

light of the disclosure evidence and that being tendered in court by the prosecution.

- (iv) That the learned trial Judge erred in law and fact when he failed to weigh and / or analyze the prosecution case presented in court with that disclosed by way of disclosure so as to assist the appellant given the inadequate defences that was mounted, which resulted in a miscarriage of justice.”

[33] The Court of Appeal seems to have referred to the post mortem photographs in the court record to show the visible injuries on the deceased’s face. In paragraphs 67 and 68 of the Court of Appeal Judgment the answer to the petitioner’s issue raised in the ground of appeal is given. It is relevant to reproduce the two paragraphs which is as follows:

Para 67 read thus:

*“The hypothetical assertion of the medical expert pertains only to the internal injuries sustained by the deceased. But the photographs taken at the post mortem examination clearly shows visible injuries caused to the face of the deceased”.*

Para 68 thereof states:

*“Based on the above observation made by the forensic pathologist the defence tried to advance the contention , that since the injuries could be seen with the naked eye, the accused would not have realized the seriousness of the damage he was causing when he inflicted them especially in the course of the second and third assaults on the deceased. This contention is based on a highly groundless hypothesis ignoring practical realities and lacks merits.”*

[34] Moreover the Court of Appeal went on to consider what the Petitioner said in answer to the question no. 206 in the Caution Interview at page 268 of SC record which I reproduce as follows:

“Q206 : Did Nelson bleed when you assaulted him.

A : Yes from his mouth and nose.”

- [35] In paragraphs 25 -31 of the Court of Appeal Judgment the Court has referred to in detail the three occasions on which the petitioner brutally punched the deceased and the evidence given by PW 1 and PW 2 at the trial corroborating the incident of assault on the deceased.
- [36] The Court of Appeal is not in error at all because mere reference to the post mortem photos taken at the post mortem examination has not caused any prejudice to the petitioner as there was sufficient medical evidence of the pathologist and the caution interview of the petitioner placed before the assessors in the trial court to prove the charge of murder against the Petitioner and therefore the Court of Appeal is not in error in dismissing the Petitioner's appeal.
- [37] The application for special leave was heard before this Court on 12<sup>th</sup> October 2017. The Petitioner was represented by a counsel who supported the application for leave. The complaint of the petitioner as contained in the ground of appeal was that the Court of Appeal considered the post mortem photos taken at the post mortem examination which were not tendered in evidence in the trial court for its decision.
- [38] The learned counsel for Petitioner contended that the Court of Appeal was in error when post mortem photographs were taken into consideration because the photographs were never tendered in evidence at trial in the lower court and Court of Appeal should not have been considered photos from the disclosure list in the court record and as a result the petitioner was prejudiced.
- [39] This Court agrees with the submission that there had been some irregularity in the Court of Appeal proceedings by referring to the post mortem photographs taken at the post mortem examination. However, that irregularity does not affect the decision of the Court of Appeal because there is sufficient evidence to show that the petitioner has recklessly assaulted the deceased's head and on the jaw by kicking and caused fatal injuries to the brain of the deceased.

[40] The forensic pathologist in his post mortem report has fixed the cause of the death of the deceased as being subarachnoid hemorrhage with cerebral oedema. In other words there was bleeding around the brain tissue and swelling of the brain. That could be brought about by blunt force trauma such as punches and would not be caused by a normal fall. The learned counsel for the petitioner admitted that the post mortem report evidence, caution interview of the petitioner wherein he has admitted the punching and kicking the deceased and the testimony of PW 1 and PW2. That evidence was available at the trial Court and was placed before the Assessors. The contention of the Petitioner's counsel was that the Petitioner would have been found guilty of manslaughter and not murder.

[41] Trial Judge directed the Assessors with reference to the post mortem report as follows in paragraph 25 of the Summing Up at page 88 of the SC record.

*“The evidence of the pathologist is probably the most important in this trial. He fixes the cause of death as being subarachnoid hemorrhage with cerebral oedema which is bleeding around the brain tissue and swelling of the brain. The doctor says that this could be brought about by punches and would not be caused by a normal fall.”*

[42] This court has carefully considered the pathologist testimony in the trial court and also both the external and internal injuries as described in the post mortem report (Ex.P1). The injuries sustained by the deceased as a result of the punches and kicks on the deceased were as follows:

**External Injuries.**

- (1) Abrasions seen at both elbows (on the left. 2 on the right)
- (2) Linear abrasions across left shin covering an area of 22x 6cm.
- (3) Right and left maxillary area bruises seen.
- (4) Froth and blood noted at nostrils.

- (5) *Both lips swollen with laceration of the upper lip measure 2.0x1.0; laceration of the lower lip measuring 0.5 x 1.0 cm ( right edge) 2.0 x 1.0 cm (middle) and 0. 5 cm ( left edge)*
- (6) *Nasal bridge fracture.*
- (7) *Multiple bruises over anterior chest and abdomen, irregular shaped and not exceeding 2cm in diameter.*

**Internal Injuries:**

- (1) *Cephalohaematoma noted on the right front-parietal and left temporo occipital area.*
- (2) *Cerebral oedema of the brain is noted grossly.*
- (3) *Subarachnoid haemorrhage noted at the base of the brain over the cerebellum”*

[43] It appears from the testimony of the pathologist and the cause of the death and nature of injuries contained in the post mortem report and the evidence of prosecution witness, Matai (PW2) and PW 1 is corroborated and supportive of the prosecution case. There is no inconsistency in the evidence before the Assessors.

[44] At page 289 of the SC record it is clearly testified by the expert forensic pathologist as follows:

*“Blood clot around head may mean fracture of the skull,*

*Swelling of the brain trauma may be concussions, may be blows,*

*Hemorrhage on the third layer. Base of skull,*

*These injuries could have been caused by blunt force trauma of significant force. Repeated trauma. Punches He was drunk – punches did have led to the hematoma.”*

[45] At page 290 of the record the doctor under cross examination said “ *this subarachnoid hemorrhage cannot have come from fall. Must be from blunt trauma*”.

**Court**

*Q: So the injuries to the head can cause injuries to the brain in a different area?*

*A: Yes.*

**Malice Aforethought**

[46] It is important to consider whether the petitioner had intention to murder or cause grievous harm to the deceased at the time committing the offence. The petitioner’s argument is that he should have been convicted of manslaughter and not murder because he never intended to kill him.

[47] The Petitioner in the caution interview and in his evidence in the trial court has said that at the time of assault on the deceased that he did not intend to kill the deceased. He further said that he was drunk and angry at the time of committing the offence . In fact the question is whether the petitioner was provoked or whether the deceased acted in self-defence as he alleged when he assaulted the deceased.

[48] Malice aforethought has been explained in section 202 of the Penal Code which is as follows:

*“Malice aforethought shall be deemed to be established by evidence proving any one of the following circumstances:*

*(a) An intention to cause the death of or to do grievous harm to any person whether such person is the person actually killed or not;*

*(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by*

*indifference whether such death or grievous bodily harm is caused or not by a wish that it may not be caused”.*

[49] At page 262 of the SC record the Petitioner clearly answered the question no.78 that was put to him as follows:

*Q: That means that you are aware of what is happening inside?*

*A. Yes. I was observing what was happening inside”.*

### **Intoxication**

[50] Was the Petitioner drunk at the time of committing the offence as he alleged in the caution interview. The provisions contained in section 13 (1) of the Penal Code states that the intoxication shall not constitute a defence to any criminal charge. Section 13(2) thereof provides that:

*“Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing”.*

The Petitioner answered the question no. 77 in his Caution Interview as follows:

*“Q. 77 : What about you?*

*A : I was little bit drunk.*

*Q. 155 : What happened when you went to check him?*

*A : I then kicked him there.*

*Q. 56 : How many times did you kick him?*

*A : I kicked him twice.*

*Q.157 : Which part did you kick?*

*A : His jaw and ribs. (Luke points to right ribs to indicate where he kicked Nelson)*

(Page 158 of the SC record)

- [51] The Petitioner at the time of inflicting injuries to the deceased knew what he was doing. The evidence shows that he knew the deceased was bleeding from nose and mouth when assaulting. The petitioner after assaulting the deceased who had fallen unconscious on the ground went inside and had sex with another attendee called Vita. He knew all the men and women attending the drinking party were shouting and making noise with drinks. He also knew that the deceased was lying unconscious outside. (Testimony of Matai, PW 2 at page 285 of the SC record).
- [52] It is clear from the evidence placed before the assessors that the Petitioner was capable of forming an intention to kill the deceased when he repeatedly assaulted him on three occasions causing fatal injuries.
- [53] There is no evidence to suggest that the petitioner was provoked by the deceased's act on any of the three occasions he attacked the deceased. The evidence is that the petitioner hated the deceased and was annoyed because the deceased took charge of the drinks and girls attending the drinking party and the deceased was attempting to court the girls.
- [54] The Court of Appeal dealt with the issue of provocation in paragraphs 54 and 55 of the Judgment which is as follows:

*“(54) To gauge the graveness of provocation, the background and surrounding circumstances of a particular case become extremely crucial. The afore discussed evidentiary material available in the brief of the instant case, does not disclose any remark made or action done by the deceased that could have gravely provoked a reasonable man placed in the situation of the appellant.*

*“(55) The second and third assaults made by the appellant on the deceased are highly uncalled for. They had been done clearly, after the passion that arose consequent to the first argument and fight that occurred at the footpath when the appellant was returning after buying cigarette had been*



*cooled down, and when the deceased was helplessly lying unconscious on the ground. The said circumstances negate the availability of the defense of grave and sudden provocation to the Appellant”*

- [55] All the defences taken by the petitioner at the trial had been properly dealt with by the trial Judge as well. Accordingly the defence of provocation, drunkenness, and self-defence were carefully considered by the trial Judge and directed the assessors thereon in paragraph 21 of his summing up ( SC record page 86) as follows:

*“(Such issues are in law “provocation “; and once the accused raises that, you must consider it. The burden of proving that the accused was not provoked when he attacked Nelson is on the prosecution and you must ask yourselves whether the prosecution has proved beyond reasonable doubt that he did not act under provocation. Provocation is a defence to murder because it reasonable explanation for the lack of intent to kill or to cause serious harm to the victim. You must look at all the evidence and ask yourselves whether the deceased ‘s behavior which if done to a reasonable man of accused’s age and physical characteristics, would have caused the reasonable person to assault the deceased in the way he did”.*

- [56] In paragraphs 27( 1) ( 2) (3) (4) and (5) of the summing up (at page 90 of the SC record) the trial Judge had properly directed the assessors as follows:

*27(1) Decide whether Luke’s punches caused the death of Nelson.*

*27(2) If Yes – then did he intend to kill or to do serious harm to Nelson. If yes – then guilty of murder. If No- then guilty of manslaughter.*

*27(3) Was he so drunk that he was not able to form an intention to kill or cause serious harm to Nelson?*

*If Yes- then guilty of manslaughter.  
If no- then guilty of murder.*

*27(4) Was he provoked? If yes- then guilty of manslaughter only.*

*If no- then murder or manslaughter.*

27(5) *Did he act in self defence?*

*If Yes- then guilty of nothing. If no- then guilty of murder or manslaughter."*

- [57] It is to be stated that the Petitioner's confession that he assaulted the deceased by punching and kicking does not stand alone and his caution interview evidence has been consistent with and corroborated by pathologist evidence and other independent witnesses PW1 and PW 2.
- [58] It appears from the trial Judge's summing up that he has left the question of malice aforethought or whether the petitioner intended to kill Nelson to the assessors. In paragraphs 26 and 27 of the Summing Up at pages 88 and 89 of the SC record) it is clearly stated that the trial Judge left it to the assessors to decide whether the Petitioner is guilty of murder or manslaughter.
- [59] Trial Judge directed the assessors very correctly as to how to decide on the person's intention to commit a crime. At page 83 in paragraph 15 of the Summing Up learned trial Judge directed as follows:

*"The third element of murder is intention and concerns the accused's mental state at the time of the unlawful act. As a matter of common sense, no one can look into a person's brain to ascertain a person's intention at the time he is committing an unlawful act. Nevertheless, his intention can be inferred from his physical actions and surrounding circumstances. You must put yourselves in the shoes of the accused, and from his physical actions, spoken words, and the surrounding circumstances, you will be able to ascertain his intentions at the time he was doing the unlawful act."*

- [60] Trial Judge moreover, has fully and correctly directed the assessors on provocation, self-defence and intoxication as required by law (**Tej Deo v The State Crim. Appeal No. CAV 0017 of 2008S (18.October 2010)** and majority opinion of the assessors was

that the petitioner was guilty of murder with which the trial Judge agreed. One Assessor brought in a verdict of manslaughter.

[61] The Petitioner has not advanced before this court any of the defences, namely provocation, self-defence and intoxication he was relying on at the trial court as grounds of appeal. The petitioner restricted himself to only one ground of appeal where the Court of Appeal had made reference in its judgment. However, in fairness to the petitioner we were mindful of the fact that this court has a duty to deal with carefully those issues at the apex Court. The Court of Appeal has fully and correctly considered all the issues relevant to the petitioner's case.

[62] The learned State Counsel submitted that the repeated assault on the deceased when the deceased was lying unconscious and defenceless on the ground is sufficient evidence to show that the petitioner had intended to cause death or grievous harm to the deceased and had knowledge that his repeated punches and kicking on the head would cause death or serious bodily harm to the deceased.

#### **Failure to Meet Leave Criteria**

[63] The Supreme Court may grant special leave to appeal only if the leave criteria for leave is met under section 7 (2) of the Supreme Court Act No. 14 of 1998. If the petitioner could satisfy the court with one or more of the leave criteria in section 7 (2) the Supreme Court may grant leave. It has been observed in several judgments in Fiji that it is extremely stringent task to cross the threshold requirements.

[64] On consideration of the above analysis it is obviously clear that the petitioner has not been able to meet the threshold criteria for leave contained in section 7(2) of the Supreme Court Act of 1998.

### Conclusion

- [65] The forensic pathologist evidence and the post-mortem report is vital and important in the instant case before us. The independent direct evidence of the witnesses PW1 and PW2 has provided sufficient proof to establish the prosecution case against the petitioner. There is no dispute that the petitioner committed the offence of assault and caused grievous bodily harm to the deceased and he had died of subarachnoid hemorrhage at the scene of the crime. The Petitioner's repeated assault on the deceased was an intended act. The contents of the post mortem report confirms that the death of the deceased was due to the blunt trauma and even if the post mortem photographs were not considered by the Court of Appeal the result would have been the same in view of the post mortem report and testimony of the expert medical evidence. No prejudice has been caused to the petitioner by a mere reference to the post mortem photographs by the Court of Appeal. The mere irregularity on the part of the Court of Appeal by making reference to post mortem photographs does not make any difference to the result of the Court of Appeal Judgment.
- [66] Having carefully considered the oral and written submissions of both parties in the instant case we observe that the Court of Appeal was not in error by dismissing the appeal and the petitioner's ground of appeal advanced in this application fails due to lack of any merit.
- [67] We, for the reasons discussed above are of the considered view that the petitioner has failed to meet any of the threshold criteria for special leave encapsulated in section 7 (2) of the Supreme Court Act No 14 of 1998 and therefore the petitioner's leave application should be dismissed.

### Chandra, J

- [68] I agree with the reasoning and conclusion of Hettige J.

**The Orders of Court are:**

- (1) *The Petitioner's application for leave is refused.*
- (2) *The judgment of the Court of Appeal dated 23<sup>rd</sup> February, 2017 is affirmed.*



.....  
Hon. Chief Justice Anthony Gates  
**PRESIDENT OF THE SUPREME COURT**



.....  
Hon. Mr. Justice Sathya Hettige  
**JUDGE OF THE SUPREME COURT**



.....  
Hon. Mr. Justice Suresh Chandra  
**JUDGE OF THE SUPREME COURT**

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