

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL NO. AAU 73 OF 2015**  
**(High Court HAC 81 of 2014)**

**BETWEEN** : **JOELI MASICOLA**  
*Appellant*

**AND** : **THE STATE**  
*Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Mr M Fesaitu for the Appellant**  
**Mr M Korovou for the Respondent**

**Date of Hearing** : **22 and 27 March 2019**

**Date of Ruling** : **10 May 2019**

**RULING**

[1] The appellant was convicted on his plea of guilty by the High Court at Suva on one count of murder, one count of attempted murder and one count of acting with intent to cause grievous harm. On 5 June 2015 he was sentenced to mandatory life imprisonment on the

first two counts and to 4 years imprisonment on the third count to be served concurrently. The Court exercised the discretion under section 237 of the Crimes Act 2009 and fixed 19 years as the minimum term before a pardon may be considered.

- [2] The appellant filed a timely notice of appeal against conviction and sentence on 3 July 2015. On 22 March 2019 the appellant filed an application seeking to abandon his appeal against sentence. That application will be listed before the Court of Appeal on a date to be fixed. This is an application for leave to appeal against conviction under section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court power to grant leave. The test for granting leave is whether the appeal is arguable before the Court of Appeal (**Naisua -v- The State** [2013] FJSC 14; CAV 10 of 2013, 30 November 2013).
- [3] The only ground of appeal against conviction relates to the defence of provocation. The ground involves consideration of two principles. The first principle is 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 (**Nalave -v- The State** [2008] FJCA 56; AAU 4 and 5 of 2006, 24 October 2008). Equivocation may be evidenced by ignorance, fear, duress, mistake or even the desire to gain a technical advantage (**Maxwell -v- R** [1996]) 184 CLR 501. The second principle is that it is the duty of a trial judge in Fiji to decide whether on the evidence he should direct the assessors and himself on the availability of any alternative defence or verdict that is not raised by the defence (**Praveen Ram v The State** [2012] 2 Fiji LR 34).
- [4] However those two principles must be considered in the context of the particular circumstances of the present application. At the trial the appellant pleaded guilty to all three counts. He was represented by Counsel. With both the appellant and Counsel present in court the prosecution read out a detailed summary of the facts. Through his counsel the appellant admitted the summary of facts.

- [5] The summary of facts that was read out in court by the prosecutor was reproduced in full in the sentencing decision. The relevant parts of the summary are adopted for the present application. The appellant and Tavenisa Lewavavai had been married for about 4 years. At the relevant time they had been separated for about 2 weeks and Tavenisa had moved away to stay with her aunt Karalaini Loalua at Kilikali settlement in Ratu Dovi Road Nadera. Tavenisa subsequently became involved with another man and they both stayed with the aunt at Kilikali settlement. On 21 February 2014 the appellant was at Kilikali settlement trying to obtain a cane knife at about 1.00am. About an hour later he obtained a cane knife from a neighbouring settlement. Shortly afterwards the appellant entered the house where his wife and her partner, Jone Nabaisila were sleeping. The aunt was also asleep at the time. The appellant struck Tavenisa first while she was still lying down. He struck her with the cane knife on the right side of her face, the back of her left shoulder and the right hand severing her small right finger.
- [6] The appellant then struck Jone Nabaisila who was also still lying down. He struck the victim on the left side of the head, left arm, left hand, abdomen and left leg. The aunt then woke up and was then struck by the appellant with the cane knife on her right hand severing her small finger. The appellant then fled the scene. The three victims were all bleeding. The most serious injuries were to Jone Nabaisila whose intestines were protruding due to the blow to his abdomen. The police were called. The two women were conveyed to CWM Hospital. Jone Nabaisila died from his injuries at the scene.
- [7] The appellant subsequently surrendered himself to Police at the Valelevu Police Station. In his caution interview the appellant said that he had allowed his wife to go and stay with her aunt. On 20 February 2014 he telephoned his wife at about 11pm to find out when she was returning home. She told him it was late and not to disturb her. The call was terminated by the wife. The appellant called a second time and on this occasion a male answered the phone. He also told the appellant not to call again. The appellant asked to speak to his wife and when she answered, she told him not to call as “*they were*



*having sex.*” The appellant told the police that he heard his wife moaning and having sex and then the phone went off. He called two more times. The first was a brief conversation with the wife and second time the phone was turned off. The appellant told the police that he made up his mind to see them and find out the truth. He told the police that if he found them sleeping together he will kill them both. When he arrived at the house he found all three were asleep with the deceased, partially dressed, sleeping between his wife and her aunt, both of whom were in their clothes. He then went searching for a knife.


- [8] There is no indication in the sentencing decision that the learned Judge considered it necessary to raise any issue with either counsel. The judge appears to have considered the appellant’s agreement with the summary of facts as decisive and immediately proceeded to convict and sentence the appellant on all three counts.
- [9] It does not follow that a judge is necessarily prevented from assessing whether a plea of guilty is equivocal when an accused person is represented by counsel. Furthermore it does not follow that a plea of guilty by an accused person who is represented by counsel should be regarded always as an unequivocal plea.
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- [10] The issue in this application is whether the judge, on the basis of the agreed summary of facts, was entitled to conclude that the guilty plea was unequivocal. A trial judge is required to address the defence of provocation if there is evidence that raises the issue of provocation. In my judgment there is no reason why that obligation should not apply when a judge is required to determine whether a plea of guilty is unequivocal based on an agreed summary of the facts presented by the prosecution
- [11] If the agreed summary of facts suggests that the plea of guilty may be equivocal due to mistake or ignorance then the judge is, in my opinion, at the very least required to raise the issue with Counsel for the accused.

[12] I have concluded that in this case it is arguable that the learned judge should have raised with counsel whether the accused had received advice on the issue of provocation based on the very detailed summary of the facts presented by the prosecution. Whether this happened can only be resolved by examining the record of proceedings in the court below. Leave is granted on that basis.

Orders:

- 1) *Leave to appeal against conviction is granted.*
- 2) *Application to abandon appeal against sentence to be listed before the Court of Appeal on a date to be fixed.*



  
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Hon Mr Justice W. D. Calanchini  
**PRESIDENT, COURT OF APPEAL**