IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO:AAU0142 of 2014
[High Court Case No: HAC052 of 2013S]

BETWEEN	**:**	**SAILASA MOCIU**
		Appellant
AND	**:**	**THE STATE**
		Respondent

Coram	:	Hon. Mr. Justice Daniel Goundar
Counsel	:	Mr S Waqanaibete for the Appellant Mr Y Prasad for the Respondent
Date of Hearing	:	13 March 2017
Date of Ruling	:	17 March 2017

RULING

[1] This is a timely application for leave to appeal against conviction and sentence. Following a trial in the High Court at Suva, the appellant was convicted of murder and sentenced to life imprisonment with a non-parole period of 20 years to serve before eligible for a pardon. The appeal is governed by section 21(1) of the Court of Appeal Act, Cap 12. The appellant has a right of appeal on any question of law alone. Leave is not required to appeal on a question of law alone. Leave is required to appeal on any question of mixed law and fact, or fact alone, and to appeal against sentence. Section 35(1) of the Court of Appeal Act Cap. 12 gives a single judge power to grant leave. The test for leave to appeal against conviction is whether the appeal is arguable (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013). The test for leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013).

[2] The grounds of appeal are:

> Appeal Against Conviction
> Ground 1 – The Learned Trial Judge erred in law when he misdirected the assessors on the elements of the offence of murder.
> Ground 2 – That the learned Trial Judge's use of examples to explain the elements of murder the assessors lacked fairness and objectivity required for a fair trial.
> Ground 3 – The Learned Trial Judge erred in law and in fact when he failed to adequately consider the defence of provocation raised by the appellant.
> Ground 4 – The Learned Trial Judge's direction to the assessors that, 'according to the prosecution, the family lived together happily until September 2012, when the accused was released from the prison', was prejudicial and lacked fairness and objectivity required for a fair trial.
> Ground 5 – That the learned Trial Judge erred in law and in fact when he did not give a written reason for admitting the confession in caution interview during a voir dire inquiry.
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> Appeal Against Sentence
> Ground 6 – The Learned Trial Judge had erred in law to consider the Appellant's conduct of taking the deceased life as an aggravating factor to enhance the sentence, when in fact the conduct of taking the life is part of the elements of murder.

[3] The evidence was largely undisputed by the appellant. The appellant had been married to the deceased for seventeen years and together they had four young children. They started having problems in their marriage after the appellant returned home in September 2012 after serving a prison sentence in an unrelated matter. Evidence was led to show that the appellant and the deceased had constant arguments. On 9 January 2013, the appellant stabbed the deceased with a kitchen knife. She died due to excessive loss of blood due to the severing of a major artery that supplied blood to the right upper limb. At trial, the appellant admitted stabbing the deceased with a kitchen knife. He said he suspected the deceased was unfaithful and she was disrespectful to him.

The elements of murder

[4] The appellant's contention is that the learned trial misdirected the assessors on the elements of murder. The impugned direction is in paragraph 9 of the summing-up:

"Murder", as a criminal offence, has three essential elements. For the accused to be found guilty of "murder", the prosecution must prove beyond reasonable doubt, the following elements:

(i) that the accused did a wilful act; and
(ii) that wilful act caused the death of the deceased; and
(iii) at the time of the wilful act, the accused either;

(a) intended to cause the death of the deceased; or
(b) is reckless as to causing the death of the deceased.

[5] Counsel for the appellant submits that the physical element of murder is conduct and not a wilful act as directed by the learned trial judge. Section 237 of the Crimes Decree 2009 defines murder as follows:

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.

[6] Although the question whether a wilful act is an element of murder is a point of law alone, in my judgment, the question is frivolous and cannot possibly succeed. To engage in an act means is to do an act (section 15(2) of the Crimes Decree 2009). Further, a conduct can only be a physical element if it is voluntary (section 16(1) and a conduct is voluntary if it is a product of the will of the person (section 16(2)). Given the definition of the phrase ‘engage in conduct’ carries the notion of a voluntary act, it is not a misdirection to inform the assessors that the prosecution is required to prove that the accused did a wilful act that caused the death of a person. Ground one cannot possibly succeed.

Use of prejudicial examples to explain the physical element

[7] This complaint is misconceived. The appellant’s contention is that the learned trial judge’s use of an example of a person stabbing with a kitchen knife to explain the physical element of murder lacked fairness and objectivity. The appellant did not

dispute stabbing the deceased with a kitchen knife. The physical element of murder was not disputed by the appellant. In these circumstances, there was nothing wrong with the use of example of a stabbing to explain the physical element of murder that was not in dispute. Ground two is unarguable.

Direction on provocation

[8] The direction on provocation is in paragraphs 14 and 36 of the summing-up as follows:

> 14. Provocation is a partial defence. If it is made out, it reduces an offence of murder to manslaughter. If an accused person does an act which causes death, in the heat of passion, caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter. Provocation is any wrongful act or insult of such nature, when done to an ordinary person, deprives him of the power of self-control, and induces him to assault the deceased. If you find that the above defence is available to the accused, then you must find him not guilty of murder, but guilty of manslaughter. However, if you find that the defence is not available to the accused, and all the three elements of murder had been proven by the prosecution beyond a reasonable doubt, then you must find the accused guilty as charged.
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> 36. You will have to consider the above defence, if you have reached the conclusion at this stage that, the accused is guilty of murdering his wife, at the material time. Please, examine this defence of provocation in the light of the direction I gave you at paragraph 14 hereof. Was the accused provoked by the wife to the extent that he subsequently stabbed her? Was the provocation by the wife of such a nature as to cause him to lose his power of self-control? Was the stabbing done in the heat of passion, caused by sudden provocation, and before there was time for his passion to cool? Was the retaliation proportionate to the provocation? In my view, the surrounding circumstances and the previous verbal arguments between the accused and his wife from 1am to 5am on 9 January 2013, was not sudden provocation. There was enough time for his anger etc to cool down as they walked to the bridge. In his own evidence, he wanted to teach her a lesson. In my view, the defence of provocation is not available to the accused. In any event, it is entirely a matter for you.

[9] Counsel for the appellant while conceding that the direction on provocation was correct, submits that the learned trial judge should have emphasised on the facts from which an inference could have been drawn that the provocation was prolonged as the couple argued the entire night before he stabbed the deceased in the early hours of the morning. In paragraphs 32-35 of the summing-up, the learned trial judge highlighted

all the relevant facts that led to the stabbing of the deceased by the appellant. The assessors and the trial judge did not find the appellant was provoked. The finding was available on the evidence. Ground three is unarguable.

Bad character evidence

[10] The bad character evidence was that the appellant had been in prison before he was charged with murder. The evidence was contained in the appellant's caution interview. The evidence was led as background evidence of the relationship between the appellant since September 2012 when the couple started having problems in their marriage. In paragraph 15 of the summing-up, the learned trial judge informed the assessors that "according to the prosecution, the family lived together happily, until September 2012, when the accused was released from prison". Otherwise, the learned trial judge did not make any further reference to this evidence in the summing-up. The evidence was led without any objection from the appellant's trial counsel. If the evidence was prejudicial to the appellant, then his trial counsel could have asked the trial judge to either exclude the evidence or warn the assessors not to draw any adverse inference as to the guilt of the appellant based on his criminal history. No direction was sought by the appellant's trial counsel. Ground four is unarguable.

Reasons for voir dire ruling

[11] The appellant's caution interview was ruled admissible after a voir dire hearing, but written reasons for the decision were given on 28 October 2014, that is, before the summing-up was delivered. Although it is always desirable for the reasons to be given at the same time when the ruling is made, there is no caveat against the ruling to be made, for instance, admitting the evidence so that the trial can proceed without delay, and the written reasons provided later during the course of the trial and before the case is concluded. The learned trial judge did give written reasons for his ruling admitting the appellant's caution interview before the summing-up was delivered. Ground five is unarguable.

Minimum term

[12] The sentence for murder is fixed. It is mandatory life imprisonment. There is no right of appeal against a fixed sentence. The appellant's complaint relates to the length of his

minimum term before he can apply for a pardon. In my judgment, the minimum term of 20 years reflect the criminality involved. The killing arose from domestic violence. The purposes of the sentence are to denounce the appellant's crime and deter him and others from committing similar offences. The minimum term is within the permissible range.

Result

[13] Leave refused.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State