IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No. CAV 0022 of 2016
[Criminal Appeal No. AAU0048 of 2012 and
High Court of Fiji Criminal Case No. HAC 049 of 2011]

BETWEEN : **MUSKAN BALAGGAN**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Chandra Ekanayake, Judge of the Supreme Court**
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court
Hon. Mr. Justice Madan B. Lokur, Judge of the Supreme Court

Counsel : **Mr. P. Sharma for the Petitioner**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **04 August 2022**
Date of Judgment : **25 August 2022**

JUDGMENT

Ekanayake, J:

Introduction

1. In this matter the petitioner had made an application to this court to review the judgment of this court delivered by their Lordships, Hon. Sathyaa Hettige and Hon. Kankani T. Chitrasiri on 4/11/2016 – by majority decision. Their Lordships of the Review Panel (Hon. Justice B. Aluwihare, Hon. Justice Brian Keith and Hon. Justice P. Dep) having considered

petitioner's application, by an order dated 19/4/2022 had granted review of the above judgment of this court.

> *"For the reasons given in paras 69-76 of the judgment of the Supreme Court dated 4 November 2016, we grant the application for a review of that judgment on the sole ground that the lack of legal representation for the petitioner at her trial in the exceptional circumstances of this case, amounted to a real risk of a miscarriage of justice. There must now be a re-hearing in the Supreme Court of her application for leave to appeal on that sole ground."*

Paras 69-76 of the judgment of this Court dated 04/11/2016 are reproduced below:-

> *"69. Three features of the case struck me immediately. First, Ms Balaggan decided to challenge the admissibility of the records of her interviews and the charge statement in the voir dire. Secondly, she decided to maintain that challenge in the course of the trial. Thirdly, she elected not to give evidence in her trial. In my opinion, these three decisions were tactical disasters. The irrefutable evidence of her links with Xhemali, and the strong evidence that she had been in possession of the bag in which the cocaine had been found, meant that her only viable defence to the charges – unless she was going to make the implausible claim that she had not known what was inside her bag – was that she had been acting under duress when she tried to take the bag to Australia. After all, that was what had been attributed to her by the police. Indeed, when she addressed the court at the conclusion of the evidence, she explained that her defence was that she had been forced to take the suitcase. So since that was to be her defence to the charges, one might have expected her to want the records of her interviews and the charge statement to go before the assessors. In the event, Goundar J ruled that they were admissible, and that ruling was an advantage to her, not a disadvantage.*
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> *70. That advantage was diminished when in the course of the trial in front of the assessors she continued to maintain in her cross-examination of the police officers that she had not said to the police what they had attributed to her, and that they had forced her to sign the records and the statement as accurately recording what had been said. The overwhelming likelihood is that the assessors did not believe her, and that would have made it less likely that they would think it possible that she had been acting under duress when she tried to take the bag containing the cocaine to Australia.*
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> *71. Finally, I am sure that any competent lawyer – indeed, even an incompetent one – would have advised Ms Balaggan that she had little option but to give*

evidence. Once the cocaine had been found in a bag in her possession, she was inevitably going to be convicted unless she had an explanation for its presence there consistent with innocence. In view of what the records of her interviews had said, and what she was going to tell the court in her closing speech her defence was, the obvious thing for her to do was to go into the witness box and tell the assessors about the pressure she had been put under by Xhemali and the drug dealer who had recruited her to take the cocaine to Australia. By electing not to give evidence, she did not explain how the presence of the cocaine in her bag was consistent with her innocence. She sealed her own fate. It is as simple as that. It is difficult to see what was left for the assessors to consider.

72. None of these points were taken by Mr. Nandan. He focused on the fact that Ms Balaggan had to cross-examine the forensic analyst called by the prosecution without the benefit of a report from her setting out what her evidence was going to be, and that the photographs produced by the analyst had not previously been disclosed to her. These disadvantages pale into insignificance when set against the disadvantages I have identified, and although Mr. Nandan did not rely on them, they are, in my view, so fundamental to whether Ms Balaggan was disadvantaged by the lack of legal representation that the Supreme Court cannot ignore them.

73. We have had cited to us many cases which have addressed the extent to which defendants facing serious criminal charges have a right to legal representation. These cases included the famous case in the High Court of Australia of Dietrich v R (1992) 64 A Crim R 176, even though in Ledua v The State [2008] FJSC 31, the Supreme Court held that Dietrich did not apply in Fiji because the common law had no application where the defendant's constitutional right to representation was under consideration. For my part, I do not think that the outcome to this case turns on what the Constitution says about a defendant's right to legal representation or how the courts have interpreted that right over the years. I accept entirely, as was said in Ledua at [34], that the right to legal representation is not absolute, but I prefer to consider whether Ms Balaggan's right to a fair trial – not so much under section 29(1) of the 1997 Constitution (which had been abrogated by the time of the trial) or under section 15(1) of the present Constitution (which had not been promulgated by then) but under the common law – was infringed. That turns on whether, to use the language of the Court of Appeal in Asesela Drotini v The State, Criminal Appeal No: AAU 0001/2005 at [11], and cited with approval in Jope Ramalasou v The State, Criminal Appeal No: AAU 0085/2007 at [9], "there is a possibility that [the defendant] was adversely prejudiced by his lack of representation". In my opinion, there was such a possibility in the very particular, and almost unique, circumstances of this case. Those circumstances were that

- *through no fault of her own Ms Balaggan was deprived only 9 weeks before the trial of the lawyer she wanted to represent her and who had appeared for her on the overwhelming majority of occasions when her case had been listed*
- *she was only 22 years old at the time and in a foreign country*

- *she wanted to be represented by a lawyer at her trial even if she had not done much to find one once her original lawyer could no longer represent her*
- *the tactical decisions she made both for the voir dire and in the course of the trial made no sense*
- *as a result of those decisions her case was never advanced in a way which had any hope of acquittal.*

Even though she may well have been at fault in not having found a lawyer to represent her in time for the trial, the combination of these circumstances lead me to conclude that the danger of her not having been able to do justice to her case was such that her conviction amounted to a real risk of a miscarriage of injustice.

74. I note Chitrasiri J's concern about defendants in the future "playing the system" in reliance on my judgment. That is, in effect, a "floodgates" argument, namely that unscrupulous lawyers might advise their clients to be unrepresented at their trial, or that unscrupulous defendants might decide for their own self-serving reasons not to be represented at their trial, so that they can later argue at the appeal stage that the absence of legal representation created a real risk that their conviction amounted to a miscarriage of justice. The consequence is said to be that cases will drag on, and the prosecution at the subsequent trial may be disadvantaged by the unavailability of witnesses.

75. I do not think that this is a realistic concern. I say that for three reasons. First, you should not underestimate the wisdom of judges. They are very sensitive to litigants and their lawyers trying to manipulate them. They are alive to the tricks which unscrupulous litigants and lawyers can get up to. Our system proceeds on the assumption that judges will not let the wool be pulled over their eyes. Secondly, courts tend to resist floodgates arguments except in plain cases. The reason is obvious. It is difficult to forecast accurately what the wider consequences will be of a particular decision. In any event, if the justice of a particular case demands that it be decided in a particular way, it would be monumentally unfair to the litigant concerned for it to be decided in another way simply because the court fears how its decision is likely to be used in the future. Thirdly – and this is the real answer to Chitrasiri J's concern in the present case – this case turns on what I have already described as its own "very particular, and almost unique" set of facts. It is extremely unlikely that the combination of circumstances which cumulatively resulted in Ms Balaggan's lack of representation resulting in there having been a real risk of a miscarriage of justice in her case will be repeated. My decision in this case is very much on its own facts, and for that reason could hardly be used as a springboard for other appeals. In that connection, I note that neither Hettige J nor Chitrasiri J have thought it appropriate to engage with the cumulative effect of the reasons which have made me think that this case is so unusual.

76. Chitrasiri J's other concern – and it is one which Hettige J has as well – is that Ms Balaggan was told by the trial judge what her rights were. She therefore knew, both at the beginning of the voir dire and in the trial proper, that the decision whether to give evidence or not was hers, and hers alone. She cannot, they say, now rely on the erroneous decisions she made then as the basis of a new appeal. The answer, with respect, is that this puts the cart before the horse. It was because she was unrepresented that she made such poor choices at her trial".

2. This matter was taken up for hearing on 4/8/2022 before this court as per the above order dated 19/4/22.

3. The appellant was jointly charged with one Elton Xhemali for attempted exportation of the illicit drug, namely, cocaine contrary to Sections 9 and 4 of the Illicit Drugs Control Act, 2004. The appellant was also charged with unlawful possession of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act 2004. After trial in the High Court, the Learned High Court Judge (HCJ) having accepted the unanimous opinion of the Assessors convicted the petitioner for attempt to export an illicit drug namely cocaine contrary to Sections 4 and 9 of the Illicit Drugs Control Act 2004 and unlawful possession of the same illicit drug contrary to Section 5(a) of the said Act. The petitioner was sentenced to 11 years and 6 months on each count which was made concurrent, with a non- parole period of 9 years,

4. The petitioner appealed against conviction and sentence by a notice of appeal dated 27 /6/ 2012. Thereafter the petitioner had filed two other amended notices. On the date of the hearing for leave in the Court of Appeal (COA), the petitioner relied on the grounds set out, in the notice dated 30 June 2014.

<u>In the Court of Appeal</u>

5. By a ruling of a Single Judge dated 4/12/2014 leave was granted only on certain grounds submitted against conviction and sentence.

Being dissatisfied by the said order petitioner had appealed to the Full COA. As per para 34 of the judgment arguments submitted to COA had been basically confined to the right to

counsel and refusal of postponements. For the reasons spelt out in the judgment dated 27/05/16 both appeals against conviction and sentence were dismissed.

In the Supreme Court

6. Being aggrieved by the said COA judgment the petitioner assailed the same by filing a leave application to this court dated 27/6/2016. As per para 7 of the judgment of this court the principal grievance and major concern of this petitioner had been as to the right of the petitioner to be legally represented at the trial and in view of the COA decision the right to counsel was denied and as such it led to an unfair trial. After hearing, the judgment dated 4/11/2016 was delivered by this court. It is observed from the conclusions of the majority decision of Hon. Hettige, J and Hon. Chitrasiri, J, leave was refused and COA judgment dated 27/5/2016 was affirmed.

7. Being aggrieved by the said judgment of this court dated 4/11/2016, this review application was filed by the petitioner. Review was allowed by the order of 19/4/2022.

8. By para 3 of the order dated 19/4/2022 Review Panel had granted leave on a limited ground, which has been already produced in preceding para – 1.

9. It is noteworthy to reproduce paragraph 20 of the original judgment of this court which is to the following effect:

> "*20. It can be seen from Supreme court record (state submissions at page 175) when the petitioner made an application for further adjournment to secure counsel on the date of the trial Goundar J has ruled as follows:*
>
> > "(8)*Balagan seeks to vacate the trial to engage counsel. After the Court disqualified Balagan's counsel, she was advised to instruct new counsel. Balagan insisted that she be represented by former counsel and elected not to instruct a new counsel for trial. Surely she has an ability to engage new counsel. She instructed Ms. Vaniqi to represent her in an appeal in an unrelated case. She instructed Mr. Jasveel Singh to seek my disqualification before the commencement of the trial within the trial.*

(9)Balagan has been given ample opportunity to engage counsel. She elected not to engage counsel for her trial. The fact that she is unrepresented is her own making. I also have to bear in mind the interests of the co-accused who has been waiting in custody on remand since 26 January 2011 for trial. After taking into account all these factors and the overall interest of justice, I refuse to grant an adjournment."

10. The main issue that needs consideration is for the reasons given in paras 69-76 of the earlier judgment on the sole ground that the lack of legal representation for the petitioner at the trial in the exceptional circumstances of this case carried a miscarriage of justice. In para – 73 I observe that it is stated – *"through no fault of her own Ms. Balaggan was deprived only 9 weeks before the trial of the lawyer she wanted to represent her and who had appeared for her on the overwhelming majority of occasions when her case had been listed"*. Proceedings had in the High Court amply demonstrates as to what happened in the HC. His former lawyer, one Mr. Chaudhary had been disqualified by court. For about 15 dates inclusive of 16/3/2011 he had appeared for the petitioner.

11. About 3 weeks prior to the original trial date, the Judge before whom it was listed had recused himself and case was assigned to Goundar, J. New trial date was fixed as 21/5/2012. Since there was an objection to the admissibility of the interviews under caution, a voir dire was fixed for 26/4/2012 for the purpose of determining the admissibility of the interview.

12. On 16/4/12 when the case was called to check on legal representation for the petitioner, as per pages 276 and 277 of the HC Record:-

"1st Accused:	*I don't want to engage any other lawyer. I am appealing against your recusal decision to COA.*
Court:	*You have any disclosures?*
1st Accused:	*I don't have my disclosures. I returned the disclosures to Mr. Chaudhary.*
Court:	*State will provide the accused with a spare copy of disclosures. Accused given ample opportunity to engage counsel. Co accused is objecting delay. Trial within trial will commence on 26/04/12 at Lautoka High Court."*

13. That being the date set for voir dire hearing, one Mr. Singh had first appeared for the petitioner and later he had withdrawn. Voir dire proceedings and right to cross-examination were explained by court to the petitioner. Then the prosecution 1st witness was called and he was cross-examined by the petitioner.

14. Most of the witnesses the prosecution had called were cross-examined by her even at the voir dire and also at the trial.

15. As per High Court Record (HCR) Volume 2, an amended information had been filed. The petitioner appears to have understood the charges and pleaded not guilty to both counts. When the prosecution commenced calling the witnesses, the HCR (Vol.1) amply demonstrates that (Proceedings starting from 21/5/2012) the petitioner appeared in person and had cross-examined most of the prosecution witnesses quite efficiently. Even at the close of the prosecution case, closing submissions also had been made by the petitioner herself. The petitioner has personally moved for two days time to prepare her mitigation which had been allowed by the learned High Court Judge. Having concluded the submissions in mitigation by the Petitioner sentence had been delivered by the Learned HCJ.

16. There is nothing that appears in the HCR even to suggest that the petitioner was not prepared to conduct her own case and/or that there were instances she sought assistance of others to conclude the trial against her.

17. It is noteworthy to stress upon the fact that Courts in this jurisdiction have shown at all levels their respect for rights of accused person to a fair trial. In others words to offer a trial according to law. Obviously this includes the right to counsel, the right to disclosure, the right to adequate time, and facilities in order to prepare a defense, the right to remain silent, and the right to trial without delay. With regard to right to counsel, I am mindful of the pronouncement of the Court of Appeal at paragraph 9 of **Jope Ramalasou v State**; Criminal Appeal No: AAU 0085/07, to the following effect:

> *"[9] This court has on several occasions explained the practical limits on the right to counsel. The right to counsel is not absolute. Where an accused person is indigent, the right to be provided with representation under the Legal Aid Scheme must depend on the interests of justice. Although, as this Court observed in* ***Asesela Drotini v. The State*** *Cr. App. AAU1/05, 24 March 2006:*
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> > *"It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence.*
> > *The question for this Court is whether there is a possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that he was given more than adequate time to find counsel, he was advised correctly of his rights by the trial judge and conducted his case competently."*

In the case at hand the record shows that the petitioner was given more than adequate opportunities and ample time to engage the services of a lawyer. Not only that, as per proceedings before High Court, the learned HCJ also had explained her rights and the proceedings sufficiently.

18. When considering the right of an accused person to be defended, one has to be mindful of Section 165 of the Criminal Procedure Decree 2009, which reads thus:-

> *"165. Any person accused of an offence before any criminal court, or against whom proceedings are instituted under this decree in any court, may of right be defended by a lawyer".*

Plain reading of the above section shows that the above right which is given to an accused is not absolute, 'but may as of right be defended by a lawyer'.

Absence of legal representation

19. If an accused is not legally represented in the trial then the appellate tribunal must examine:

(a) whether the trial was fairly conducted, and

(b) whether it was not miscarried due to lack of representation.

In this regard I opt to cite the observations made in the case of **Balelala v State** [2004] FJCA 4; AAU .2004S (11/11/2004):

> *"The desirability of any accused person having legal representation at a trial is obvious, for the reasons stated in **Dietrich v. The Queen** [1992] HCA 57; (1992) 177 CLR 292; but it is not an absolute right – **Robinson v. The Queen** (1985) AC 956.*
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> > *"The absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted. In this case, the appellant sought, but was refused legal aid by reason of an assessment of a lack of merits in his defence. The decision was properly reviewed and dismissed. Section 28 of the Constitution does not require the provision of legal aid in absolute terms. The obligation which is implicit in that respect is one which arises where "the interests of justice so require."*

20. Now, I shall advert to the contention whether absence of counsel is not necessarily fatal to a conviction which is obtained after a trial that has been fairly conducted.

21. In **Esala Tabaloa v The State**; Criminal Appeal No. AAU 0058/08 (15/7/2010) the Court of Appeal held that: "*It is well established that the right to counsel is not an absolute right* (***Eliki Mototabua v. The State;*** *CAV 004 of 2005S) and the absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted (**Seremaia Balelala v. The State** Criminal Appeal No. AAU0003 of 2004). The question is whether the trial miscarried as a result of the appellant being unrepresented **(Samuela Ledua v The State** Criminal Appeal CAV004 of 2007).* In this case the learned High Court Judge had given the appellant ample time and opportunity to secure a counsel of her own choice but she had not done so. Instead she had insisted that she be represented by her

former counsel whom the court had disqualified, and against whom the petitioner had also complained.

22. Having carefully considered how the petitioner had conducted her trial in the High Court in person there is nothing on the record even to suggest that the petitioner's trial miscarried due to lack of representation. Further the learned HCJ not only throughout the voir dire inquiry, but also throughout the main trial had offered the petitioner ample opportunities to retain counsel. But she had continuously failed to do so for reasons unknown and cannot be gathered from the record.

23. Being aggrieved by the conviction and sentence, the petitioner had lodged an appeal to the Court of Appeal which was dismissed on 27/05/2016. Then she assailed the said COA judgment in this Court on 04/11/2016. The main grounds are spelt out in paragraph 6 (i) (a) – (c) of the said petition to the Supreme Court dated 04/11/2016.

24. It is to be noted that all 3 grounds submitted here were interconnected to the issue of whether the COA erred in law in failing to hold that there was a miscarriage of justice due to non-representation. On a careful perusal of the COA judgment I am convinced that for the reasons stated therein, they had not erred in arriving upon the conclusion reached on the principal issues namely, right to counsel and with regard to postponements. I see no error has been committed by them. In the result, appeal had been dismissed.

25. I have carefully considered the material included in paras 69 -76 of the previous judgment of this court as mentioned in the review order dated 19/4/2022. Further it is noteworthy to mention that according to the material on record the petitioner had made no attempts to obtain legal aid. For the reasons articulated in the preceding paragraphs I am convinced that trial had been fairly conducted and it was not miscarried due to lack of representation. Further, I am satisfied that no exceptional circumstances also exist here which compels this court to conclude that there was a risk of miscarriage of justice.

Special Leave

26. Section 7 of the Supreme Court Act No. 14 of 1998 deals with special leave to appeal to the Supreme Court. Section 7 thus reads as follows:-

> (1). In exercising its jurisdiction under Section 98 [formerly section 122] of the Constitution with respect to special leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstance of the case-
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> (a) refuse to grant special leave to appeal;
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> (b) grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
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> (c) grant special leave and allow the appeal and make such other orders as the circumstances of the case require.

Section 7(2):-

In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

(a) a question of general legal importance is involved;
(b) a substantial question of principle affecting the administration of criminal justice is involved; or
(c) substantial and grave injustice may otherwise occur.

In this jurisdiction it is well settled that the criteria set out in Section 7(2) of the Supreme Court Act are extremely stringent and special leave to appeal is not granted as a matter of course. In **Dip Chand v State**; CAV 004.2010(9/5/12) had clearly held as follows:-

> *"....Given that the criteria is set out in Section 7 (2) of the* Supreme Court Act *No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course the fact that the majority of the grounds relied upon by the Petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the Petitioner of crossing satisfying (sic) the threshold requirements for special leave even more difficult."*

27. It is needless to stress that this Court being the final Appellate Court, special leave to appeal should be granted only in cases which crosses the threshold stipulated in section 7(2) of the Supreme Court Act 14 of 1988. In view of the above analysis, I conclude that petitioner has

failed to satisfy court with regard to above threshold. Special leave to appeal is therefore refused. The judgment – majority judgment of this Court dated 4/11/2016 is hereby affirmed.

Jayawardena, J:

28. I have considered both the judgments of Hon. Justice C. Ekanayake and Hon. Justice M. Lokur. I agree with the reasoning, findings and the conclusion of the draft judgment of Hon. Chandra Ekanayake.

Lokur, J (dissenting)

29. I have had the benefit of reading the draft judgment prepared by my learned sister Justice Chandra Ekanayake. With respect, I am unable to subscribe to the view that she has taken.

30. This petition is listed for considering a review of the judgment dated 4 November 2016 "*on the sole ground that the lack of legal representation for the petitioner at her trial in the exceptional circumstances of this case, amounted to a real risk of a miscarriage of justice.*"

31. The facts of the case have been mentioned by my learned sister Justice Ekanayake in her draft judgment and there is no reason to repeat them, except to the extent of the facts material for a decision on the question referred.

32. In June 2011, an allegation of rape was made by the petitioner against her chosen lawyer, which allegation she later withdrew. She was then charged with giving false information to a public servant. She pleaded guilty and was sentenced to two years imprisonment by the Magistrate's Court.

33. Later, the learned High Court Judge seized of the principal case, on his own motion, took up the matter of disqualification of the chosen lawyer as counsel for the petitioner in the case. The lawyer was heard and the learned Trial Judge gave a ruling on 16 March 2012 disqualifying the lawyer as "necessary to ensure a fair trial for the accused and to maintain public confidence in the administration of the criminal justice system." It is important to

note that notwithstanding the false allegation, the lawyer was willing to represent the petitioner and the petitioner was desirous of the lawyer continuing to represent her.

34. The learned Trial Judge noted that the trial is scheduled to commence on 21 May 2012 and therefore the petitioner has adequate time of nine weeks to engage and instruct a new counsel.

35. Feeling dissatisfied with the ruling of learned Trial Judge, the petitioner preferred an appeal before the Court of Appeal. The appeal was heard by a learned single Judge who delivered his ruling on 25 May 2012, that is, after the trial had commenced. This is significant.

36. The learned single Judge concluded that since the disqualification of the chosen lawyer was an interlocutory order, it could not be appealed against to the Court of Appeal as an interlocutory appeal. However, the learned single Judge held: "It may form the basis of a ground of appeal in the event that the Appellant is convicted."

37. In the meanwhile, on 21 May 2012 before the trial commenced, the petitioner moved an application before the learned Trial Judge for an order for the trial to be vacated to enable her to engage a counsel. Like any litigant, the petitioner would have perhaps been hopeful of a favourable verdict from the Court of Appeal. It may be recalled that on 21 May 2012 her appeal before the Court of Appeal had not yet been decided and it was uncertain whether she could be represented by her chosen lawyer. In view of the pendency of the appeal, there was no occasion for the petitioner to even consider engaging and instructing another lawyer.

38. The petitioner's application before the learned Trial Judge was rejected on the same day (21 May 2012) and the trial commenced without the petitioner knowing whether she could or could not be represented by her chosen lawyer. In my opinion, this was unfair to her. The learned Trial Judge was of the view that the situation in which the petitioner found herself was of her own making. This is not entirely correct, since her appeal disqualifying her chosen lawyer was pending before the Court of Appeal and the ruling had not yet been

delivered. It would, in my opinion, have been appropriate, if not respectful, for the learned Trial Judge to await the decision of the Court of Appeal.

39. Be that as it may, the trial for the first five days was conducted without the petitioner being represented by a lawyer. During this period, at least 20 (if not more) prosecution witnesses were examined, out of a total of about 27. Surely, this is unfair to any accused, however heinous the alleged crime.

40. That the petitioner conducted the proceedings well (including the voir dire) is beside the point. The question is whether the petitioner was entitled to be represented by a lawyer, if not of her own choice, then at least by some other lawyer. The petitioner was neither represented by a lawyer of her own choice nor by any other lawyer. It is not as if the petitioner willingly conducted the trial in person – she had no option but to do so because of circumstances beyond her control, namely, the pendency of her appeal in the Court of Appeal and the haste of the learned Trial Judge to commence the proceedings without waiting for the decision of the Court of Appeal.

41. I am of the opinion that the lack of legal representation for the petitioner at her trial in the exceptional circumstances of this case, amounted to a real risk of a miscarriage of justice.

42. In my opinion, the petitioner's application for leave to appeal must be re-heard on this sole ground.

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Hon. Mr. Justice Madan B. Lokur
Judge of the Supreme Court

Orders of the Court:

1. Special leave to appeal is refused.
2. The majority judgment of this court dated 04/11/2016 is affirmed.

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Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

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