

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

**CRIMINAL PETITION No: CAV 0026.2015**  
**(On Appeal From Court of Appeal No: AAU 106.2011)**

**BETWEEN** : **JOVECI NAIKA**

*Petitioner*

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

*Respondent*

**Coram** : Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court  
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court  
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court

**Counsel** : Petitioner in Person  
Mr. L. J. Burney with Mr. E. Samisoni for the Respondent

**Date of Hearing:** 11 April 2017

**Date of Judgment:** 21 April 2017

**JUDGMENT**

**Marsoof, J**

1. I have read the judgment of Jayawardena J in draft and I am in agreement with his reasoning and conclusions.

**Aluwihare, J**

2. I agree with the conclusions of Jayawardena J.

**Jayawardena, J**

3. This is an application for an enlargement of time to appeal against a Ruling of a Single Judge of the Court of Appeal dated 14<sup>th</sup> August 2013 by which the Petitioner's application for leave to appeal against sentence was dismissed.
4. In this application the jurisdiction of the Supreme Court has been invoked on the 18<sup>th</sup> of August, 2016.
5. An application for special leave to appeal to the Supreme Court against the conviction of the Petitioner has been heard by a bench of the Supreme Court comprising of Hon. Mr. Justice Saleem Marsoof, Hon. Mr. Justice Suresh Chandra, and Hon. Justice Sathya Hettige and the appeal was dismissed due to want of merits.
6. Prior to the commencement of the hearing of this application, it was brought to the notice of the Petitioner and the learned State Counsel that Hon. Mr. Justice Saleem Marsoof was a member of the said panel of judges which heard the connected appeal of the Petitioner with respect to his conviction and inquired as to whether they have any objection to Hon. Mr. Justice Marsoof hearing the instant application relating to the sentence. Both the learned State Counsel and the Petitioner informed Court that they have no objection to his Lordship hearing this application.
7. The Petitioner was convicted of two counts of murder contrary to sections 199 and 200 of the Penal Code and was imposed two sentences of life imprisonment with a non-parole period of 14 years in respect of each count on the 6<sup>th</sup> of October, 2011. Thereafter, the Petitioner had filed an appeal in the Court of Appeal against the said conviction and the sentence. A Single Judge of the Court of Appeal granted leave on the application for leave to appeal on the conviction but dismissed his application for leave to appeal on the sentence.

8. The Petitioner has filed this Petition after a lapse of nearly 3 years from the date of the dismissal of his application for leave to appeal against the sentence by a judge of the Court of Appeal. However, the Petitioner failed to give a reason for the failure to file the Petition within the stipulated time.

#### **APPLICATION FOR ENLARGEMENT OF TIME**

9. In the case of *Kumar v State; Sinu v State [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012)* the Supreme Court stated;

*“Appellate courts examine five factors by way of a principled approach to such applications. These factors are:*

- (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 courts consideration.*
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
- (v) If the time is enlarged, will the respondent be unfairly prejudiced?”*

***(a) The reason for the failure to file within time.***

10. The Petitioner has not given any reasons for the delay in filing this application. Therefore, during the hearing he was questioned by the court as to why he failed to file an application for special leave to appeal in time, and the answer was that he expected to succeed in his appeal against the conviction. This cannot be accepted this as a plausible explanation for the failure to file the application in time.

***(b) The length of the delay.***

11. In considering an application for enlargement of time, the length of delay plays a vital role in deciding the application. In the case of *The Queen v Brown (1963) SASR 190 at 191* it was held;

*“The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that there is a question which justifies serious consideration.”*

12. Taking into consideration the relevant law and the explanation given by the Appellant for the delay, I hold that the Appellant has failed to justify the delay.

***(c) Whether there is a ground of merit justifying the appellate courts consideration ?***

13. In order to consider whether the application of the Petitioner has any merit I will now consider the facts of this application.
14. The Petitioner was convicted of two counts of murder contrary to sections 199 and 200 of the Penal Code and imposed two sentences of life imprisonment with a non-parole period of 14 years in respect of each count.
15. Being aggrieved by the said conviction and the sentence imposed by the High Court the Petitioner has preferred an application to the Court of Appeal for leave to appeal against the conviction and sentence. The said application contained eleven grounds of appeal against the conviction and two grounds of appeal against the sentence.
16. The grounds of appeal urged in the Court of Appeal included the following;
- (i) that the trial judge erred in law in deciding the principles of joint enterprise,
  - (ii) that the sentence imposed by the trial court was too harsh and excessive, and
  - (iii) that a grave miscarriage of justice has been occasioned.

17. A Single Judge of the Court of Appeal having considered the said application inter-alia held;

“In relation to sentence, the Appellant claims that the sentence of life imprisonment was harsh and excessive. Under section 21 ( 1 ) ( c ) of the Act, a person convicted in the High Court can seek leave to appeal against sentence, unless the sentence is one fixed by law. The sentence for a person convicted of murder is fixed by law and is life imprisonment. Even if the fixing of a non-parole term is appealable, it is clear from the sentencing judgement that the learned trial judge has exercised his discretion according to sentencing principles. There is no error of law and the application for leave to appeal against sentence is dismissed pursuant to section 35 (2) of the Act.

Accordingly, the Petitioner’s application for leave to appeal against sentence was dismissed on the 14<sup>th</sup> of August, 2013. However, leave to appeal was granted against the conviction on the grounds relating to joint enterprise.”

18. Thereafter, the Court of Appeal heard the appeal of the Petitioner with regard to the said conviction and dismissed the same on the 5<sup>th</sup> of October, 2015. Being aggrieved by the said judgement of the Court of Appeal the Petitioner appealed to the Supreme Court. However, the Appellant did not seek special leave to appeal against the said dismissal of his leave to appeal application against the sentence.
19. After hearing the parties the Supreme Court dismissed the said appeal preferred against the conviction on the 4<sup>th</sup> of August, 2016.
20. The present Petition has been filed by the Petitioner in the Supreme Court against the decision of the Judge of the Court of Appeal, where granting of leave to appeal to the Court of Appeal against the sentence was dismissed on the 14<sup>th</sup> of August, 2013.
21. The Petitioner confined his argument only for imposing a sentence for life. Thus, I will

confine my judgement only in relation to the said question of law. In the instant petition the Petitioner had pleaded;

- (i) that under the Crimes Decree imprisonment for murder is no longer mandatory. Therefore, the sentence is no longer fixed by law. Anyone found guilty for murder may not be sentenced to imprisonment for life. Penalties prescribed in the Crimes Decree are the maximum sentences only. "Penalty" means the maximum penalty which may be determined and imposed by a Court (in accordance with the Sentencing and Penalties Decree 2009) in relation to the offence for which the penalty is prescribed in the Decree,
- (ii) that sections 82 and 237 of the Crimes Decree empower courts to impose a life sentence. However, section 82 is discretionary but section 237 is mandatory. Therefore, section 82 can be invoked by court when sentencing for murder which is discretionary,
- (iii) that he was charged under Section 199 and 200 of the Penal Code but the law was changed during the pendency of the trial,
- (iv) that he should have been given the benefit by applying section 82 of the Crimes Decree when sentencing for murder, and
- (v) that his co-accused confessed to killing two Indo –Fijians in the course of robbery.

22. In response it was submitted on behalf of the Respondents;

- (i) that following a trial in the High Court, the Petitioner was convicted of two counts of murder contrary to Sections 199 and 200 of the Penal Code. On 6 October 2011, he was sentenced to life imprisonment with a non-parole period of 14 years,
- (ii) that the Petitioner was granted leave to appeal against the conviction on grounds related to joint enterprise and his appeal against sentence was dismissed by a single judge of the Court of Appeal under section 35(2) of the Court of Appeal Act ("the sentence dismissal") on the 14<sup>th</sup> of August, 2013,

- (iii) that the Full Court dismissed the Petitioner's appeal against conviction on the 2<sup>nd</sup> of October 2015,
- (iv) that the Supreme Court refused the Petitioners' application for special leave to appeal against his conviction. The Petitioner did not, at that time, seek special leave to appeal against the sentence dismissal on the 4<sup>th</sup> August, of 2016,
- (v) the Petitioner has now sought an enlargement of time to appeal against the said decision of the judge of the Court of Appeal. The present application for enlargement of time is nearly three (3) years out of time as he has filed this application on the 18 August 2016,
- (vi) that the Petitioner's grounds of appeal are set out in his letter dated 18 August 2016. They appear to be based on the misconception that under the Crimes Act the penalty of life imprisonment for murder is no longer mandatory,
- (vii) that under section 237 Crimes Act the penalty for murder is a mandatory sentence of imprisonment for life with judicial discretion to set a minimum term to be served before a pardon may be considered, and
- (viii) that the Petitioner maintains in his core submission that under the Crimes Act, life imprisonment is the maximum penalty for murder.

### ***Court of Appeal Act***

23. Section 21 of the Court of Appeal Act stipulates the right of appeal in criminal cases. Section 21A( 1 ) states;

*“21. (1) A person convicted on a trial held before the [High Court] may appeal under this Part to the Court of Appeal –*

*(a) against his conviction on any ground of appeal which involves a question of law alone;*

*(b) with the leave of the Court of Appeal or upon a certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of*

*fact alone or a question of mixed law and fact or any other ground of appeal and;*

*(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law."[emphasis added ]*

24. As the present Petition relates to imposing a sentence it is necessary to consider the right of the Appellant to appeal against the sentence imposed on him. In this case the Petitioner was charged on two counts of murder contrary to sections 199 and 200 of the Penal Code. At the trial the Petitioner was convicted for both counts and imposed two sentences for life imprisonment with a non-parole period of 14 years.
25. The question of law that needs to be determined in this appeal is whether the learned trial judge erred in law by imposing a sentence for life.
26. It is important to note that at the time the proceedings were instituted against the Petitioner in the High Court the Penal Code was in operation. In fact as stated above the Petitioner was charged under the Penal Code. However, the Penal Code was repealed and the Crimes Decree was introduced during the trial in the High Court.
27. Section 199 of the Penal Code deals with the offence of murder.

It states;

*"(1) Any person who of malice aforethought caused the death of another person by an unlawful act or omission is guilty of murder .*

*Provided that shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other.*

*(2) Where it is shown that a person charged with the murder of another killed the other, it shall be for the defence to prove that the person charged was acting in pursuance of a suicide pact between him and the other.*



*(3)For the purposes of this section 'suicide pact' means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.*"[emphasis added ]

28. Sections 200 and 201 of the Penal Code set out the Punishments for murder and manslaughter respectively
29. Section 200 of the Penal Code states; "*Any person convicted of murder shall be sentenced to imprisonment for life.*"
30. Section 201 of the Penal Code stipulates that;  
*"Any person who commits the felony of manslaughter is liable to imprisonment for life."*
31. It is pertinent to note that though the said penal sections carry the sentence of life imprisonment, the said two sections have two different wordings for penalties. The same words "liable to" has been used in section 28 ( 2 ) of the Penal Code too. Section 28 ( 2 ) of the Penal Code states;  
*"A person liable to imprisonment for life or any other period may be sentenced for any shorter term." [emphasis added]*
32. The Petitioner also drew the attention of court to section 33 of the Penal Code in support of his argument. The said section states;  
*"Where an offence in any written law prescribes a maximum term of imprisonment of ten years or more, including life imprisonment, any court passing sentence for such offence may fix the minimum period which the court considers the convicted person must serve."*

33. The Petitioner argued that imposing a sentence for life imprisonment for murder is not mandatory, but directory. The Petitioner drew the attention of court to section 28 (2) of the Penal Code which states “A person *liable to imprisonment for life* or any other period may be sentenced for any shorter term.”
34. Having drawn the attention of court to the said section, the Petitioner argued that even for the offence of murder, a sentencing judge has the discretion to impose a shorter term instead of imprisonment for life. He further, submitted that the sentencing judge has an option to impose a sentence either under section 28 (2) or section 200.
35. A careful analysis of section 199 of the Penal Code shows that the said section contains two separate and distinct offences. i.e. murder and manslaughter. However, whilst section 200 stipulates the penalty for murder, section 201 stipulates the penalty for manslaughter. Further, the penalty stipulated in section 200 is mandatory but the penalty imposed in section 201 is directory because of the use of the words “is liable” in that section.
36. Another similar instance is found in the penalty for the offence of Rape. Section 150 of the Penal Code states;
- “Any person who commits the offence of rape is liable to imprisonment for life, with or without corporal punishment.”*
37. Whilst section 200 has the word “shall”, section 201 contains words “is liable”. The courts have over and over had interpreted the word “shall” as a mandatory provision. However, the words “is liable” means not mandatory but directory.
38. In any event taking into consideration of the structure of the Penal Code and the fact that section 200 has a specific penalty for murder, I am of the opinion that it is mandatory to impose a sentence of imprisonment for life for murder and that the said sentence is a sentence fixed by law.

39. Therefore, I hold that the Appellant cannot maintain this appeal in terms and under section 21 (1) (c) of the Court of Appeal Act. Further, the order of single judge of the Court of Appeal is in accordance with the law.

40. Section 237 of the Crime Decree, 2009 states;

*“A person commits an indictable offence if—*

*(a) the person engages in conduct; and*

*(b) the conduct causes the death of another person; and*

*(c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.*

*Penalty — **Mandatory** sentence of Imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered.” [emphasis added]*

41. It is interesting to note that the word “mandatory” used in the aforementioned section is not used in section 200 of the Penal Code and the legislature in its wisdom has included the word “mandatory” when enacting the Crimes Decree. I am of the view that the intention of the legislature would have been to avoid any ambiguity in the interpretation of the said section with regard to the question whether the sentence for murder is mandatory or directory.

#### ***Savings Provisions in the Crimes Decree***

42. Section 392 of the Crimes Decree, 2009 states;

*“(1) Nothing in this Decree affects the validity of any court proceedings for an offence under the Penal Code which has been commenced or conducted prior to the commencement of the Decree.*

*(2) When imposing sentences for any offence under the Penal Code which was committed prior to the commencement of this Decree, the court*

*shall apply the penalties prescribed for that offence by the Penal Code.*"  
[emphasis added ]

### ***Transitional Provisions in the Crimes Decree***

43. Section 393 ( 1 ) of the Crimes Decree which is the transitional provision states;

*"for all purposes associated with the application of section of section 392, the Penal Code shall still apply to any offence committed against the Penal Code prior to the commencement of this Decree, and for the purpose of the proceedings relating to such offences the Penal Code shall be deemed to be still in force."*  
[emphasis added ]

44. Therefore, I am of the opinion that the learned trial judge who imposed the sentence has complied with sections 392 and 393 of the Crimes Decree, 2009 and imposed a sentence of imprisonment for life. Further, section 237 of the Crime Decree, 2009 has no application to the instant case.

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

45. In this case the Petitioner was convicted of two counts of murder and imposed two sentences of life imprisonment for life. As stated above the only sentence that can be passed on a person convicted for murder is imprisonment for life. Thus, I am of the opinion that this appeal cannot succeed.

*(e) If the time is enlarged, will the respondent be unfairly prejudiced ?*

46. As stated above there is no merit in this application and in such circumstances the question of entertaining an application for enlarging of time will not arise. Therefore, if the application of the Petitioner is allowed undoubtedly the Respondent will be unfairly prejudiced.

***Conclusion***

47. In view of the fact that the grounds urged for grant of special leave to appeal are devoid of merit, the grant of enlargement of time for the Petitioner to pursue this application for special leave to appeal would be an exercise of futility.

48. Moreover, there is no question of general legal importance or a substantial question of principle affecting the administration of criminal justice involved in this application. Further, there is no miscarriage of justice caused to the Petitioner.

49. Further, as discussed above, the Petitioner failed to meet the criteria set out in section 7 (2) of the Supreme Court Act.

50. Accordingly, the application for enlargement of time is refused and the Petition is dismissed.

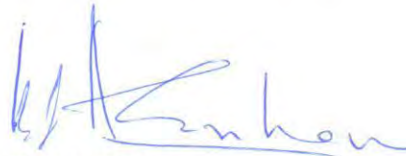
51. However, I am of the opinion that like any other prisoner the Petitioner is entitled to petition under section 119 of the Constitution seeking the President exercise a power of mercy by granting a free or conditional pardon or remitting all or a part of a punishment. Therefore the right to petition the Mercy Commission is open to any person convicted of murder.

***Orders of the Court:***

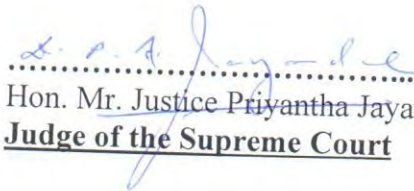
1. Application for enlargement of time is refused,
2. Application is dismissed, and
3. Sentence imposed on the Petitioner will stand



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



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



.....  
Hon. Mr. Justice Priyantha Jayawardena  
**Judge of the Supreme Court**

**Solicitors:**

Office of the Legal Aid Commission for the Petitioner  
Office of the Director of Public Prosecutions for the Respondent.