

IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0041 of 2023
Court of Appeal No. AAU 0036 of 2018

BETWEEN : **SULIASI NASARA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Justice William Young
Judge of the Supreme Court

Counsel : **The petitioner in person**
Mr A Singh and Ms S Swastika for the Respondent

Date of Hearing : **14 October, 2024**

Date of Judgment : **30 October, 2024**

JUDGMENT

Temo, AP

[1] I agree entirely with the judgment of Young, J.

Gates, J

- [2] I agree with the following judgment of Young, J, its reasons and orders.

Young, J

The petition

- [3] In May 2017, the petitioner was tried before a Judge and assessors on charges of murder and aggravated robbery. At the conclusion of the trial, the assessors expressed the opinion that the petitioner was guilty of manslaughter and aggravated robbery. For the reasons given in a judgment he delivered on 6 June 2017, the Judge convicted the petitioner of murder (rather than manslaughter) as well as aggravated robbery. He later sentenced the petitioner to life imprisonment (with a minimum of 18 years before he can be considered for pardon) and 10 years nine months for aggravated robbery.
- [4] The petitioner's appeal against conviction having been dismissed by the Court of Appeal, he now seeks leave to appeal to this Court.

The background

- [5] The deceased, Nitin Kumar, died on 16 November 2014. He was 30 years of age. He had been operating as an unlicensed taxi driver using a white van that belonged to his mother. At around 4.00am on 16 November 2014, he was at the Lales Millenium Pacific Energy Service Station in Nadi. There he picked up a young iTaukei man. The arrangement was that Mr Kumar was to take the young iTaukei man to Naikabula. This was witnessed by a bowser attendant. Not long afterwards, there was a disturbance in a compound in Naikabula. Those in the vicinity heard shouting and cries for help. People who went to see what was going on saw a white van driving out of the compound and found Mr Kumar lying on the ground inside the compound. He was covered in blood. They took him to hospital, but he died in the intensive care unit later that day. His death was the result of multiple head injuries.
- [6] At around 6.00am on 16 November 2014, two iTaukei men were seen pushing a white van into a drain beside a road at Drasa Flat. This was the van that belonged to Mr Kumar's mother and which he had been using as a taxi. The person who saw this

incident was an aunt of the petitioner and she was able to identify him as one of the two men.

- [7] On 18 November 2014, at around 8.00pm, Detective Constable Jone Sauqaqa arrested the petitioner for the murder of Mr Kumar. He said that at that time the petitioner had a cut on his upper lip. He asked him about the injury and the petitioner replied that the injury happened in the course of his struggle with Mr Kumar. The petitioner was taken to the Lautoka Police station and then, just after midnight, to the hospital where he was medically examined. This examination confirmed that he had a lip injury.

- [8] The petitioner was interviewed under caution starting at 11.30am on 19 November and finishing at 3.10pm on 20 November 2014. In the course of the interview, he acknowledged that he was the man who had got into the white van with Mr Kumar at the service station. He admitted assaulting him with a wheel spanner at the compound in Naikabula and driving the white van out of that compound. He also accepted that he was one of the two men his aunt had seen at 6.00am on 16 November pushing the van into a drain.

- [9] His explanation for what happened was along the following lines.

- [10] He had been drinking kava with a relation and one of her friends from about 10.00pm on 15 November 2014 until sometime after 3.30am on 16 November (which was when a telecast of a rugby league match between Fiji and Wales started). He said he then left to look for Mr Kumar (to whom he referred as “an Indian boy” rather than by name).

- [11] His explanation for trying to find Mr Kumar was as follows. Two weeks earlier he had been approached by a “Fijian guy” (whom he had never previously met) who had a car radio that he wanted to sell. The two of them sold it to Mr Kumar for \$50, of which \$20 was paid immediately with the balance to be paid later. The Fijian man later came back to the petitioner thinking that he might have received the \$30. The petitioner told the interviewing officer that he wanted to speak to Mr Kumar as he was:

... angry because I did not receive any money from him, and he was trying to con us.

[12] The petitioner said that he saw Mr Kumar at the Lales Service Station sometime after 4.00am on 16 November 2014. He made it clear that he wanted to talk to him about the radio. They had some kava together. Mr Kumar then asked him to get into the van and he (that is Mr Kumar) told the bowser attendant that they were going to Naikabula. On the way they discussed the radio payment issue and tried to call the Fijian man, but without success. Mr Kumar was not able to pay to him the unpaid \$30.

[13] When they got to Naikabula, the petitioner told Mr Kumar that he would take the radio back. At this, Mr Kumar turned the car into the compound already referred to and ordered the petitioner from the van. The petitioner refused to get out unless Mr Kumar did so too. After some swearing at each other, they both got out of the van. Mr Kumar punched him in the face, picked up a stone, yelled out an insult and came towards him. As result, the petitioner picked up a wheel spanner which was conveniently to hand. Mr Kumar threw the stone at him but missed. There was then a struggle in the course of which he used the wheel spanner against Mr Kumar's head "several times". This resulted in Mr Kumar dropping to the ground. According to the petitioner

While he was on the ground motionless, I struck his head again about three times with the wheel spanner.

[14] He told the police that the injury to his upper lip was the result of an effort by Mr Kumar to take the wheel spanner off him, an effort that had resulted in the spanner striking his lip.

[15] The petitioner drove away from the compound. He threw away the wheel spanner. He then picked up his cousin Tevita and they drove around in the van. While they were doing so, the van ran out petrol. They then pushed the van into a drain on the side of the road. The petitioner said that he took the radio from the van and later sold it for \$20 to a juice seller in the market.

[16] In the course of his caution interview, the petitioner took the police to the juice seller and the police retrieved the radio from him.

[17] In his charging statement, the petitioner said:

I admit that I killed, I did not mean to kill the Indian boy I just hit him to injure him because he did not pay me the money he owed me. I also ask for forgiveness of the wrongdoing that I did.

- [18] The petitioner challenged the admissibility of the caution interview and charging statement both before trial and later, on appeal to the Court of Appeal. But, as I will explain shortly, he no longer challenges their admissibility. Instead, he relies on them as supporting the arguments that he advanced to us at the hearing. That being so, there is no need for me to discuss the grounds on which his admissibility challenge was presented or why it was dismissed by the Judge.

The statutory provisions as to the mens rea for murder and the defences of self-defence and provocation

- [19] In support of his petition, the petitioner has challenged the way in which the Judge dealt (or did not deal) with the mens rea elements of murder and also self-defence and provocation. To provide a frame for what follows, it is appropriate to set out the provisions of the Crimes Act 2009 that are engaged by these arguments.

- [20] Murder is defined in the Crimes Act in this way:

237. A person commits an indictable offence if —

- (a) the person engages in conduct; and
- (b) the conduct causes the death of another person; and
- (c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.

For ease of discussion, I will refer to the states of mind stipulated in s 237 (including recklessness) as “murderous intent” – that is, the intent that must be shown to establish a charge of murder and thus not confined to an intent to kill.

- [21] Recklessness is addressed in s 21(2) of the Crimes Act. It provides:

(2) A person is reckless with respect to a result if —

- (a) he or she is aware of a substantial risk that the result will occur; and
- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Self defence

[22] This is provided for in s 42 of the Crimes Act:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence.
- (2) A person carries out conduct in self defence if and only if he or she believes the conduct is necessary:
 - (a) to defend himself or herself or another person; or
 - ...
- (4) This section does not apply if —
 - (a) the person is responding to lawful conduct; and
 - (b) he or she knew that the conduct was lawful.

Provocation

[23] Section 242 of the Crimes Act provides:

- (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in sub-section (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only.
- (2) The term "provocation" means (except as stated in this definition to the contrary) any wrongful act or insult of such a nature as to be likely when—
 - (a) done to an ordinary person ...

to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

The trial and verdict

[24] The prosecution evidence at trial was broadly along the lines already outlined save that, by the time of trial, the bowser attendant at the Lales Service Station was able to confirm that the petitioner was the man who had got into the van with Mr Kumar not long before the murder. The background to this “identification” was a little unusual. Not long after Mr Kumar’s death, the bowser attendant had briefly been in custody in the prison in

which the petitioner was on remand awaiting trial for Mr Kumar's murder. During this time, the petitioner told him that he was the man who had gone off with Mr Kumar.

- [25] The defence was conducted on the basis that the petitioner had not been involved in the death of Mr Kumar. So, the bowser attendant was cross-examined by defence counsel on the basis that he was wrong about the petitioner having got into the van with Mr Kumar. And the petitioner's aunt was cross-examined on the basis that she was lying when she said that she saw him push the van into a ditch on 16 November 2014.
- [26] At the end of the prosecution case, the petitioner indicated that he would give evidence. The case was then stood down to enable defence counsel to photocopy a document (presumably one that she envisaged the petitioner would speak to in his evidence). But when the case was recalled not long afterwards, defence counsel advised the Judge that the petitioner had changed his mind and would not give evidence.
- [27] The prosecution case against the petitioner was strong to say the least. In the absence of defence evidence, it was inevitable that the assessors and Judge would conclude that he had fatally attacked Mr Kumar and stolen the van. And the caution interview and charging statement offered at best limited opportunities for reliance on self-defence, absence of murderous intent or provocation. It follows that the decision by the petitioner not to give evidence left his counsel with very little to work with.
- [28] Defence counsel's closing address to the assessors was consistent with the basis on which the defence had been conducted. Her position was that the prosecution had not established that the petitioner had killed Mr Kumar. She did not rely on self-defence, lack of murderous intent or provocation.
- [29] The Judge summed up in orthodox fashion on the elements of the offence of murder and in particular whether the prosecution had proved that the petitioner had acted with murderous intent. He made it clear that the prosecution was relying on inferences to be drawn from the actions of the petitioner and particularly the nature of the attack. He also summed up on self-defence, again in orthodox fashion. He did not sum up on provocation.

- [30] The assessors' opinion that the petitioner was guilty of manslaughter and aggravated robbery implies a rejection of self-defence. The manslaughter verdict they favoured must have reflected doubts on their part as to whether the petitioner had acted with murderous intent.
- [31] In his 6 June 2017 judgment convicting the petitioner of murder and aggravated robbery, the Judge reviewed the evidence in detail.
- [32] Primarily relevant for present purposes are the reasons the Judge gave for disagreeing with the assessors' opinion that the petitioner was guilty of manslaughter and not murder. Broadly those reasons came down to:
- (a) the Judge's view that murderous intent could be inferred from the nature of the injuries inflicted on Mr Kumar;
 - (b) the passage from his caution interview that I have already cited at [13] being consistent with murderous intent; and
 - (c) the petitioner not transporting Mr Kumar to hospital but rather fleeing the scene.
- [33] The Judge also discussed the possibility that the petitioner had acted in self-defence, a possibility that he rejected on the basis that even if the petitioner genuinely believed that he had been under attack from Mr Kumar, the force he used was not reasonable. He also relied on the passage already cited at [13] as to the "about three" times the petitioner struck Mr Kumar's head while he was lying motionless on the ground.

The appeal to the Court of Appeal

- [34] The petitioner's appeal to the Court of Appeal focused on the admissibility of the caution interview. The Court upheld the correctness of the ruling that the caution interview and charging statement were admissible. Arguments that the verdicts of guilty were unreasonable that the Judge had not given cogent reasons for not agreeing with the assessors, while referred to in the appellant's notice of appeal, were not relied on by counsel and treated by the Court of Appeal as "effectively abandoned".

The basis of the petition to this Court

[35] The two grounds of appeal identified in the petition are the contentions that were raised in the notice of appeal to the Court of Appeal but not pressed in argument, namely that the verdicts of guilty were unreasonable and that the Judge did not offer cogent grounds for differing from the unanimous opinion of the assessors as to manslaughter. As well, in written material handed up to us at the hearing to which the petitioner spoke, he raised additional arguments to the effect that:

- (a) the judge had not dealt with self-defence adequately in his summing up and judgment and should have addressed provocation but did not do so; and
- (b) the hearing of the petition should be adjourned to enable evidence to be called as to the possible significance of the kava consumed by the petitioner on the evening of 15 and the early morning of 16 November 2014 as to whether he had acted with murderous intent.

[36] As the first proposed ground of appeal challenges the convictions for both murder and aggravated robbery, it appeared to be premised on the contention that the prosecution at trial had not adequately proved that the petitioner was the man who got into the van with Mr Kumar at the Lales service station, later fatally attacked him and stole the van. That, however, is not the way the petitioner now seeks to advance his case. Rather he acknowledges that he killed Mr Kumar (or at least is not disputing this) but is seeking to justify (on the basis of self-defence) or mitigate (on the bases of lack of murderous intent or provocation) his actions. And instead of challenging the admissibility of his caution interview and charging statement, he now relies on them to support his position.

[37] The arguments the petitioner now wishes to present were not advanced to the Court of Appeal. This gives rise to process and jurisdictional issues. But rather than get involved in the detail of these issues, I prefer to deal directly with the arguments advanced and will do so by reference to the aspects of the case that the petitioner says were not adequately addressed by the trial Judge and also his request for a further hearing as to the significance of the kava that he had consumed. Since the petitioner's arguments are based substantially on what he said in his caution interview I will also discuss the weight that should be attached to it.

[38] In the sections of this judgment that follow I discuss:

- (a) the weight to be given to the caution interview;
- (b) self-defence;
- (c) murderous intent and the application for an adjournment to allow evidence of possible significance of kava consumption; and
- (d) provocation.

The weight to be given to the caution interview

[39] I have no doubt as to the truth of the petitioner's admissions that he fatally wounded Mr Kumar in the early hours of 16 November 2014. I do, however, have reservations about the truth of some of the contextual aspects of his narrative. For instance, what he said about the involvement of the "Fijian guy" referred to in [11] is not particularly credible. As well, his account of his interactions with Mr Kumar at the Lales Service Station is not consistent with the evidence of the bowser attendant which was along the lines that the petitioner wanted a ride to Naikabula, Mr Kumar was available to take him there and he was to be paid when he got there by the petitioner's wife.

[40] Despite these reservations, I will discuss the case on the basis that it is reasonably possible that the account of events given by the petitioner in his caution interview is true.

Self-defence

[41] I see no ground for complaint as to self-defence. The Judge left self-defence to the assessors and specifically addressed it again in his decision convicting the petitioner of murder and I see no errors of fact or law in the way in which he did so.

[42] In his submissions to us, the petitioner complained that his admission that he had continued to target Mr Kumar's head with the wheel spanner while he was lying motionless on the ground:

... was taken in isolation without attention to all relevant circumstances

I do not think that this is true. This admission formed a natural part of the narrative the petitioner gave in his caution interview. Nothing was said in argument to suggest that there was a context to this admission that diminished its significance. That significance was substantial – the petitioner could not have been acting in self-defence while was using the wheel spanner to strike Mr Kumar’s head when he was on the ground and motionless.

Murderous intent and the application for an adjournment to allow evidence of possible significance of kava consumption

The conclusion of the Judge that the petitioner had acted with murderous intent

- [43] The petitioner had targeted Mr Kumar’s head. He used a wheel spanner, a “solid blunt iron rod”, as the Judge described it, likely to cause severe damage when used against Mr Kumar’s head. Unsurprisingly this attack did cause very severe injuries. The petitioner continued to hit Mr Kumar’s head with the wheel spanner when he was lying motionless on the ground.
- [44] The petitioner’s attack on Mr Kumar’s head with the wheel spanner created a substantial risk that he would die. That substantial risk was so obvious as to make it well open to inference that at the time of his attack on Mr Kumar, the petitioner was reckless in the sense envisaged by ss 21(2) and 237(c) of the Crimes Act.
- [45] In the immediate aftermath of the attack, the petitioner did nothing that was inconsistent with the Judge drawing that inference. For instance, he made no attempt to secure assistance for Mr Kumar even though it must have been obvious to him that he had severely injured him. Had he done so, that might have provided some support for an argument at trial that he lacked murderous intent. But instead of providing assistance, he just drove away.
- [46] What of the kava that the petitioner had consumed?

- [47] In his caution interview the petitioner referred to consuming kava but did not say how much or explain its effect on him. He likewise did not relate his consumption of kava to his attack on Mr Kumar. For instance, his explanation in his charging statement for his attack on Mr Kumar – that he wanted to injure him because he was angry over the unpaid balance of \$30 for the radio – had no apparent linkage to his kava consumption. Given this, I read his references to kava consumption in his caution interview as just part of his narrative as to what he had been doing before he met up with Mr Kumar in the early hours of 16 November 2014.
- [48] I am not aware of cases in Fiji in which defendants have successfully relied on the effects of kava on cognitive ability to support absence of mens rea arguments. As well, there is nothing in the practice of the courts to suggest that general references in a caution statement to kava consumption warrant special attention by a Judge, whether in summing up to assessors or in a judgment. This is unsurprising for the reason I give shortly, at [53], below.
- [49] The petitioner said in his charging statement that he did not intend to kill Mr Kumar. But there was nothing said either in the charging statement or the earlier caution interview that offered an explanation for why he may not have recognised that his attack on Mr Kumar’s head with the wheel spanner put Mr Kumar at serious risk of death.
- [50] All in all, the evidence relevant to murderous intent that was available to the Judge and assessors was limited, confined to the severity of the petitioner’s attack on Mr Kumar’s head and what he had said in his caution interview and charging statement. On that evidence, the conclusion of the Judge that the petitioner had acted with murderous intent was available to him.
- [51] The Judge was required to give “cogent reasons” for substituting his view of the offending (that the petitioner was guilty of murder) for that of the assessors (that the right verdict was manslaughter).¹ The reasons that he gave for doing so which I have

¹ Under s 237(4) of the Criminal Procedure Act 2009, a Judge who did not agree with the majority opinion of assessors was required to give reasons. That such reasons must be “cogent” goes back at least as far as *Ram Bali v R* [1970] 7 FLR 80 at 83.

summarised at [32] cover broadly the same ground as I have and are cogent enough for me.

The application for an adjournment so that evidence as to the possible significance of his kava consumption can be led

[52] The petitioner seeks an adjournment to allow evidence to be adduced as to the possible impact of the kava he consumed on his cognitive abilities – evidence that he hopes will provide support for his claim to us that he acted without murderous intent.

[53] My survey of the academic literature on the pharmacological effects of kava indicates that it has at most very limited impact on cognitive ability.² So I think it unlikely that further evidence of the kind envisaged by the petitioner would provide substantial support for his case. I suspect that at most the evidence might leave open the possibility that kava might occasionally have some adverse impact on cognition. A possibility of that sort would be of little assistance to the petitioner unless it could be correlated to his actions on 16 November 2014. But, as I have indicated, there is nothing in his caution interview to provide such correlation.

Conclusion

[54] For the reasons just given, I see no error in the Judge’s conclusion that the petitioner had murderous intent when he killed Mr Kumar and would not adjourn the proceedings to allow further evidence in relation to the possible significance of the petitioner’s kava consumption.

Provocation

[55] The approach that trial Judges should take to provocation was explained by the Court of Appeal in *Codrokadroka v The State* in this way:³

² See Le Porte and others, “Neurocognitive effects of kava (*Piper methysticum*): a systematic review”, *Human Psychopharmacology: Clinical and Experimental*: Volume 26, Issue 2, (2011) and Aporosa and others, “Kava drinking in traditional settings: Towards understanding effects on cognitive function” *Hum Psychopharmacol Clin Exp*. 2020;e2725. <https://doi.org/10.1002/hup.2725>

³ *Codrokadroka v State* [2008] FJCA 122 at [38].

1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.
2. There should be a "credible narrative" on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.
3. There should be a "credible narrative" of a resulting loss of self-control by the accused
4. There should be a "credible narrative" of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.
5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the fact of each case. However cumulative provocation is in principle relevant and admissible.
6. There must be an evidential link between the provocation offered and the assault inflicted.

- [56] The correctness of this approach was affirmed by this Court on appeal.⁴ These cases were decided under ss 203 and 204 of the Penal Code, but these sections were substantially to the same effect as s 142 of the Crimes Act.
- [57] The petitioner's submissions suggest that non-payment of the \$30 due in relation to the radio was provocation for the purposes of s 142. This contention warrants some analysis.
- [58] On the narrative of the petitioner in his caution interview, this non-payment was the reason for his antipathy towards Mr Kumar. Such antipathy and its underlying cause are not easily encompassed by s 242; this given (a) the reference to "the heat of passion caused by sudden provocation" and (b) the requirement that the killing occur "before there is time for the passion to cool". This language appears to require immediacy between the alleged provocation, the resulting loss of self-control (associated with "heat of passion") and the consequential assault. It does not encompass a festering grudge of the kind that the petitioner claimed to have had against Mr Kumar. I accept that the courts have recognised what was referred to in *Codrokadroka* as "accumulative provocation". This means that the impact of the provocation that is said to have caused

⁴ *Codrokadroka v State* [2013] FJSC 15 at [17].

the loss of control can be assessed in light of earlier provocative words or actions. But that said, I struggle to see how non-payment of a \$30 debt could cause, or even contribute to, the “ordinary person” referred to in s 142 losing self-control and induce that “ordinary person” to attack the debtor’s head with a wheel spanner.

[59] The petitioner’s admission that he had been looking out for Mr Kumar because he was angry with him and his refusal to get out of the car when told to do so by Mr Kumar make it clear that he was the primary initiator of the altercation that led to Mr Kumar’s death. Mr Kumar was entitled to tell the petitioner to get out of the car. If the petitioner had done so, all would have been well. His refusal to get out of the car unless Mr Kumar also got out set the scene for the altercation that followed. The provocations attributed to Mr Kumar (other than the irrelevant non-payment of the \$30) were all associated with this altercation. The altercation having been initiated by the petitioner, I do not see the reactions of Mr Kumar as provocation at all, let alone provocation of a kind that would result in an “ordinary person” losing self-control and attacking his head with a wheel spanner.

[60] The petitioner’s admission in the charging statement that he had set out to injure Mr Kumar because he was angry with him for not paying him the outstanding \$30 is not consistent with his lethal assault on Mr Kumar having been induced by the other provocations attributed to Mr Kumar. And more generally, there is nothing explicit in the caution statement to suggest a loss of self-control by the petitioner.

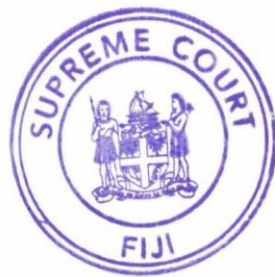
[61] Against this background, and by reference to the *Codrokadroka* approach, there was no “credible narrative” of either provocation of the kind envisaged by s 142 (point 2) or a loss of self-control by the petitioner (point 3). There was likewise no “credible narrative” which supports the view that the attack on Mr Kumar was proportionate to the alleged provocation (point 4). In these circumstances, there was no occasion for the Judge to address provocation in either his summing up to the assessors or his judgment convicting the petitioner.

Result

[62] The petitioner not having satisfied the leave threshold in s 7(2) of the Supreme Court Act 1998, I would dismiss the petition.

Order of the Court

The petition is dismissed.



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The Hon. Mr. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

A blue ink signature, appearing to be "Anthony Gates", written above a horizontal line.

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

A blue ink signature, appearing to be "William Young", written above a horizontal line.

The Hon. Mr. Justice William Young
Judge of the Supreme Court