

IN THE SUPREME COURT OF FIJI
APPELLATE CRIMINAL JURISDICTION

CRIMINAL PETITION No: CAV 0023 of 2015
(On Appeal from Court of Appeal
No. AAU 0058/2010)

BETWEEN : **PAULIASI NACAGILEVU**

Petitioner

AND : **THE STATE**

Respondent

CORAM : Hon. Justice Sathya Hettige, Justice of the Supreme Court
Hon. Justice Suresh Chandra, Justice of the Supreme Court
Hon. Justice Almeida Guneratne, Justice of the Supreme Court

COUNSEL : Petitioner in Person
Mr. M. Korovou for the Respondent

Date of Hearing: 09 June 2016

Date of Judgment: 22 June 2016

JUDGMENT OF THE COURT

Sathya Hettige, J

- [1] The petitioner was charged along with four others for one count of murder contrary to section 199 read with section 200 of the Penal Code (Cap.17) and four counts of Robbery with violence contrary to section 293 (1) (a) of the repealed Penal Code (Cap.17) in the High Court of Lautoka and proceeded to trial before the assessors.

- [2] After trial, all 3 assessors returned a unanimous verdict of guilty for the charge of murder and four counts of robbery with violence.

On 6th of August 2010, the learned trial Judge, Madigan J, having accepted the unanimous decision of the assessors convicted the petitioner for the count of murder of Narendra Prasad and robbery with violence as charged. The petitioner was sentenced to life imprisonment for the charge of murder with a minimum term of 14 years imprisonment to be served by the petitioner before being eligible for parole and 15 years imprisonment was handed down for the counts of robbery with violence.

- [3] Being aggrieved by the decision of the High Court at Lautoka dated 6th August, 2010 the petitioner lodged a leave to appeal application to the Court of Appeal against the conviction and sentence on the following 3 grounds of appeal on 10th August 2010.

- (i) *THAT the learned trial Judge erred in law when convicting me (the appellant) with murder when the evidence of joint enterprise was available in evidence and the appellant was acting in concert with his accomplices.*
- (ii) *THAT the learned Trial Judge erred in law when he did not properly and/or adequately direct the assessors on the issue of causation.*
- (iii) *THAT the learned Trial Judge erred in law when convicting me (appellant) with the four counts of robbery with violence when the evidence shows that the appellant had effectively withdrawn himself from the joint enterprise.*

- [4] The single judge of the Court of Appeal, per Chandra RJA delivered a Ruling on 1st February 2013, allowing leave to appeal against the conviction of the petitioner for murder and refusing leave to appeal on the counts of robbery.

- [5] Pursuant to the Ruling of the Court of Appeal dated 1st February 2013, the petitioner filed an application to the Full Court of Appeal seeking leave to appeal against the dismissal of ground of appeal 3 against conviction before the single Judge and hearing of the grounds of appeal 1 and 2.

[6] The Full Court of Appeal in its majority ruling (Goundar JA and Temo JA) confirmed the conviction of the petitioner ordered by the High Court and dismissed the appeal on 14th August 2015. However, Gamalath JA in his judgment set aside the conviction and sentence for murder and the petitioner was acquitted of the charge of murder and found him guilty of manslaughter and a sentence of 4 years imprisonment was imposed. Further His Lordship dismissed the appeal subject to the above variation.

[7] The petitioner, Pauliasi Nacagilevu, being dissatisfied with the decision dated 14 August 2015 has filed this application seeking special leave to appeal against the majority decision of the Court of Appeal which dismissed the appeal on the following grounds of appeal.

GROUND OF APPEAL FOR SPECIAL LEAVE

[8] The 6 grounds of appeal filed before the Supreme Court in the application for leave to appeal which is undated is as follows:

- a) Goundar J and Temo J erred in law and facts on conviction for murder as evidence was clear that the first punch landed on the deceased forehead did not kill him as the shopkeeper had survived the punch, tried to yell, but was dragged off by others and his mouth was covered by hand to stop yelling while his legs and hands were tied up.
- b) That the petitioner had robbed the shop keeper before he was dragged off immediately after he fell and took F\$200 from his pocket and also took his mobile phone then walked away.
- c) That the learned judges were wrong to find me guilty of murder as the shop keeper was clearly alive but later tried to escape and fell hitting his head (see paragraph 45 of Gamalath JA's Judgment at page 16) on the railings and edge of the concrete which can

cause severe concussion and also a possible heart attack according to the pathologist. Page 102 (33) “... *concluded that the cause of the death was cerebral edema due to severe concussion and significant condition contributing to the death was ischemic heart disease.*”

- d) The learned Judges erred in law and facts when they accepted the post-mortem results when the pathologist who gave evidence on it was not the pathologist who did the post mortem.
- e) That the learned judges erred in law and fact when they did not discern the withdrawal of joint enterprise was according to the initial plan which was to rob the shopkeeper (not the family) at the shop (which I did) and after I took the two hundred dollars and mobile phone I then left him with others and when they wanted to tie him up I had effectively left the scene of crime.
- f) That Goundar JA and Temo JA erred in law and fact on the basis of section 202 (9) (6) of the Penal Code which required that the intention and knowledge of an act or omission to be proved in order to convict me of murder. That in fact I had no intention to kill the shopkeeper but only to rob him nor did I have knowledge that my one punch would kill him as the facts revealed that the deceased was alive and well when I left. Had he not valiantly tried to escape from the other co-accused he would have died and had the co-accused followed me and left with me, no death or further robbery would have occurred.

[9] I will proceed to outline the facts of this case briefly before dealing with the grounds of appeal.

Factual Matrix

On the 5th of October 2007 the petitioner along with other four accused planned to rob the grocery shop operated by the deceased, Narendra Prasad and his family at Toko, Tavua. In the night at about 9 pm they approached the premises of the grocery shop and way laid the shop owner, deceased. The shop was called the “ Mata Prasad Shop “ and the deceased house was also located behind the shop almost adjacent to the shop. The deceased was about 66 years old.

The deceased after closing the shop for business was about to get back home when the petitioner along with others armed with a pinch bar and a cane knife stormed into the shop and manhandled the deceased . The petitioner violently punched the deceased on the forehead and as a result of the punch he fell down on the ground hitting his head on the railing and the concrete floor that connected the grocery with the house . The other accused tied the deceased’s hands and legs with a raffia string.

The other four accused continued to attack the deceased on the chest causing fractures to the 5th and 6th ribs and he was gagged by pressing his mouth with the assailants’ hands. After ransacking the shop they proceeded to the residence of the deceased. The deceased’s wife Satya Wati stepped out of the house to inquire as to why the deceased was late in returning home for dinner. Then the assailants started assaulting the wife of the deceased in the face until she fell down. Then they noticed the elderly mother and two other sisters who had come from Australia to visit the family inside the house and threatened them with weapons and assaulted them physically causing injuries. The deceased was lying by the steps of the shop with the legs and hands tied up. A neighbour who came to the rescue from a nearby house took the deceased to the hospital where the examining doctor pronounced him dead.

The petitioner and the other accused were arrested and interviewed under caution and the confessions made with regard to the robbery with violence were admitted in evidence at the trial without objections. However, the petitioner, though admitted involvement in the robbery said that he did not intend to kill the deceased.

[10] At the hearing on 09th June 2016 the petitioner admitted that the ground 4 urged in the petition was a fresh ground of appeal which was not raised in the Court of Appeal. The petitioner urged in the Court of Appeal only 3 grounds of appeal. Namely the “issue of inconsistency of the assessors verdict, “ the issue of causation and the issue of withdrawal from the joint enterprise.” However, the petitioner urges six grounds of appeal for special leave. The 1, 2 and 3 grounds refer to the issue of causation and the ground four (4) is regarding the acceptance of pathologist evidence at the trial which is fresh ground of appeal. Ground 5 relates to the question of withdrawal from the joint enterprise and the 6th ground of appeal is on the issue of malice aforethought.

[11] Since the 1,2 and 3 grounds relate to the issue of causation, it is more convenient to deal with all 3 grounds together.

The Issue of Causation

[12] Causation is the relationship (causal link) between the unlawful act committed by the accused and the resulting effect of that act which is the victim’s death. Causation is linked to the *actus reus* of the offence of murder and manslaughter as well. The question for determination under this ground of appeal before this court is what act caused the death of the deceased. The petitioner argues that he should not have been convicted for murder having relied on the concept of “*novus actus interveniens*.” The petitioner claims that after his act of assault on the deceased the victim survived the punch and was alive and the deceased hit his head on the railing and the concrete edge when he fell down to the ground. According to the post-mortem report the deceased had died of concussion due to “ischemic heart disease”. The petitioner further adverts to the fact that the brain injury sustained by the deceased was a result of the falling and hitting his head on the edge of the concrete and not the punch he landed on the head.

[13] The petitioner alleges that the Court of Appeal was wrong in holding that the causation was established from the evidence elicited at the trial in its majority

decision and also did not adequately direct the assessors on causation. In fact the learned trial Judge fairly and adequately directed the assessors on the evidence of causation as follows in paragraph 52 of the summing up.

"The fourth accused (petitioner) admits in his caution interview that " I went towards him and coughed for him to look at me and he did and I pulled him out pulled out and gave a hard punch on his fore head and he fell heavily to the ground." This then is an unlawful act and if you find that it caused Narend to fall to hard ground, causing concussion to the head, then death, you will find all of the co-conspirators guilty of murder. If you also find that each one knew that this was a probable consequence of violence used during a robbery. If you think it was not possible to find that each knew that it was a probable consequence you can then go to find them all guilty of manslaughter; and if you are not sure about any of it you will find them not guilty of anything. If you think, as has been suggested to you, that he had a heart attack, fell to the ground getting severe concussion and then died; you will find them all not guilty of murder and not guilty of manslaughter. "

In paragraph 54 of the summing up the trial judge directed the assessors with reference to the cause of death of the deceased as elicited in evidence as follows:

"you might also bear in mind that the pathologist has said that the cause of death was extensive cerebral edema due to severe concussion, and she said falling to hard ground would have been consistent with such a medical finding."

- [14] It can be argued that the cause of concussion the victim died of would have been caused due to the heavy punch landed by the petitioner on the deceased's head which made the victim fall to the ground.
- [15] The allegation by the petitioner that the deceased would have died of concussion caused due to the falling and hitting his head on the edge of the concrete and due to the heart condition cannot be supported due to the evidence elicited from the post mortem report and caution interview statement as admitted by the petitioner. One can argue that the medical condition of the deceased of which the petitioner was unaware would have rendered the victim susceptible to death than a person of normal health. But that contention or proposition does not enable the assailant to claim that the death does not attract criminal liability.

[16] In the case of Mamote-Kulang v Queen 1964 111 CLR 62 the issue on medical condition which leads to the victim's death due to assault was made clear. In that case the assailant hit the wife in the spleen causing the spleen to rupture and his wife to die. Windeyer J observed that *"killing is not less a crime because the victim was frail and easily killed"*

[17] On the question of "novus actus interveniens" as the petitioner relies on this case there does not seem to be any break in the chain of causation. In R v David Keith Pagett (1983) 76 Cri. App. R. 279 which is an authority on the issue of causation, the court observed that on the direction by the trial Judge it is a matter for the assessors to decide as it is a question of fact. In that case Lord Robert Goff LJ said that

"The principles which we have stated are principles of law. This is plain from, for example, the case of Pitts (1842) C. & M. 284, to which we have already referred. It follows that where, in any particular case, there is an issue concerned with what we have for convenience called novus actus interveniens, it will be appropriate for the judge to direct the jury in accordance with these principles. It does not however, follow that it is accurate to state broadly that causation is a question of law. On the contrary, generally speaking causation is a question of fact for the jury. Thus in, for example, Towers (1874) 12 Cox C.C. 530 the accused struck a woman; she screamed loudly, and a child whom she was then nursing turned black in the face, and from that day until it died suffered from convulsions. The question whether the death of the child was caused by the act of the accused was left by the judge to the jury to decide as a question of fact."

Lord Robert Goff further said at page 288 that:

"Even where it is necessary to direct the jury's mind to the question of causation It is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death it being enough that his act contributed significantly to that result. It is right to observe in passing, however, that even this simple direction is a direction of law relating to causation."

[18] In R v Smith 1959 2 QB 35. The defendant, a soldier, got in a fight at an army barracks and stabbed another soldier. The injured soldier was taken to the medics

but was dropped twice on route. Once there the treatment given was described as palpably wrong. They failed to diagnose that his lung had been punctured. The soldier died. The defendant was convicted of murder and appealed contending that if the victim had received correct medical treatment he would not have died. The court held that stab wound was an operating cause of death and therefore the conviction was upheld.

- [19] In Vereimi Ikanivai v Reginam (1986) 32 FLR 156 the five appellants made an appeal against their conviction for murder of a 42 year old Indian, Munideo. In that case, at about 7.30 pm on 26 May 1984, the deceased was attacked by the appellants. He was punched, kicked and stabbed with a broken bottle, stripped of his clothing and left unconscious. He was found on 27th May 1984 and admitted to hospital in an unconscious state. ..He was found to have multiple incised wounds to the head and body and was in a critical condition. He died on 21st June 1984 having contracted bilateral lobar pneumonia. The immediate cause of death was pneumonia.

The defence relied on the provisions contained in section 206(a) of the repealed Penal Code (Cap. 17) and argued that the immediate cause of death was pneumonia resulting from treatment which had not been employed in good faith or was employed without common knowledge or skill.

Section 206(a) of the repealed Penal Code defines "causation" as follows:

"A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases

206(a)

"If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was employed without common knowledge or skill"

The pathologist's evidence was to the effect that the medical treatment increased Munideo's chances of contracting fatal pneumonia and retarded his natural defences.

The Court of Appeal held the provisions in the proviso to section 206(a) has no application and the injuries sustained by the deceased “caused the death of the victim.

- [20] In view of the legal principles discussed above and as has been decided **R.v Pagett** (supra) on causation it is necessary to simply give the assessors the proper direction that in law, accused’s act need not be the sole cause or even the main cause of death of the victim’s death but it is enough that the accused’s act significantly contributed to that result. (21) Therefore we conclude that the petitioner’s grounds of appeal 1, 2 and 3 have no merit and accordingly are dismissed. However, as to whether the petitioner had the required *mens rea* to commit the offence of murder of which he has been found guilty will be dealt with when the court considers the ground of appeal 6 which concerns the malice aforethought of the petitioner later in our judgment.

Ground 4

- [21] The appeal ground 4 concerns the post-mortem report and the pathologist evidence. This ground of appeal was never raised by the petitioner in the Court of Appeal. It is a fresh ground urged for special leave.
- [22] It is pertinent to note that the Supreme Court has been reluctant and have refused to excise its jurisdiction in allowing the new points to be taken up or to be argued in the Apex court if the new point had not been argued in the court below. State Counsel has moved in his written submissions not to consider this ground and to dismiss this ground of appeal as this ground has not been argued in the court below. However, in fairness to the petitioner we decide to consider this ground briefly to examine whether there is any merit in this ground of appeal.
- [23] Learned State Counsel submitted that the petitioner was ably represented by a counsel at the hearing in the trial court and did not object to tendering of the pathologist report by the prosecution.

[24] It is relevant to state that the provisions contained in sections 133(1) (2) and (3) (a) of the Criminal Procedure Decree 2009 provides for adducing signed reports of a pathologist into evidence in a trial if that report had been disclosed to the accused. It is further provided in section 133(5) thereof for another doctor to be called as a witness to comment on the admitted medical report. In this case the post-mortem report was prepared by Dr. Lusiana Boseiwaqa and Dr. Litia Tudravu was called by the prosecution in the trial to refer to the report and comment on the work done by Dr. Lusiana.

[25] Section 133(1) of the Criminal Procedure Decree 2009 reads as follows:

“Any plan, report, photograph or document purporting to have been made or taken in the course of an office, appointment or profession by or under the handoff any of the persons specified in subsection (3), may be given in evidence in any trial or other proceeding under the provisions of this Decree, unless the person shall be required to attend as a witness by

a) The Court; or

b) The accused person, in which case the accused person shall give to the prosecutor not less than 14 clear days before the trial or other proceeding.

Section 133 (5) thereof provides that;

“The contents of any report which the prosecution intends to give as evidence under this section and about which notice has been given under sub-section 2, may be referred to and commented upon by any other expert called as a witness in any criminal trial.”

[26] It would appear that the above provisions contained in section 133 (5) are an *exception to* the hearsay rule. It is to be emphasized that the provisions in this section may be used only for the limited purpose of referring to the contents of the report and comment thereon on the work done by the original author of the report.

[27] On perusal of the court records it appears that the Pathologist Dr. Lusiana Boseiwaqa who prepared the post-mortem report after examining the deceased had gone abroad at the time of production of the post-mortem report. However, the learned counsel who represented the petitioner at the trial did not object to any other

replacement doctor being called as a witness to make any comment on the contents of the report having referred to it.

- [28] Dr. Litia Tudravu pathologist who had experience as a pathologist for 14 years was called by the prosecution and she testified in court on the post-mortem report (Exhibit P 42) in relation to the deceased Narendra Prasad. Having explained the 3 external injuries on deceased body and gave evidence on the cause of death of the deceased at page 119 of the High Court record Vol.11. Dr. Said that;

“Cause of death – extensive cerebral edema due to severe concussion. Ischemic heart decease- heart attack.” When Mr. Singh examined her at page 120 of the HC Record Vol.11 she further said as follows:

Question. Injury to head causes concussion? Can concussion occur due to falling on hard surface?

Answer: yes.

Q: Hard punch to head?

A: Yes.

Q: Explain heart decease?

A: Factor: Ischemic heart decease- lack of blood. Blood vessel blocked. It is existing condition.

Q: A patient aware of it?

A: Not unusual that they collapse and die- to be unaware of it.

Q: In the report what was primary cause?

A: cerebral edema.”

- [29] Thereafter Ms. J. Nair cross-examined Dr. Litia Tudravu. She also testified in detail when questioned by the counsel. At page 124 of the HC record Vol.11 in answering to court she said *“the cause of death due to concussion not heart condition.”* It appears from the questions asked and the answers given by the replacement pathologist, the major part of the evidence is inadmissible hearsay which is contrary to section 4 of the Evidence Act Cap.41 (Ed.1978) because Dr. Litia did not examine

the deceased and did not prepare the report and what the replacement pathologist said was not part of the business record of the hospital.

- [30] The respondent relied upon the Court of Appeal decision in **Devendra Singh v State** (1999) 45 FLR 96 (14 May 1999) which was a prevailing authority for the proposition that hospital was a place of business and a post-mortem report prepared by a pathologist employed by the hospital for a post-mortem conducted at a hospital was a business record.
- [31] It appears from the recent Judgment in the Supreme Court in **Suresh Chandra** Crim. Petition No. CAV 21 of 2015 in its majority decision has taken a different view with regard to evidence on the contents of a post-mortem report given by a replacement pathologist and held that the contents of the report was inadmissible hearsay under section 4 of the Evidence Act Cap.41(ED 1978). However, it important to mention that the Supreme Court decision in **Suresh Chandra** case (supra) did not expressly overrule the **Devendra Singh** decision.
- [32] In the light of the matters considered above it can be concluded that the provisions contained in section 133 (5) of the Criminal Procedure Decree 2009 can be invoked in order to summon an expert as a witness to comment on a post-mortem report prepared by a different pathologist having produced it in evidence provided that the post-mortem report prepared after a post-mortem examination conducted by a pathologist falls within the scope of the section 4 of the Evidence Act. Cap. 41.
- [33] In view of the above conclusions we are not satisfied that there is any merit in this ground of appeal and therefore this ground of appeal fails. The evidence of the post-mortem report is admissible under section 133 (5) of the Criminal procedure Decree 2009 after excluding the evidence of the pathologist called as a witness expressing her opinion as to the cause of death of the deceased as it is inadmissible hearsay. It is

important that the learned trial judge has a legal duty to give proper directions to the assessors on the pathologist evidence.

Ground 5

- [34] Ground 5 of the grounds of appeal concerns the withdrawal from the joint enterprise. The Court of Appeal In its majority decision , found that there was no evidence of withdrawal from the joint enterprise. There was nothing in evidence to indicate that the petitioner informed the other accused that he was withdrawing from the joint enterprise. Learned trial Judge in his summing up gave directions to the assessors in paragraph 55 of the summing up on withdrawal from the joint enterprise as follows:

“...in looking at the robbery charges against the 4th accused you will recall, that his caution interview he admits to punching Satya wati on the side of the face while two of the other boys were going into house to rob the other ladies. He was therefore “doing his bit” by clearing the way for the others to go in to rob and the law says that he is therefore liable for all of the robberies in the house at3 the time he was holding Satya Wati on the ground. The fact he went and stood at the roadside is irrelevant. The law says once he has embarked on a joint enterprise , he cannot get out of it , unless he does something definite to tell the others he has no more part in it. Merely walking away is not enough. He is jointly responsible. For what happened. But then of course, it is a matter for you. If you find that the fourth accused did not play any part in the robberies of the four ladies or you are not sure , you will find him not guilty of the robberies, however, if you think he was part of the group and “ playing his part “ then it is open to you find him guilty of all four robberies.”

- [35] The law says that not only the withdrawal must be unequivocal; it must also be effectively communicated to the other participants of a joint enterprise. It is to be noted that the trial Judge has correctly directed the assessors and the Court of Appeal has correctly applied the law relating to withdrawal from the joint enterprise . However, in fairness to the petitioner we observe that that there is inconsistency of the conviction given by the trial judge based on the assessor’s decision between the petitioner and the other accused. The petitioner was part of the joint enterprise. He never withdrew from the joint enterprise in terms of law. The petitioner was convicted of murder and the others were convicted of manslaughter.

- [36] The joint enterprise is a legal doctrine that is well settled in Fiji. The Supreme Court in **Rasaku v State (2013) FJSC 4; CAV0009, 2009 (24 April 2013)** expounded the doctrine of joint enterprise in paragraphs 44 and 45 as follows:

“If two people jointly commit an unlawful act, each is equally liable no matter who did what. There does not have to be any prior agreement either written or oral. It can be spontaneous. The doctrine of common enterprise has been applied consistently in a large number of cases in England and other jurisdictions, including those such as Fiji in which the Penal Code is structured on the foundations of the Common Law of England. The formation of a joint enterprise may be spontaneous, and the fact that the participants acted on the spur of the moment does not negative their criminal liability on the basis of joint enterprise.”

- [37] In this background, it is clear that the petitioner cannot escape liability by saying that he withdrew from the joint enterprise as planned. There was no evidence to suggest that the petitioner had communicated with the other accused before leaving scene of crime. It is clear however, that the petitioner had participated in the crime as planned with a common purpose. The petitioner is the one who landed a heavy punch on the deceased's forehead. He actively participated in the attack and the death occurred after the deceased fell hitting his head on the concrete edge. The question is whether the death of the deceased a probable consequence of the implementation of the common purpose.

- [38] It is relevant to state at this stage that the petitioner being a member of the joint enterprise is equally liable for the consequences of the unlawful act. The unlawful act committed by the petitioner and other accused was that the petitioner heavily punched the deceased on the head and the other accused robbed the “Mata Prasad” grocery shop and the deceased's wife and other relatives who were inside the house, of their jewellery, money including foreign currency and the mobile phone and ventured to attack the deceased's wife and caused grievous bodily harm. The petitioner's punch on the deceased's head caused a serious bodily harm making the deceased to fall to the ground as a result of which the deceased died.

- [39] After trial the assessors found the petitioner guilty of murder and robbery with violence as the principal offender and the other accused were found guilty of manslaughter and robbery with violence. No doubt that the petitioner and his accomplices acted under the same joint enterprise. It is arguable that the petitioner and all the accomplices should have been convicted of the same offence. The petitioner strongly urged that his murder conviction was unreasonable, unfair and inconsistent with the other accomplices' verdict for manslaughter. In fact the petitioner referred to Question and Answer 80 in his caution interview wherein he had stated about other accomplices' involvement in the commission of the offence as follows:

"...that when the old man fell to ground, the other boys grabbed him as he fell to where they were hiding. I saw the Fijian boy blocking the old man's mouth and others were tying him up."

- [40] It can be seen from the caution interviews of other accused that they have participated in the commission of the crime. (Please see Questions and Answer Nos. 77 – 93, 65 -74 and 55-56 in the caution interviews of the accomplices.) Each accused has admitted in their caution interview their participation in the commission of the offence. I am of the view that, on this ground of appeal there seems to be some inconsistency in the conviction of the petitioner and that of the other accomplices. Even though the petitioner urged that he withdrew himself from the joint enterprise, there is no evidence of withdrawal in terms of the law. Therefore, we are of the view that we should grant leave on this ground.

Ground 6

- [41] Ground 6 of the grounds of appeal concerns the complaint on malice aforethought and submits that the petitioner, though he punched the deceased on the head, never intended to kill the deceased.

[42] On a careful reading of the trial Judge's directions it can be seen that trial Judge has properly directed the assessors in his summing up on the elements of the offence of murder and manslaughter in paragraphs 37 – 39 of the summing up as follows:

"...The third element of murder is intention and concerns the accused's mental state at the time of committing the unlawful act. As a matter of common sense, no one can look into a person's brain, to ascertain the person's intention, at the time of him doing the unlawful act. Nevertheless, his intentions can be inferred from his physical actions and spoken words, and the 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.

In Paragraph 38 learned trials Judge directs as follows:

"In this case , you will not be required to decide on the accuser's mental state as to intention to kill or intention to cause very serious harm because the prosecution is not running its case on these mental states. It had the option to do so, but chose not to do so. The prosecution is simply relying on the mental state of recklessness to prove its case against the accused, beyond reasonable doubt. So, when referring to the example we discussed Just previously if the prosecution proved that when I threw the punch at the person's head, I knew at the time, that death or serious injury would be caused on the person, but nevertheless and recklessly I threw the punch at him anyway, I would be guilty of murder, because they have satisfied beyond reasonable doubt the mental element of action without caring if death or serious harm would result."

In paragraph 39 of the summing up trial Judge directed as follows:

" If on the other hand ,the prosecution failed to prove beyond reasonable doubt ,the mental element required, but have only proved beyond reasonable doubt that-

- (i) An illegal act was done*
- (ii) It resulted in the death*

Then you are entitled to find the accused guilty of the lesser offence of manslaughter. The elements of manslaughter are the first two elements for murder, that is the accused did an unlawful act which caused the deceased's death. In this case ,if you find that the prosecution has failed to prove beyond reasonable doubt the mental element of intention, but they have proven beyond reasonable doubt the elements of unlawful act and death, then you are obliged to return a verdict of not guilty of murder, but guilty of manslaughter."

- [43] In this case the assessors found the petitioner guilty of murder. The learned trial Judge accepted the verdict of murder conviction and accordingly sentenced the petitioner to mandatory term of life imprisonment. It may be that in the circumstances of this case the petitioner committed the unlawful act of punching the deceased's head which caused serious harm to the deceased. The accomplices were convicted of manslaughter by the unanimous verdict of the three assessors. The trial Judge in paragraph 4 of his judgment said that:

“Pauliasi Nacagilevu, you have been found guilty by the unanimous decision of three assessors of the murder of Narendra Prasad. That verdict is available on the evidence and in directing myself on my summing up, I agree with them. The judgment of Court is that you are guilty on count 1 and you are convicted of murder.”

- [44] The issue that arises, in fact, is as to whether the petitioner had the required intention (mens rea) for murder or as to whether, at the time of committing the unlawful act, he had the knowledge that his action would probably cause the death of the deceased or grievous harm. The Court of Appeal, in its majority decision accepted the unanimous decision of the assessors convicting the petitioner of murder and finding the accomplices guilty of manslaughter.

- [45] Lord Woolf MR in **R. v HM Coroner for Inner London** **EX.P Douglas Williams** (1999) 1 All. E.R.344 Observed as follows:

“The act or omission must be a substantial cause of death. But it need not be sole or main cause of death. It must have more, than minimally, negligibly or trivially contributed to the death” Did the unlawful act of punching the deceased on the head trivially or minimally contribute to the death of the deceased. If so, can the petitioner be convicted for murder? There must be an unlawful act which must be a substantial cause of death. According to the medical evidence the cause of death was “cerebral edema due to concussion – Ischemic heart disease.” The petitioner in his caution interview says that he never intended to kill the deceased. The petitioner or any of his accomplices did not use any weapons though they were armed. The

design of the whole joint enterprise was to rob the grocery stores of the deceased.

- [46] Did the Court of Appeal, in its majority decision, fall into error in reaching the Conclusion to convict the petitioner of murder in the absence of required malice aforethought whether the petitioner should have been convicted of manslaughter together with the accomplices. We agree with the conclusion of the judgment of Gamalath JA in this case.

In the circumstances of this ground of appeal we are of the view that leave should be granted on this ground of appeal as well.

Special Leave Criteria

- [47] In this application the petitioner is seeking special leave to appeal against the judgment of the Court of Appeal dated 14th August 2015 dismissing the appeal in its majority decision (Goundar JA and Temo JA). Gamalath JA gave a judgment setting aside the trial Court decision and convicted the petitioner of the offence of manslaughter. We have already dealt with the grounds of appeal urged by the petitioner. It is however, incumbent on this court to examine and see as to whether the petitioner's application case is a fit case to grant special leave and satisfied the leave criteria contemplated in section 7 (2) of the Supreme Court Act No. 14 of 1998.

Section 7 (2) provides as follows:

"In relation to a criminal matter, 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) A substantial and grave injustice may otherwise occur."*

[48] The Supreme Court derives power to hear and determine appeals from the final judgments of the Court of Appeal under section 98(3) and (4) of the Constitution of the Republic of Fiji.

Section 98 (3) thereof provides that:

“The Supreme Court –

- (a) Is the final appellate court*
- (b) Has exclusive jurisdiction, subject such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal : and*
- (c) Has original jurisdiction to hear and determine constitutional questions referred under section 91(5)?”*

Section 98 (4) provides thus:

“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.”

Section 98 (5) reads as follows:

“In the exercise of its appellate jurisdiction, the Supreme Court may -

- (a) Review, vary, set aside or affirm decisions or orders of the Court of Appeal, or*
- (b) Make any other order necessary for the administration of justice, including an order for a new trial or an order awarding costs.*

Section 98 (6) provides that decisions of the Supreme Court are, subject to subsection 7 binding on all other courts of the State.

[49] The Supreme Court of Fiji in number of cases has interpreted the special leave to appeal threshold criteria enumerated in section 7 of the Supreme Court Act and settled the law.

[50] 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.

App. 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 which in this instance, was an order for a new trial.”

- [51] It is to be noted 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 (4th May 2006), **Chand v The State** (2012) FJSC6 ; CAV14/2010(9th May 2012).
- [52] As stated above the stringent threshold criteria in section 7 of the Supreme Court has been discussed and decided in a catena of cases in the Supreme Court of Fiji. See **Bulu v Housing Authority** (2005) FJSC 1 CBV 0011.2004S 8 April 2005. It can be observed that 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.
- [53] In **Dip Chand v State** CAV0014/2012 9th 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”*
- [54] I observe that It is also relevant to consider the provisions contained in Article 136 of the Indian Constitution which grants entirely a discretionary power to the Indian Supreme Court whether to grant special leave or not in a particular case as

the Indian Supreme Court is not a regular Appeal Court. The relevancy of the provisions in Article 136 of the Indian Constitution is extra-ordinary discretionary power exercised by the Indian Supreme Court which is similar to the exclusive discretionary power in Fiji Supreme Court in leave to appeal applications. The Article 136 of Indian Constitution reads as follows:

“Notwithstanding anything in this chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India”

- [55] In **Chandrasingh v State of Rajasthan** AIR 2003 SC 2889 (vide paragraphs 43 and 45) the Court observed that under Article 136 it was not bound to set aside an Order even if an order is not in conformity with the law since the power under Art.136 was discretionary.
- [56] The exclusive jurisdiction conferred upon the Supreme Court which is meant to deal with more important issues involving questions of law of general importance by the provisions in section 98 (3) of the Constitution will be exercised sparingly and in furtherance of justice in cases where the greater burden on the petitioner to satisfy the threshold requirements under section 7(2) is fulfilled.

CONCLUSION

- [57] We have carefully considered the grounds of appeal of the petitioner and the submissions of the counsel for the petitioner and the respondent. We have also considered the majority decision of the Court of appeal and the Judgment of Gamalath JA who decided the appeal differently with whom this court in agreement having carefully considered the complex issues involving causation, pathologist evidence, joint enterprise and malice aforethought. We conclude that the petitioner's application for leave should be allowed only on grounds of appeal on joint enterprise and ground 6 in relation to malice aforethought and the petitioner should be convicted for the lesser offence of manslaughter. We also conclude that the majority decision of the Court of Appeal dated 14 August 2015 in relation to the charge of murder should be set aside and substitute the petitioner's conviction of murder with conviction of manslaughter.

[58] For the reasons set out above we dismiss the appeal subject to above variation.

Chandra, J

[59] I agree with the reasoning and conclusions of Hettige, J.

Guneratne, J

[60] I also agree with the reasoning and conclusions of Hettige, J.

The Orders of the Court are:

1. *The appeal is dismissed subject to the above variation.*
2. *The majority judgment of the Court of Appeal dated 14 August 2015 in relation to the charge of murder is set aside.*
3. *The Judgment of Gamalath JA dated 14 August 2015 in relation to the charge of murder is affirmed.*
4. *The petitioner is convicted of manslaughter and the sentence of 4 (four) years imprisonment imposed by Gamalath JA in the Court of Appeal is affirmed.*



.....
Hon. Justice Sathya Hettige
Justice of the Supreme Court




.....
Hon. Justice Suresh Chandra
Justice of the Supreme Court



.....
Hon. Justice Almeida Guneratne
Justice of the Supreme Court

Solicitors:

Petitioner in Person

Office of the Director of Public Prosecutions for the Respondent.