IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0006 of 2023
[Court of Appeal No. AAU 137 of 2017]

BETWEEN	:	**LIVAI LINO**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Justice William Calanchini, Judge of the Supreme Court** **The Hon. Justice Lowell Goddard, Judge of the Supreme Court** **The Hon. Justice William Young, Judge of the Supreme Court**
Counsel	:	**Petitioner in person** **Ms. U. Ratukalou for the Respondent**
Date of Hearing	:	**09 August 2024**
Date of Judgment	:	**29 October 2024**

JUDGMENT

Calanchini, J

1. I have read in draft form the judgment of Goddard, J and agree with the proposed orders and her reasons.

Goddard, J

Introduction

2. The petitioner was tried in August 2017 on one count of murder before a trial judge and three assessors. The defence accepted the petitioner had caused the death of the victim by stabbing him in the right side of his chest with a kitchen knife. The issues for determination were whether he had intended to cause the victim's death or had been reckless in causing his death; or whether, on the balance of probabilities, he was mentally impaired at the time and therefore not guilty of criminal offending (section 28(1) Crimes Act 2009).

3. An agreed summary of facts was produced which set out in detail the sequence of events. Only two witnesses were called by the State to give viva voce evidence at the trial: the investigating police officer; and Dr Biukoto, a consultant psychiatrist and medical superintendent of St Giles Hospital. The petitioner who suffered from schizophrenia had been a patient at St Giles from time to time since first being diagnosed with the illness in 2001. A previous admission to St Giles in 2010 had resulted from an earlier stabbing incident. The petitioner was prescribed medication to manage his illness but had a history of neglecting to take this.

4. At the conclusion of the trial, the assessors returned a unanimous opinion of guilty as charged and a conviction was entered by the Judge to that effect. There is no transcript of the hearing and only the Judge's notes are available. It is therefore difficult to discern with exactitude how the defence of mental impairment emerged or was developed during the trial.

5. On 22 August 2017, the petitioner was sentenced to mandatory life imprisonment, to serve 17 years before his eligibility for pardon may be considered.

Section 28 Crimes Act 2009

6. Section 28(1) of the Crimes Act 2009 defines mental impairment as follows:

> *"A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that —*

(a) the person did not know the nature and quality of the conduct; or

(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

(c) the person was unable to control the conduct.

(2) The question whether the person was suffering from a mental impairment is one of fact.

(3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displace"28. (1) A person is not criminally responsible for an offence if, at the time of d if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.

.....

(5) The court must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment."

(6) A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.

(7) If the court is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.

(8) In this section –
mental impairment included senility, intellectual disability, mental illness, brain damage and severe personality disorder.

(9) The reference in subsection (8) to mental illness is a reference to an underlying pathological infirmity of the mind (whether of long or short duration and whether permanent or temporary) but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli."

Brief chronology

7. The fatal incident occurred on 21 June 2013, almost four years before the trial of the petitioner took place. The reason for this delay was the necessity to establish whether, in the first

instance, the petitioner was fit to instruct counsel and enter a plea; and thereafter the need to monitor his mental health and to psychiatrically evaluate him.

8. At around 3.30pm on the day, the petitioner went to the house where he was staying and told a member of the household that an Indian man had chased him from the road. He took a silver handled knife from the kitchen table and tucked it into the back of his clothing. He said he was going to use it to cut onions. He then left the house and walked to the local shop where the victim was standing outside. Witnesses saw him approach the victim and say something to him before he suddenly pulled out the knife and stabbed the victim in the right side of his chest. The petitioner then ran away, disposing of the detached silver handle of the knife as he went. He returned to the scene sometime later because he wanted to explain his side of things to the police because he feared arrest.

9. A bystander rushed the victim to the accident and emergency unit in his vehicle. A duty nurse who attended to the victim said he told her he had been stabbed by a Fijian man who lived in Namotomoto Village and was mentally ill. He said the mentally ill man had stabbed him "*all of a sudden*" and after stabbing him had asked "*why you were laughing at me?"*.

10. The postmortem results recorded a single stabbing of considerable force with the blade of the knife penetrating the victim's chest wall and right lung.

11. The day after the incident the petitioner was caution interviewed at Nadi Police Station. At interview he was said to be very co-operative and presented as well educated and was not violent. He gave logical answers to the questions he was asked. This interview will be referred to later in more detail.

12. The following day the petitioner was sent for a medical examination. The examining doctor found him to be mentally unsound but oriented to time, person and place. The petitioner told the doctor he had stabbed an Indian man on Friday at 3.30pm and said he had done it for no reason. The doctor recommended he be sent for follow-up at St Giles Hospital.

The psychiatric reports

13. Dr Biukoto, in his evidence at trial, produced three reports of forensic interviews carried out with the petitioner following the fatal incident. These reports were dated 25 September 2013, 20 August 2014 and 13 April 2015.

First report: 25 September 2013

14. The first report dated 25 September 2013, recorded the observations and clinical findings by Dr Sefanaia Qaloewai, who interviewed the petitioner when he was first admitted to St Giles after the fatal incident; and Dr Biukoto's subsequent observations of the petitioner during a follow up interview a month later. Dr Biukoto's notes of these first two interviews record as follows:

> *"On interview with Dr Qaloewai, the Accused stated that the victim bothered him. The Accused stated that others in the village bothered him in a similar manner. The Accused did not clarify his statements. The Accused stated ignorance of name of victim. The Accused stated he used a kitchen knife with intent to injure the person. He did not express any intent to cause death. He did not show any sign of remorse over death of the victim. He showed a lack of concern and anxiety over his legal circumstances. He denied hearing commanding voices around time of alleged offence. The Accused was alert and oriented to time, and person. The Accused cooperated with interview and did not show agitated or aggressive behaviour.*
>
> *On interview with Dr Biukoto, the Accused said that he allegedly stabbed a male Fijian of Indian ethnicity ('kai Idia') at the store at Namotomoto. He stated the alleged stabbing occurred on a Friday in the afternoon, outside in front of the store. He stated a kitchen knife was used to stab the male. He stated he met the male at the bus stop. He stated he looked for a knife with intent to stab the person. He denied intent to cause death. He took the knife from a home belonging to a family member. The Accused claimed the male "marked" him, so he followed the male to the store. The Accused did not clarify meaning of his statement. He claimed the people of Namotomoto (i.e. the i-Taukei) and Fijians of Indian ethnicity often teased him. The Accused denied influence of delusions or hallucinations. The Accused showed a lack of concern over his legal circumstances. The Accused was alert and oriented to time, and person."*

15. Dr Biukoto's findings and recommendations at the time of this first report were:

*"**Mental State Examination***

He appeared alert. He appeared calm. He walked into the interview area with a normal gait. He did not display any odd or bizarre behaviour. He waited calmly during questions posed by interviewer. He remained seated in one spot throughout the interview. He displayed acute awareness of surroundings. He showed little interest in the interview. He did not appear concerned about his legal status.

Medical Assessment

The accused has a personal history of Schizophrenia. He also has a personal history of not taking medications prescribed by doctors to keep him mentally stable.

Medico-Legal Assessment

On the issue of his knowledge of his actions at the time of the alleged offence, in my opinion it is more likely than not that the Accused was aware of his actions and understood the health consequences of the act of stabbing another person.

It is possible that he was acting under the influence of persecutory thoughts (i.e. others persecuted him). However, it is not possible to ascertain whether this was based on reality or mental illness, due to his lack of clarification of his thoughts.

On the issue of his fitness to plead, in my opinion, the Accused does not have the capacity to advise his lawyer in his defence.

Recommendation

The Accused does not express any emotional concern over his legal circumstances and the health status of the victim of stabbing. The Accused shows more concern about returning to his village. The Accused does not take medications on his own accord. Family members appear to show low interest in his adherence to prescribed medications."

Second Report: 20 August 2014

16. In the second report dated 20 August 2014, recorded after interviewing the petitioner at Natabua Correctional Facility, Dr Biukoto again found the petitioner to be alert and fully oriented to time, place and person and aware of his situation. The petitioner expressed remorse for his actions and said at the time of the incident he had stopped taking his prescribed medications, had started drinking alcohol with villagers and had drunk yaqona until the early hours of that morning. The petitioner said he was also suffering from persecutory thoughts at the time and on the night before he stabbed the victim, he dreamt the victim was a source of his persecution. He denied having any current perceptual distortions or delusions and did not express any persecutory thoughts during the interview.

17. Dr Biukoto's findings and recommendations following this interview were:

> *"**Medical Assessment***
>
> *The Defendant currently does not have any evidence of mental illness. However, the Defendant needs to continue treatment in the form of medications to ensure he remains free of symptoms.*
>
> ***Medico-legal Assessment***
>
> *In my opinion, the Defendant currently has the capacity to participate in legal proceedings and advise his lawyer. He is assessed as fit to plead.*
>
> *Though the original report indicated an inability to comment on his state of mind at the time of alleged offence, recent information provided in response to questions by the accused indicated that he was most likely acting under the influence of mental illness at the time of the alleged offence. I base this opinion on his medical history that indicates that accused becomes mentally ill when he stops taking medications as prescribed. Around the time of the offence, he was not taking medications and indulging in behaviours (alcohol use, sleep deprivation) that increased the risk of his becoming ill again.*
>
> ***Recommendations***
>
> *I recommend that the accused if discharged from incarceration is placed on a Community Treatment Order (CTO) (Mental Health Decree 2010) under the joint supervision of Ministry of Health officials, based at Stress Management Ward Lautoka Hospital (Dr Victor Wasson), and the Fiji Police Force.*
>
> *I recommend that the accused if discharged from incarceration is transported to Stress Management Ward by a responsible agency or adult for arrangement of community treatment.*
>
> *The above measures are important to ensure he does not become a danger to others due to recurrence of mental illness, by ensuring adherence to prescribed treatment and early intervention when he becomes ill or reverts to substance (alcohol, yaqona) use."*

Third Report: 13 April 2015

18. Dr Biukoto's third report updated his previous interviews with the petitioner. His findings were again that the petitioner was alert and oriented to time, place and person when interviewed; that he was coherent, and he expressed remorse for his actions. His response to questions put to him about the event were recorded as follows:

> *"He stated that he walked from the village to the store and crossed the road behind the victim. He stood outside the shop with victim but did not talk with the victim.*

He felt a right sided pain over his head and shoulder. He attributed the cause of pain to persecution by the male and other villagers. He stated that every time he felt the pain; he know that a person was ridiculing him and persecuting him. He use the iTaukei words "vakalialia" (making like he is crazy) "qitotaki" (play around with him, in a derogatory sense) "cakavi tiko" (something is being done to him, in a persecutory sense). He wanted relief from the pain and walked to Bea's house and looked for a knife. He retrieved the knife from the kitchen table and returned to the shop. He walked to the male and stabbed him on his upper chest once and then ran to Namotomoto village and wandered around the bushes surrounding the village. He returned to the scene of the alleged offence as he stated he wanted to provide the police with his version of events. He stated that he ran away after the alleged stabbing as he feared arrest ("vesu") by others. He declined to state the intent of the alleged stabbing (i.e. to kill or to injure) except to state that he just wanted to stab to relieve his pain.

He expressed remorse over the incident and stated that he should have taken medications. He stated he stopped medications two months before the event.

Currently, he denied perceptual distortions or delusions. He did not express persecutory thoughts. He did not express any suicidal or homicidal thoughts or plans."

19. Dr Biukoto's medical assessment and medico-legal assessment following this third interview were:

*"**Medical Assessment***

The Defendant currently does not have any evidence of mental illness. He has remained free of illness.

However, the Defendant needs to continue treatment in the form of medications to ensure he remains free of symptoms.

Medico-legal Assessment

In my opinion, the Defendant currently has the capacity to participate in legal proceedings and advise his lawyer. He is assessed as fit to plead.

Accused was most likely acting under the influence of mental illness, such as persecutory delusions (false beliefs that others, even strangers, meant evil towards him) at the time of the alleged offence. <u>He appeared to have capacity of awareness of his actions based on consistency of recollection and goal orientated behavior leading to the alleged offence.</u>

Accused also appears to have an awareness of the negative view by society on the act of stabbing another person based on his act of running away to avoid capture and arrest. However, he appeared to have impaired logic as he returned to the scene to, in his words, provide police with a fair version (his version) of events."

20. Again, the doctor's recommendations were around ensuring long term measures to ensure the petitioner did not become a menace to others due to recurrence of his mental illness:

> *"**Recommendations***
>
> *...measures are important to ensure he does not become a danger to others due to recurrence of mental illness, by ensuring adherence to prescribed treatment and early intervention when he becomes ill or reverts to substance (alcohol, yaqona) use."*

The trial

21. The trial took place in August 2017, four years after the event.

22. As earlier recorded, only two witnesses were called to give viva voce evidence: the police officer who interviewed the petitioner and Dr Biukoto. All other witness statements were admitted by consent.

23. The police officer's evidence concerned the petitioner's caution statement, the essence of which was:

> *"Q40: Did anything you bring from that house?*
>
> *A: Yes.*
>
> *Q41: What did you bring?*
>
> *A: A kitchen knife with a wooden silver handle.*
>
> *Q43: Then what happened next?*
>
> *A: I came to Namotomoto shopping centre.*
>
> *Q44: What did you do?*
>
> *A: I stabbed then I ran away.*
>
> *Q45: Whom did you stab?*
>
> *A: One Indian man.*
>
> *Q45: Did you know this man?*
>
> *A: No.*
>
> *Q46: Which particular part of his body did you stab?*

A: His chest.

Q47: Where was the handle of the kitchen knife?

A: I threw it somewhere, I didn't know.

Q48: Why did you stab this Indian man?

A: Because I hate him.

Q54: Where did you go after?

A: I ran across the road towards Namotomoto village.

Q55: What did you take with you?

A: The handle of the kitchen knife.

Q56: What type was the handle?

A: It was silver type.

Q57: Where was the blade?

A: I didn't know.

Q58: Where was the handle you have taken it with you?

A: I threw it on the road side towards Namotomoto village.

Q59: Why did you stab this Indian man?

A: Because I hated him.

Q60: According to a witness he said that you demanded from him but he refused. What will you say about that?

A: No I didn't do it.

Q61: There must be a reason why you have done this. Can you tell me?

A: Refuse to answer.

Q62: After stabbing this man how did you enter Namotomoto village?

A: I ran.

Q63: Why did you run?

A: Because I knew I have injured him.

Q64: Did you know what had happened to this Indian man?

A: He is dead."

24. In giving his evidence in chief, Dr Biukoto produced his reports and said that in his opinion the petitioner:

> *"… was aware of his action at the time of the alleged offence. In all the reports (that is three now) I maintained that the accused was aware of the nature and quality of his conduct at the time of the alleged offences. In the first report, accused was not fit to plead. Second report, he was fit to plead. Third report, he was fit to plead.[emphasis added]*
>
> *We are aware that patients may fake mental illness. It is low in this case. The first report is the best indicator of the accused's state of mind at the time of the alleged offence."[emphasis added]*

25. When cross-examined the doctor said:

> *" …He did not express any intent to cause death. He knew that the act of inflicting injuries on others with a knife is not acceptable. He was suffering from schizophrenia. [emphasis added]*
>
> *…He was paranoid of others in the village doing harm to him. Response can vary between no response to violent reaction. He would be angry and annoyed. If he does not take his medication, he will become mentally ill. When he committed the offence, he was aware of the nature and quality of his conduct. He also at this time knew the conduct of stabbing someone with a knife is wrong. [emphasis added]*
>
> *…Based on what he said, he had delusional perception before he committed the stabbing."[emphasis added]*

26. In re-examination, the doctor expressed the conclusory view, relative to the wording of sections 28(1)(a)(b) and (c) of the Crimes Act, that the petitioner:

> *"…was aware of the nature and quality of the conduct. He knew the conduct was wrong. I am not sure on whether or not he can control his conduct."[emphasis added]*

27. From the Judge's note of the closing addresses of counsel it is evident that the prominent issue that went to the assessors for their opinion was the question of the petitioner's sanity at the material time.

28. Counsel for the State argued that the petitioner was sane at the time and discussed the provisions of section 28, pointing out that the evidential burden of proving mental impairment on the balance of probabilities was on the accused. State counsel asked the assessors to

consider Dr Biukoto's evidence, which had covered section 28(1)(a) and (b) but not (c) of the Crimes Act and referred to the doctor as not having been sure about 28(1)(c).

29. Defence counsel in closing argued that the petitioner *"was not in the right state of mind"* and was *"mentally impaired at the time he stabbed the victim."* The petitioner *"hated the victim because others in the village were stealing his food",* he *"was not taking his medication, was drinking liquor and yaqona"*, he did not know the victim and *"he knew nature and quality of the conduct and knew it was wrong".*

The Judge's summing up

30. After traversing the provisions of section 28(1)(a)(b) and(c), the trial Judge directed the jury in the following manner:

> *"The question whether the person was suffering from a mental impairment is one of fact for you. 'Mental impairment', as a concept, encompasses various types of mental conditions. It includes 'senility, intellectual disability, mental illness, brain damage and severe personality disorder'. One could easily argue that any person having any type of 'mental illness', could escape criminal liability, even for an offence of murder, as in this case. However, the law does not give a blanket cover to people suffering from any type of mental illness to escape criminal liability.*
>
> *For the defence of 'mental impairment' to succeed, the defence must prove, on the balance of probabilities that: (1) the accused is suffering from a mental illness, at the material time; (2) the accused did not know the nature and quality of the conduct, at the material time; OR (3) the accused did not know the conduct was wrong; OR (4) the accused was unable to control the conduct. If the defence succeeds on the above, then the accused is not guilty of murder, because of mental impairment."*

31. After acknowledging Dr Biukoto's expertise, the Judge referred to the essence of his 3 written reports and to the State's submission that the doctor's opinions precluded a defence of mental impairment:

> *"The reports examined the accused's mental state at the time of the offending. According to Doctor Biukoto, the accused did know the nature and quality of his conduct at the time he stabbed the deceased, and well knew it was wrong. He said he was not sure on whether or not he can control his conduct at the time. According to the State, Doctor Biukoto's above opinions meant the defence of 'mental*

impairment' is not available to the defence. It is the State's argument that when the accused stabbed the deceased, at the material time, he intended to cause his death.

Alternatively, the State argued that when the accused stabbed the deceased in the right chest, at the material time, he was reckless in causing his death. Was the accused aware of a substantial risk that the deceased would die if he stabbed him in the right chest with a kitchen knife? Having regard to the circumstances known to him (i.e. he had in his possession a kitchen knife, the deceased was unaware of his plan to stab him and if the knife was used as a weapon, it will cause injuries), was it justifiable to take a risk by stabbing the deceased in the right chest? In my view, he was not justified in taking a risk of stabbing the deceased in the right chest. In any event, it is a matter entirely for you.

If you find, after considering the above that, the accused intended to cause the deceased's death by stabbing his right chest with a kitchen knife; or alternatively, that he was reckless in causing his death, then you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you."

32. Turning to the defence case, the Judge directed the assessors, that:

> *"Although the accused chose to remain silent and called no witnesses, in their closing submission they submitted that the accused was not guilty of murder, because when he stabbed the deceased at the material time, he was mentally impaired. On this point, you will have to carefully consider the evidence of Doctor Peni Biukoto and the contents of the three psychiatric reports he submitted on the accused. Doctor Biukoto was of the view that the accused, when he stabbed the deceased in the chest on 21 June 2013, was aware of the nature and quality of his conduct at the time and knew that the same was wrong. Doctor Biukoto was unsure whether or not he could control his conduct at the time. In terms of section 28 (1)(a) and (b) of the Crimes Act 2009, it would appear, given Doctor Biukoto's opinion, the defence of mental impairment was not available to the defence. How you treat Doctor Biukoto's opinion, is a matter entirely for you. If you accept his opinion, you will have to find the accused guilty as charged. If otherwise, you will have to consider the strength of the prosecution's case."*

33. The Judge concluded by directing:

> *"Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged."*

The assessor's opinion and the judgment

34. The assessors returned a unanimous opinion of guilty as charged. The Judge found their opinion not to be perverse and to be open on the evidence:

> *"On the evidence, I accept the three Assessor's guilty opinion. I accept that the accused, at the material time stabbed the deceased in the chest (conduct). The stabbing caused injuries to the deceased chest and lungs and body, resulting in excessive loss of blood, which lead to his death. I find that when he stabbed the deceased, he intended to cause his death. Alternatively, he was also reckless in causing the deceased's death.*
>
> *In my view, given Doctor Peni Biukoto's evidence, the accused was not mentally impaired at the material time. He knew what he was doing (that is stabbing the deceased) and he knew it was wrong.*
> *I accept the evidence of the Prosecution's two witnesses.*
>
> *Given the above, I agree with the Assessors unanimous guilty opinion. I find the accused guilty as charged and I convict him of murder accordingly."*

35. The petitioner was sentenced to mandatory life imprisonment with a minimum of seventeen years to be served before a pardon may be considered.

The appeal

36. Following the guilty verdict at trial, the petitioner filed a timely application for leave to appeal to the Court of Appeal. The matter came before a single judge of appeal on 1 August 2019 and on 27 November 2019 the petitioner was granted leave to appeal. The grounds of his application were that the trial judge had not adequately assessed and/or considered the defence of mental impairment under Section 28(1) Crimes Act. This was based on Dr Biukoto's evidence in re-examination at the trial which appeared to contradict statements in the doctor's written reports.

37. The appeal judge was of the view that such apparent discrepancies should be determined by the full Court of Appeal.

38. Before the full Court of Appeal, the petitioner's counsel argued that Dr Biukoto's response during re-examination "*I am not sure on whether or not he can control his conduct*" had

effectively displaced the presumption in section 28(3) and provided a legal basis for the defence of mental impairment under section 28(1)(c). Counsel submitted that should have been put to the assessors under directions from the trial judge. This had not happened and therefore the petitioner's right to a fair trial had been prejudiced.

39. In relation to that issue, the Court of Appeal said:

> *"[21] Taken alone in the narrow context of the apparent contradiction in Dr Biukoto's medical evidence there may be sufficient basis for the defence of mental impairment to be considered by the assessors and the trial judge. In reviewing the court record, it is noted that the trial judge did address the issue of mental impairment in summing up to the assessors."*

40. The Court of Appeal further noted that other relevant evidence had been adduced which reflected the petitioner's mental state proximate to the fatal event, such as the answers he gave in his caution interview the day after the event. The Court felt it had been open to the assessors to accept such evidence as sufficient to remove any doubt created by the apparent contradiction in Dr Biukoto's evidence and to reach the opinion they did. The Court observed that the assessors were not bound to accept the medical opinion or any part of it, and the totality of the evidence included all connected facts, as well as the statements given, including the appellant's own statement. In the Court's view, the assessors' finding of fact and the opinion they formed were properly based on the evidence adduced in Court and was therefore open to them.

41. The Court further found the argument that the trial judge had not given adequate weight to Dr Biukoto's somewhat equivocal statement in re-examination about section 28(1)(c) to be without merit. The doctor's statement that he was unsure if the petitioner were able to control his conduct at the material time had indicated only the possibility of mental impairment. The burden and standard of proof where a legal presumption exists, until and unless the contrary is proved, had placed the onus on the petitioner to displace the presumption on the balance of probabilities and the burden had not been discharged.

Overview of the law relevant to criminal responsibility

42. The issues that were left to the assessors and trial Judge for determination were whether the victim's death was the result of an intentional killing or a reckless act causing his death; or whether on the evidence there was the reasonable probability that he was mentally impaired at the time and therefore not criminally responsible in terms of section 28 Crimes Act. As is apparent from the notes made by the Judge of the closing addresses and his summing-up, the question of mental impairment had become the major focus.

43. The Judge did not direct the assessors on manslaughter as an alternative to intentional killing or recklessness and nor did he refer to that as a possible verdict in his judgment.

44. A separate legal consideration, which does not appear to have been raised by the defence at trial, was the possibility of a verdict under section 243 Crimes Act. This provides for a partial defence of diminished responsibility which, if successful, reduces murder to manslaughter. Such a verdict requires proof on the balance of probabilities based on medical evidence.

45. I will refer again briefly to the included and partial defences of manslaughter and diminished responsibility as possible trial outcomes at a later point.

The defence of mental impairment under Section 28 Crimes Act 2009

46. The starting point for analysis under section 28 is the facts, as required under section 28(2). I have set out the salient features of these in paragraphs 6 - 10 above.

47. A primary and established fact is that the petitioner suffers from schizophrenia, which is a lifelong mental illness or underlying mental infirmity within the definition of mental impairment in section 28 Crimes Act 2009 and within the definition of diminished responsibility in section 243 of the Act.

Sections 28(1)(a) and (b)

48. Doctor Biukoto's expert evidence was delivered in language that in general addressed the legal elements of section 28(1) and he employed the wording of the section in relating his clinical findings. After describing the petitioner's history, his apparent symptoms and his conduct in terms of sections 28(1)(a) and (b), Dr Biukoto's opinion was that the petitioner was aware of the nature and quality of his conduct at the time he stabbed the victim and he knew this conduct to be wrong.

49. In terms of section 28(1) (a), given Doctor Biukoto's evidence, there can be little doubt the petitioner was conscious of his action in stabbing the victim and that he retained a clear recollection of the incident and his motivation for it.

50. The rather different question is whether, at the time of the incident, the petitioner's perception of the nature of what he was doing was so affected by his underlying mental infirmity that he could not know that his conduct was wrong within the meaning of the test of wrongful knowledge in section 28(1)(b).

51. Relevant knowledge under the subsection, is not limited simply to knowledge that an action is wrong in law. Rather, the section provides for a qualified and expanded test of knowledge of wrongful conduct based on an ability to reason and to perceive, such as might be expected of a reasonable (rational) member of society. The essential components of the test are:

> *"… at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that —*
>
> *(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong)."*

52. The language of the test in is taken from the following passage in the summing up of Dixon J in a 1933 Australian case[1], subsequently accepted in Australia and New Zealand as explaining the effect of the M'Naghten rule and its statutory equivalents:

[1] R v Porter (1933) 55 CLR 182

> *"We are not dealing with right or wrong in the abstract. The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by "wrong"? What is meant by wrong is wrong having regard to the everyday standards of reasonable people."*

53. In the later decision of *Stapleton v. R*[2] , Dixon CJ, approved the "*moral wrong*" concept after reviewing the opinions in *M'Naghten's* case[3], concluding they sanctioned a direction to a jury that "*wrong*" means not merely contrary to law but also contrary to the generally accepted standards of reasonable people.

54. In the present case it seems the petitioner realised his action was wrong in law, given his previous experience of stabbing someone and being sent to St Giles'. That was also implicit in his fleeing from the scene to avoid arrest but then returning to the scene to explain himself to the police (actions described by Dr Biukoto as demonstrating *"impaired logic*"). However, while the petitioner may have understood the health consequences of stabbing someone with a knife, and in Dr Biukoto's words "*knew that inflicting injuries on others with a knife is not acceptable"*, his basic concepts of wrongfulness fell far short of the expanded statutory test in section 28(1)(b).

55. Dr Biukoto was not asked in evidence and nor did he elaborate on or express an opinion about what the petitioner's probable perception of his wrongful conduct was in terms of the expanded test in section 28(1)(b).

56. However, when that expanded test is applied to Dr Buikoto's evidence, it gives rise to the probability that, at the time of stabbing the victim, the petitioner was unable to reason with a moderate degree of sense and composure, as to whether such an act would be perceived by reasonable people to be wrong. In the doctor's opinion, the petitioner was most likely acting

[2] (1952), 86 C.L.R. 358
[3] (1843), 10 Cl. & Fin. 200

under the influence of schizophrenia at the time, based on his medical history of becoming mentally ill when not taking his medication and when indulging in risky behaviours such as alcohol use and sleep deprivation. By his own account he was also suffering from delusions and paranoia at the time. He was assessed as unfit to plead and without capacity to instruct a lawyer in his defence.

57. When this evidence is considered it must lead to a finding of fact that, on the balance of probabilities, the petitioner was mentally impaired at the time of stabbing the victim. While he appreciated that his act was wrong in a legal sense, his illness had rendered him unable to reason with a moderate degree of sense and composure as to whether reasonable people would have perceived his action to be wrong.

58. On that basis, a special verdict of not guilty because of mental impairment would have been the appropriate trial outcome. Such a verdict did not eventuate because Dr Buikoto's evidence was not directed to the expanded legal test under section 28(1)(b) and the Judge did not determine the question of probable mental impairment by reference to the correct legal test. On both bases it must be concluded that the trial miscarried and the resultant verdict was unsafe.

Section 28(1)(c)

59. It was only at the end of the Dr Biukoto's evidence and while he was being re-examined, that he made the equivocal statement, in terms of section 28(1)(c): *"I am not sure on whether or not he can control his conduct".* As seems clear from the closing statements of counsel and the Judge's summing-up, this sub-section consequentially assumed some prominence in the assessors' deliberations and in the judgment.

60. Professor Colvin in his Commentary from Criminal Law of Fiji, records an absence of any parallel to the defence at common law, whilst noting that it has been introduced in some Australian jurisdictions where two different interpretations have been applied. The first and more restrictive approach has interpreted the inability to control one's conduct as a state in

which a person was completely unaware of what they were doing; essentially, the person was acting as an automaton.

61. The second and less restrictive approach, concerns an insanity defence of irresistible impulse, which again does not require proof of motive but simply of an impulsive decision to engage in conduct. Professor Colvin described this as a more radical interpretation in "that it permits the insanity defence in cases of 'irresistible impulse', where a person has experienced an overwhelming desire to do something and has been unable to exercise restraint" ...

62. In some USA jurisdictions the irresistible impulse test is applied to an accused who may know the nature and quality of the offence and be aware that it is wrong but who may be irresistibly driven to commit the act by an overpowering impulse resulting from a defective mental condition.

63. Although each of the three limbs of section 28(1) are phrased in the alternative, it is logical to conclude there may be a distinct overlap between the workings of a mentally impaired mind and action taken by the person consequent to disordered thought processes. That seems to have been the situation in the petitioner's case. Therefore, the equivocal nature of Dr Biukoto's answer in re-examination *"I am not sure on whether or not he can control his conduct"* is understandable. This brief statement was not explored any further by counsel, so far as the Judge's notes disclose, and no amplification or clarification of what the doctor meant in terms of inability to control conduct is recorded. However, that is of no consequence and does not detract from the finding of mental impairment on the balance of probabilities under section 28(1)(b) Crimes Act.

Section 243 Diminished responsibility

64. As earlier noted, section 243 Crimes Act, although not raised by the defence at trial, provides for a partial defence of diminished responsibility where an accused person who killed another was in such a state of abnormality of mind that it had substantially impaired their capacity to understand or control their actions or to know their actions were wrong. In such a case, if proven, the person is liable to be convicted of manslaughter only. The onus is on the defence

to prove on the balance of probabilities that such an "*underlying pathological infirmity of mind*" was in existence:

65. The threshold criteria of a "*substantial impairment"* of one of the three mental capacities listed in section 243 provides a less stringent threshold than the criteria of mental impairment under section 28, as it recognises a reduced culpability arising from a range of disorders not amounting to insanity. Such abnormalities do not absolve from criminal responsibility and do not entitle an offender to a special verdict of not guilty because of mental impairment.

66. It is not known whether defence counsel considered raising the partial defence of diminished responsibility in the petitioner's case and, if so, whether it would have sat comfortably as an alternative to section 28. In any event, for the reasons given above, the evidence as adduced supported a finding on the balance of probabilities that the petitioner was mentally impaired in terms of section 28(1)(b) because of his underlying illness of schizophrenia and was thereby entitled to a special verdict.

Manslaughter as an alternative to murder

67. At the commencement of the trial, counsel for the petitioner advised the Court that the defence position was lack of intention to cause death and lack of awareness of the risk of death. This approach in opening was not premised on any mental impairment, simply on lack of murderous intent. On that basis and in terms of section 28(6) Crimes Act, the assessment of the petitioner's criminal responsibility in relation to the reduced verdict of manslaughter, had to be determined without regard to the impact of schizophrenia on his cognitive abilities,

68. Although he was questioned about his motive for the stabbing on several occasions and over a considerable period of time, the petitioner never expressed or acknowledged any intention to kill the victim. In his third interview with Dr Biukoto, when asked quite directly about this, he simply said he had wanted to stab to relieve the pain over the right side of his head and shoulder caused by persons who were ridiculing and persecuting him.

69. However, the selection and targeting of the victim, the arming of himself with a lethal weapon and the infliction of a violent stab wound in a vital area of the victim's body would have

precluded a finding of manslaughter based simply on a lack of murderous intent or reckless disregard to the obvious risk.

Jurisdiction of the Supreme Court

70. The matters raised in this petition are of a serious and important nature in terms of the criteria in section 79(2) of the Supreme Court Act No.14 of 1998 and have required the consideration of the Supreme Court, otherwise a substantial and grave injustice may have occurred.

The verdict is unsound

71. The question that went to the assessors and was determined by the Judge was simply whether the petitioner knew his conduct to have been wrong. The guilty verdict was reached in the absence of any consideration of the qualifying features of the legal test of wrongful knowledge provided for in section 28(1)(b) Crimes Act. On that basis the trial miscarried, and the verdict was unsound as it was against the weight of the credible evidence taken as a whole.

72. However, although the correct legal test was not addressed at the trial the evidence supported a special verdict of not guilty because of mental impairment on the balance of probabilities under sections 28(5) and having regard to 105(1)(b) Criminal Procedure Act. In considering the position as it now is, given the weight of evidence and the considerable elapse of time since the fatal event and the trial, the interests of justice are now most appropriately to be served by quashing the verdict of guilty and substituting in lieu a special verdict of not guilty because of mental impairment pursuant to sections 24(3) of the Court of Appeal Act and section 14 of the Supreme Court Act.

73. Accordingly, the conviction for murder will be quashed and a special verdict of not guilty because of mental impairment entered in lieu. A further consequential order as to the petitioner's safe custody pending assessment and determination of his appropriate place of confinement will follow.

74. The orders that follow this judgment are made pursuant to section 24(3) Court of Appeal Act; section 98(5)(b) of the Constitution of the Republic of Fiji; sections 7(1)(a), (b) and (c) and 7(2)(c) of the Supreme Court Act; and section 105(2)(a) Criminal Procedure Act 2009.

Young, J

Concurrence with the result

75. I agree with the orders proposed by Goddard J. I will explain in my own words why this is so.

Section 28(1)(b) of the Crimes Act 2009

76. Section 28(1)(b) of the Crimes Act 2009 provides:

> (1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that —
>
> …
>
> (b) the person did not know that the conduct was wrong *(that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong)* … .

I will refer to the words I have emphasised as "the expanded wording" and the approach that they require as "the expanded approach".

77. Neither Dr Biukoto in his evidence nor the Judge when summing up to the assessors and in his judgment convicting the petitioner referred to the expanded wording. Instead, they focused simply on whether the petitioner had known that his conduct was wrong. In issue now is whether this matters and, if so, what this Court should do about it.

Contextualising s28(1)(b)

78. As Goddard J's judgment shows, the expanded wording that appears in s 28(1)(b) was taken from the summing up of the then Dixon J in *R v Porter*.[4] Current Australian and New Zealand practice is to apply an approach to insanity defences using language that is practically the same as the expanded wording in s 28(1)(b).[5] This means that there are a number of Australian and New Zealand cases that demonstrate how the expanded approach works in practice.

75. On the expanded approach, simple awareness on the part of the defendant that the conduct in question would be regarded as wrong by other people does not preclude reliance on a defence of mental impairment (or insanity). Most commonly, this arises in situations where defendants knew that the conduct would be regarded as wrong by others but did not see themselves as subject to normal moral constraints. An example is the New Zealand case *R v MacMillan*.[6] In that case, the defendant had probably known that others would regard his actions as wrong. But because of his psychiatric illness he did not see his actions as wrong for him. His insanity defence succeeded on appeal.

76. I do not see the expanded wording approach as confined to circumstances where defendants thought themselves not subject normal moral standards. Rather I see cases such as *MacMillan* exemplifying a broader principle well-captured in a leading New Zealand criminal law text in this way:[7]

> The interpretation provided by *R v MacMillan*, … reflected sound common sense. A defendant should not be convicted of a crime where his mind is so disordered that he is unable to make moral judgments which in sane people enable them to live socially integrated lives and to choose conduct which conforms with both moral and legal norms. It is that capacity which is lacking in an "insane" person.

[4] *R v Porter* (1933) 55 CLR 182.
[5] See *Stapleton v The Queen* (1952) 86 CLR 358 (HCA) and *R v MacMillan* **[**1966] NZLR 616 (CA).
[6] See *MacMillan*, fn 5, above.
[7] Stephanie Bishop and others, *Garrow and Turkington's Criminal Law in New Zealand*, (online ed, LexisNexis) at [CRI23.7].

Section 28(1)(b) and the facts of this case

79. Despite not having directed his mind to the expanded wording, Dr Biukoto offered opinions that provide some support for the view that the petitioner was mentally impaired within the meaning s 28(1)(b).

80. In his first report, Dr Biukoto said:

> On the issue of his knowledge of his actions at the time of the alleged offence, in my opinion it is more likely than not that the Accused was aware of his actions and understood the health consequences of the act of stabbing another person.
>
> It is possible that he was acting under the influence of persecutory thoughts (i.e. others persecuted him). However, it is not possible to ascertain whether this was based on reality or mental illness, due to his lack of clarification of his thoughts.

As to this, it is now clear that the persecutory thoughts that affected the petitioner were not based on reality. In other words, they were delusional.

77. In his second report, Dr Biukoto commented:

> … recent information provided in response to questions by the accused indicated that he was most likely acting under the influence of mental illness at the time of the alleged offence. I base this opinion on his medical history that indicates that accused becomes mentally ill when he stops taking medications as prescribed. Around the time of the offence, he was not taking medications and indulging in behaviours (alcohol use, sleep deprivation) that increased the risk of his becoming ill again.

81. In his third report, Dr Biukoto said:

> He stated that he walked from the village to the store and crossed the road behind the victim. He stood outside the shop with victim but did not talk with the victim. He felt a right sided pain over his head and shoulder. He attributed the cause of pain to persecution by the male and other villagers. He stated that every time he felt the pain; he know that a person was ridiculing him and persecuting him. He use the iTaukei words "vakalialia" (making like he is crazy) "qitotaki" (play around with him, in a derogatory sense) "cakavi tiko" (something is being done to him, in a persecutory sense). He wanted relief from the pain and walked to Bea's house and looked for a knife. He retrieved the knife from the kitchen table and returned to the shop. He walked to the male and stabbed him on his upper chest once and then ran to Namotomoto village and wandered around the bushes surrounding the village. He returned to the scene of the alleged offence as he stated he wanted to provide the police with his version of events. He stated that he ran away after the alleged stabbing as he feared arrest ("vesu") by others. He declined to state the intent of the alleged

> stabbing (i.e. to kill or to injure) except to state that he just wanted to stab to relieve his pain.
>
> Accused was most likely acting under the influence of mental illness, such as persecutory delusions (false beliefs that others, even strangers, meant evil towards him) at the time of the alleged offence. He appeared to have capacity of awareness of his actions based on consistency of recollection and goal orientated behaviour leading to the alleged offence.
>
> Accused also appears to have an awareness of the negative view by society on the act of stabbing another person based on his act of running away to avoid capture and arrest. However, he appeared to have impaired logic as he returned to the scene to, in his words, provide police with a fair version (his version) of events.

82. In his evidence at trial, Dr Biukoto explained:

> He did not express any intent to cause death. He knew that the act of inflicting injuries on others with a knife is not acceptable. He was suffering from schizophrenia.
>
> He was paranoid of others in the village doing harm to him. Response can vary between no response to violent reaction. He would be angry and annoyed. If he does not take his medication, he will become mentally ill. When he committed the offence, he was aware of the nature and quality of his conduct. He also at this time knew the conduct of stabbing someone with a knife is wrong.
>
> Based on what he said, he had delusional perception before he committed the stabbing."

83. The evidence of Dr Biukoto must be assessed together with the other evidence that was adduced. The petitioner's attack on the deceased was unjustified, pointless and thus irrational. It can only have been motivated by what Dr Biukoto described as "persecutory delusions" that were a product of his mental illness. The events surrounding the petitioner's attack on the deceased suggest that he was not reasoning "with a moderate degree of sense and composure about whether [his attack on the deceased] as perceived by reasonable people, was wrong". And Dr Biukoto's evidence as a whole indicates that this was because of his mental illness.

84. It follows that if there had been focus at trial on the expanded approach, it is at least likely that the petitioner would have been found not guilty because of mental impairment. This means that the non-engagement at trial with the expanded wording cannot be treated as

immaterial to the outcome of the trial. For this reason, there was a miscarriage of justice. I would therefore allow the appeal and set-aside the conviction for murder.

A new trial or a verdict of not guilty because of mental impairment?

85. If the trial had been in the recent past (say the last two years), I would have been inclined to order a new trial at which the defence of mental impairment could be assessed in light of psychiatric evidence that was directed to the expanded wording. Such a process would be a better way of determining whether the defence of mental impairment should succeed than for us doing so relying only on evidence given at trial that did not expressly address the critical question. However, the effluxion of time since both the petitioner's attack on the deceased (in 2013) and the trial (in 2017) makes me reluctant to order a new trial unless it is necessary to do so. So, I have considered whether the evidence that was adduced at trial is sufficient to warrant a finding that the petitioner was mentally impaired within the meaning of s 28(1)(b).

86. Having done so, I consider it more likely than not that at the time of his attack on the deceased, the petitioner was relevantly mentally impaired. The combined effect of his mental illness, its direct causative link with his attack on the deceased, the delusional persecutory thoughts that motivated him and his generally impaired logic make it more probable than not that petitioner had not been able "to reason with a moderate degree of sense and composure" in the sense contemplated by s 28(1)(b).

87. I am of the view that the combined effect of s 14 of the Supreme Court Act 1998 (which confers on this Court the powers of the Court of Appeal) and ss 23(2) and 24(3) of the Court of Appeal Act 1949 enable this Court to direct that a verdict of acquittal because of mental impairment be entered and to make appropriate consequential orders.

Orders of the Court:

1. *Leave to appeal is granted.*
2. *The verdict of guilty of murder is quashed.*
3. *In lieu a special verdict of not guilty because of mental impairment is entered.*
4. *The sentence of mandatory life imprisonment with a minimum sentence of seventeen years to be served is quashed*
5. *The petitioner is ordered to be confined in the mental health facility of St Giles for his safe custody pending assessment under the Mental Health Act for his long-term arrangements. Thereafter any further directions in relation to his confinement will be for determination by the High Court.*

The Hon. Mr. Justice William Calanchini
JUDGE OF THE SUPREME COURT

The Hon. Madam Justice Lowell Goddard
JUDGE OF THE SUPREME COURT

The Hon. Mr. Justice William Young
JUDGE OF THE SUPREME COURT

Solicitors:

Petitioner in person
Office of the Director of Public Prosecution for the Respondent