IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO: AAU0078/2013
(High Court Case No. HAC045/2013)

BETWEEN	:	**NILESH CHAND**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Hon. Mr. Justice Daniel Goundar**
Counsel	:	**Mr. A. Kohli for the Appellant** **Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**16 February 2016**
Date of Ruling	:	**1 March 2016**

RULING

[1] The appellant was charged with two counts of murder contrary to section 237(a) (b) and (c) of the Crimes Decree 2009. On count 1 it was alleged that between 5th and 7th July 2013 the appellant murdered Abhikesh Kumar. On count 2 it was alleged that between 5th and 7th July 2013, the appellant and his accomplice,TevitaDutaboto murdered Samuel VikashNand. On 6 August 2013, the appellant appeared in the High Court at Labasa with his private counsel, Mr Sen and pleaded guilty to both counts. His accomplice who was represented by a different private counsel entered a plea of not guilty to count 2. On 8 August 2013, the appellant accepted the facts presented by the prosecution in support of the charges, after which the appellant's counsel presented mitigation. On 9 August 2013, the appellant was sentenced to life imprisonment with a minimum term of 25 years before eligible for pardon.

[2] This is a timely application for leave to appeal against conviction and sentence on the following grounds:

1. That the plea of the Appellant was equivocal and involuntary and he was pressured into pleading guilty to the offence of murder.
2. That the learned Judge erred in law in failing to correctly apply judicial discretion to set a minimum non-parole term to be served by the Appellant before he could apply for a pardon.

[3] The facts have been succinctly summarised in paragraphs [3]-[7] of the sentencing remarks as follows:

> The two victims of these murders were Abhishek (aged 20, a F.N.U. student) and his friend Samuel (aged 17, a student at Dreketi High School). For some time Abhishek had been having a romantic but platonic relationship with a young lady called Subashni (18 years) who happened to be the accused's niece and was living with the accused.
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> On the 5th July 2013 at about 7.45pm the accused, a 31 year old farmer of Matasawalevu, Dreketi drove to Abhishek's home in Wailevu and picked up the two young men. The accused was together with another. The four of them drove to Labasa, bought a carton of beer and then proceeded to Korosomo, Seaqaqa to drink the beer.
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> The accused knew that Abhishek had been texting and phoning his niece and he was most unhappy about it. The accused had taken Subashni'ssim card from her phone and using it in his own phone placed a miss-call to Abhishek on their way to Korosomo. As soon as the call was received on Abhishek's phone he showed it to the accused telling him that there was a missed call from Subashni. The accused then got angry saying that this now confirmed that they were having a relationship. He was angry with Samuel as well because he attended the same school as Subashni and the accused thought he was acting as a messenger for Abhishek.
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> They drove up to Korosomo and at Long Bay they stopped and parked. The four got out and started to drink the beer. The accused then asked Abhishek why Subashni had called and picking up a full bottle of beer, he, with full

strength, struck the face of Abishek with it. Abhishek fell to the ground. The accused went to the car and pulled out a cane knife. He sat on Abhishek's chest and slashed his neck with the knife several times until Abhishek was motionless.

After cutting Abhishek's neck the accused then jumped on to Samuel and slashed both his arms with the knife. He then cut the boy's neck from the back, severing the spinal cord from his neck. The accused and his companion then got back into the vehicle and left the scene.

[4] The appellant's contention is that he pleaded guilty to the charges under pressure from his trial counsel, Mr Sen. The appellant has filed an affidavit in which he has stated that Mr Sen was engaged by his father and one of the conditions for the payment of counsel's fees was to plead guilty. The appellant's father did this to save the family from embarrassmentof a trial. Neither Mr Sen nor the appellant's father filed any affidavit to support these contentions.

[5] The principles governing an appeal against conviction arising from a guilty plea were explained by the court in*Nalave& Marama v State*unreported Criminal Appeal No. AAU004 & AAU005 of 2006; 24 October 2008 in paragraphs 24-25 as follows:

> *"It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, **R v. Vent** (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (**Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132.*
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> *In **Maxwell v The Queen** (1986) 184 CLR 501, the High Court of Australia at p. 511 said:*
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> *The plea of guilty must however be unequivocal and not made in circumstances suggesting that it not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification*

indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered."

[6] I have reviewed the trial judge's file notes of 6th and 8th August 2013. There is nothing in the court record to suggest that the appellant did not exercise his free will when he pleaded guilty to the charges. The appellant was represented by Mr Sen, who is considered a senior practitioner in Labasa. The trial judge had no reason to question Mr Sen's professional judgment. The facts supported the charges and there were no evidential basis for any defence such as provocation available to the appellant. There is no air of reality in the appellant's claim that he was pressurised by Mr Sen to plead guilty to the charges. Firstly, the appellant has not made any formal complaint against Mr Sen to the Legal Practitioners Unit regarding the alleged professional misconduct. Secondly, the initial notice of appeal was filed by Mr.Sen, who appealed against sentence only. This shows that the appellant was willing to retain Mr Sen as his counsel after pleading guilty. It was only when the appellant changed counsel, he contended that his plea was involuntary and equivocal. In these circumstances, there is no arguable ground to suggest the guilty pleas were equivocal, and therefore, leave to appeal against conviction should be refused.

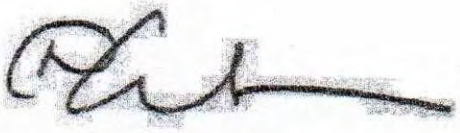
[7] The reasons the learned Judge imposed a minimum term of 25 years are summarised in para. [15] of the sentencing remarks:

> I take into account the accused's early guilty plea; I take into account his co-operation with the authorities; I take into account his clear record and I take into account his reported remorse: however the sheer horror of these frenzied, unprovoked and unjustified intentional murders of two very young men must attract a minimum term of 25 years and that is the minimum term I impose.

[8] In my judgment, there is no arguable error in the sentencing discretion of the learned Judge to arrive at a minimum term of 25 years. The murders were dreadful and a minimum term of 25 years was justified on the facts of this case. For these reasons, leave to appeal against sentence should be refused.

[9] **Result**

Leave refused.



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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Messrs Kohli& Singh, Labasa for the Appellant.
Office of the Director of Public Prosecutions for the State.