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

CRIMINAL APPEAL NO.AAU 086 of 2016
[In the High Court at Lautoka Case No. HAC 36 of 2010]

BETWEEN	:	**ASHIL KUMAR**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. A. Chand for the Appellant**
	:	**Mr. L. Burney for the Respondent**
Date of Hearing	:	**14 August 2020**
Date of Ruling	:	**18 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of murder contrary to section 237 of the Crimes Decree, 2009 committed on 10 April 2010 at Nawaka settlement, Nadi in the Western Division.

[2] The information read as follows.

> *'Statement of Offence*
>
> ***MURDER:*** *Contrary to section 237 of the Crimes Decree No. 44 of 2009.*
>
> *Particulars of Offence*
>
> ***ASHNIL KUMAR*** *on the 10th day of April 2010 at Nawaka settlement, Nadi in the Western Division murdered Mukesh Kumar.'*

[3] On 11 May 2012 the appellant had been sentenced to mandatory life imprisonment upon his plea of guilty to the information with a non-parole period of 04 years. I find the following paragraphs in the sentencing order regarding his guilty plea and the sentence.

> *'2. When the case was taken up for Trial the Accused through his Counsel informed the Court that he wants to plead guilty. Since the only punishment is life imprisonment, the Accused was informed of the consequences of the sentence and he was given time to re-consider his decision*
>
> *3. When the case was called on the following day the Accused informed the Court that after considering all circumstances he wants to plead guilty. Charge was read to the Accused then he pleaded guilty to the charge. His Counsel also confirmed the plea.*
>
> *4. When the State Counsel submitted the summary of facts the Accused admitted to the same without any reservation.*
>
> *According to the summary of facts the mother (Kiran Lata) of the Accused had an extra marital affair with the Deceased Mukesh Kumar who was the step brother of her husband. On the fateful day, the Accused who was working as a driver at a tourist Bus Company had come home to take his jacket. In the mean time, the mother Kiran Lata sneaked her Deceased paramour and involved with him at the bedroom. On hearing the Accused coming home the deceased hid himself under the bed. The Accused bend under the bed to retrieve a carton to get his jacket had seen the deceased under the bed. Both were involved in a physical altercation and the Accused had attacked the deceased with a knife. The deceased succumbed to his injuries. Witnesses to the incident are the mother, sister and brother of the Accused.*
>
> *5. Being convinced with the plea of the Accused to be unequivocal, I found the Accused guilty and convicted him for the charge of Murder punishable under section 237 of the Crimes Decree.*

[4] It appears that the trial judge had referred to section 18(1) of the Sentencing and Penalties Act and some judicial decisions in imposing the non-parole period of 04 years. However, it is pertinent to mention that in terms of section 237 of the Crimes Act, 2009 the sentencing judge has the judicial discretion only to fix a minimum term to be served before pardon may be consiwaadered (while the imprisonment for life is mandatory) and not a non-parole period under section 18(1) of the Sentencing and Penalties Act.

[5] While a pardon may be recommended, upon a petition by a prisoner, by the Mercy Commission under section 119 of the Constitution to the President of the Republic of Fiji, the release of a prisoner serving a non-parole period will be determined in terms of the provisions of the Corrections Services Act 2006 as amended by Corrections Services (Amendment) Act 2019. Therefore, a minimum period of imprisonment and a non-parole period have very different consequences for an accused. In **Balekivuva v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016), the Court of Appeal clarified this as follows.

> *'[37] In my judgment the effect of section 237 when read with section 119(3) of the Constitution is that a convicted murderer may not petition the Mercy Commission to recommend a pardon until that person has served the minimum term set by the trial Judge. The reference to minimum term in section 237 has nothing to do with early release. The Mercy Commission may or may not make the necessary recommendation to the President. Furthermore, the matters that the Mercy Commission takes into account in deciding whether to recommend a pardon may or may not be the same as the matters that are taken into account by the trial judge when he sets the minimum term.*
>
> *[38] It should be noted that under section 119(3) of the Constitution any convicted person may petition at any time the Mercy Commission to recommend (a) a pardon, (b) postponement of punishment or (c) remission of punishment. However it would be reasonable to conclude that the Mercy Commission would take into account the sentencing judgment and the actual sentence imposed during the course of its deliberations.*
>
> *[39] Finally and importantly, it is abundantly clear from the observations made above that the discretion to set a minimum term under section 237 of the Decree is not the same as the mandatory requirement to set a non-parole term under section 18 of the Sentencing Decree.*

[6] The appellant had by himself filed an application for leave to appeal against sentence on 27 June 2016 (received by the CA registry on 07 July 2016). However, he had on 25 April 2018 filed an application in Form 3 to abandon his appeal against sentence. Thereafter, his then solicitors had filed an amended application for leave to appeal against conviction on four grounds of appeal on 13 June 2019 which was late by 07 years and one month. His affidavit dated 12 June 2019 still has not explained why there was a delay over 07 years for the appellant to challenge the conviction. However, his solicitors had submitted in the written submissions filed on 28 June 2019 that the appellant had been informed by his trial lawyer that he would have to

serve only 04 years of imprisonment and be released thereafter but later informed by the prison authorities that he could only apply for presidential pardon to be released after serving his non-parole period. That is the point at which he had filed his appeal by way of a letter which reached the CA registry in July 2016. He had retained a solicitors firm to assist him file formal papers in appeal but they had not done so. Thereafter, the second solicitors firm had tendered relevant documents to pursue his appeal.

[7] However, in his affidavit the appellant had not pleaded any of the above matters as the reason for the very substantial delay which should have been included in his affidavit and not in the written submissions. The appellant in his affidavit, however, had stated that both the state counsel and his own counsel persuaded him to plead guilty to murder with a promise that he would serve only four years of custodial term.

[8] Thereafter, there had been a change of solicitors from 12 May 2020 and the new solicitors of the appellant had filed another written submission on behalf of the appellant on 19 May 2020. The counsel for the appellant at the hearing on 14 August 2020 indicated that she would rely on those submissions and made oral submissions as well.

[9] The state had originally filed brief submissions on 02 June 2020 and filed detailed supplemental submissions on 18 June 2020.

[10] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[11] In ***Kumar*** the Supreme Court held

> *"[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[12] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[13] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a **'real prospect of success'** (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....'*

[14] Grounds of appeal urged on behalf of the appellant are as follows.

> *Ground 1 - That the guilty plea to murder was equivocal and not freely given.*
>
> *Ground 2 – That the plea of guilty to murder was obtained by the promise of a four year jail term by the appellant's counsel and state counsel.*
>
> *Ground 3- That the learned judge erred in law in entering a plea of guilty to murder in the face of the appellant's submission that he had no intention to kill the deceased.*
>
> *Ground 4 – That the learned judge erred in law to consider the offence of manslaughter in lieu of the offence of murder.*

[15] When the matter first came up for hearing before this court on 25 June 2020, the counsel for the appellant moved for time to consult the appellant and decide whether first and second grounds of appeal would be perused in the light of the decision in

Chand v State [2019] FJCA 254; AAU0078.2013 (28 November 2019) where judicial guidelines were pronounced regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal urged on behalf of the appellant.

[16] On 09 July 2020 the appellant's counsel informed this court that she would abandon the second ground of appeal and peruse only the 01st, 03rd and 04th grounds of appeal.

[17] The counsel for the appellant at the hearing stated in answer to a question by this court that her client had petitioned the Mercy Commission for a pardon, which had considered it and informed him that his application would be considered after he will have served 18 years of imprisonment.

[18] The summary of facts (along with the report of the Post-Mortem Examination) submitted to this court at the hearing is as follows.

> *'**ASHIL KUMAR** is currently 24 years old. He is a citizen of Fiji. The events as charged occurred at his residence at Valley Estate, Nawaka, Nadi.*
>
> ***MUKESH KUMAR** is the deceased. He was 43 years old at his death. He died on between the 10th day of April 2010 and the 12th day of April 2010. He died as a result of loss of blood into his left pleural cavity and into his peritoneal cavity as a result of multiple stab wounds to his chest and abdomen. During the course of the post mortem, it was clear that **MUKESH KUMAR** had received cuts to the face, to the area around the heart, his sternum and stomach. **MUKESH KUMAR** had also received defensive wounds on his left arm around the forearm and elbow. (Annexed herewith is the Post-Mortem Report of **MUKESH KUMAR**).*
>
> ***MUKESH KUMAR** at the time of his death has been involved in a relationship with **KIRAN LATA**. **KIRAN LATA** was herself married to **ASHOK KUMAR, MUKESH KUMAR's** step-brother.*
>
> *On 10 April 2010, **ASHOK KUMAR** had left the home he shared with his wife, **KIRAN LATA**, son **ASHIL KUMAR** also known as **VICKY** (the accused), his daughter **SHOBNA DHARSHANI KUMAR** and his son **KRISHNEEL KUMAR**, at around 5.00 pm. ASHIL KUMAR the accused left home for work at ROSIE HOLIDAY TOURS at 5.00 pm also, KRISHNEEL KUMAR had been visiting relatives in Sigatoka that day and had not returned home.*

*At around 8.30 pm **MUKESH KUMAR** went to visit **KIRAN LATA** at her home. **KIRAN LATA** had been resting in the accused person's bedroom. After ascertaining that **KIRAN LATA** was at home alone save for her daughter, **MUKESH KUMAR** entered the house. **ASHIL KUMAR** learnt through his sister that **MUKESH KUMAR** was at home. He came home to pick up his dinner.*

***ASHIL KUMAR** arrived at the house at around 9.00 pm. He drove to the house form his work. When he arrived in the drive-way he tooted his horn and he entered the house calling out a greeting to his mother. **MUKESH KUMAR** went under the bed in **ASHIL KUMAR's** bedroom. **ASHIL KUMAR** entered his bedroom and asked his mother if she had seen his jacket. He reached under the bed to retrieve a carton that might have his jacket and he discovered **MUKESH KUMAR** hiding under the bed.*

***ASHIL KUMAR** pulled the deceased out from under the bed and physical altercation broke out between them. The Police Statements of **KIRAN LATA** and **SHOBNA DHARSHANI KUMAR** indicate that **ASHIL KUMAR** struck the first blow. During the course of the altercation, **ASHIL KUMAR** obtained a knife from the kitchen and attacked the deceased with it. The deceased then pulled out a black handled knife from his person and respondent. In the course of the fight that ensued, **ASHIL KUMAR** grabbed the black handled knife from the deceased and he ultimately used this knife to stab the deceased. The deceased received injuries as a result and fled from the house.*

Relatives inquired after the deceased the following day and a search was carried out for him. On 12 April, 2010, the deceased's body close to the accused person's home. He was lying on the ground without shoes and clutching his mobile phone.

The extent of the injuries are severe. They indicate that the accused person struck the deceased numerous times in places that would have caused and did cause death. They indicate that the deceased person received significant defensive wounds during the cause of these events. The stab wounds pierced the left ventricle 1 cm above the apex of the heart, cut the costo-chondral junction at the 4th rib and cut the 4th inter-costal region also. There were punctures to the inter-costal space and cuts at the costo- chondral junction between the 5th and 6th ribs.

The only injuries found on the accused person four days later were healing injuries to his right knee (scratches), cut to his right hand and his right little finger. He informed the Police that he had received these injuries during his "scuffle" with the deceased.

It is apparent that when the accused picked up the knife and at the points of stabbing the accused person had formed the requisite intent to kill.'

[19] The direct cause of death had been loss of blood into left pleural cavity and peritoneal cavity, the antecedent causes being multiple stab wounds to chest and abdomen. The Post-Mortem Examination report had revealed 14 such injuries which are consistent with the appellant's assault on the deceased with a knife.

01st ground of appeal

[20] The appellant argues that his guilty plea was equivocal for the reason that the defense as well as the prosecuting counsel advised him that if he pleaded guilty to the information, he would inevitably be released in 04 years promising that they would ensure that a short non-parole period would be given.

[21] It was further submitted that the state counsel had recommended a non-parole period of 04 years in her submissions to the High Court and in fact the trial judge had commended the prosecuting counsel in the sentencing order for maintaining the highest traditions of the office of the Director of Public Prosecution and making very fair and useful submission. It is exactly 04 years that the judge imposed as a non-parole period in the end.

[22] The fact that the state counsel had proposed a non-parole period of 04 years is borne out by the ruling in **State v Kumar** [2014] FJCA 86; AAU0040.2012 (2 June 2014) where the state had appealed against the non-parole period of 04 years. Goundar J had remarked in granting leave to appeal as follows; for reasons unknown at this stage this appeal had not come up before the full court for the hearing as yet.

> *'[3] Both counsel have filed detailed and helpful submissions. Mr. Delaney submits that the 4-year term is manifestly lenient having regard to the nature and circumstances of the offence. Mr. Delaney has also provided a tabulation of cases to show that in Fiji the non-parole period for murder is between 12 to 24 years.*
>
> *[4] Mr. Savou concedes that the 4-year term is 'relatively low' but argues that the State is barred from bringing this appeal because the 4-year term was recommended by the State counsel appearing in the High Court.*
>
> *[5] It is not in dispute that counsel for the State, Ms Puamau recommended the 4-year term in the sentencing hearing. Mr. Delaney submits that Ms Puamau's recommendation was made in an error and was not binding on the State.*

[6] It is clear that it was inappropriate for Ms Puamau to recommend a specific term of non-parole period. Sentencing is a matter for the courts and not for the prosecutors. The prosecutors' obligations are to assist the court by providing all the relevant information that has bearing on the sentence. It is not their function to recommend a specific punishment.

[7] In the present case, it could be argued that the trial judge erred by imposing a term of non-parole period recommended by the State counsel in the sentencing hearing when that recommendation was made in an error.

[23] The state while admitting that the trial judge had fallen into error has argued that it does not make a difference as the appellant could petition to the Mercy Commission. However, as I have already pointed out earlier how a non-parole period impacts an accused and how a minimum serving period for the same length impacts him as far as his imprisonment is concerned do not produce the same result for an accused.

[24] The question here is not whether the 04 year non-parole period recommended by the prosecuting counsel and readily and understandably agreed to by the defense counsel was wrong or not, but whether the appellant was persuaded by the misguided hope to plead to the information that he would inevitably be released after his non-parole period is over as alleged by him.

[25] What is clear is that the appellant had filed his first appeal in person against sentence in June 2016 within a short time after his non-parole period was completed in May 2016. Was this, perhaps, an indication that he was actually expecting to be released after the non-parole was over? However, the appellant had not said even in layman's terms that he pleaded guilty under the impression or in the hope that he would be released after the completion of the non-parole period. Is his complaint now against conviction that his guilty plea was equivocal as he acted on this promise, only an afterthought?

[26] The trail judge had informed the consequences of pleading guilty to murder to the appellant as the only punishment was life imprisonment and given time for him to re-consider. The fact that the appellant had decided to abandon his second ground of appeal where he had specifically alleged that the plea of guilty to the information was obtained by the promise of a four year jail term by the appellant's counsel and state counsel may go to suggest that his plea of guilty was not the result of the 04 year non-

parole period. It is worth ascertaining whether in **State v Kumar** AAU0040.2012 the respondent's counsel (the appellant was the respondent in that appeal) had made any submission that the appellant had been lured into plead guilty by the alleged promise or advise of 04 year non-parole period. I hope that the state would either take steps to have that appeal taken up for hearing before the full court, if it has not yet done so, or abandon it rather than allowing it to remain dormant in the court roll indefinitely.

[27] The appellate courts had considered similar complaints of equivocation of the plea of guilty, incompetency of defence counsel, guilty plea being ambiguous and the admitted facts not disclosing the offence the appellant was charged with, as grounds of appeal against conviction upon a plea of guilty in the recent past in different factual contexts, such as, for example in **Nalave v The State** [2008] FJCA 56 AAU 4 and 5 of 2006, 24 October 2008; AAU 4 and 5 of 2006, 24 October 2008; **Praveen Ram v The State** [2012] 2 Fiji LR 34; **Darshani v State** [2018] FJSC 25; CAV0015.2018 (1 November 2018); **Masicola v State** AAU73 of 2015: 10 May 2019 [2019] FJCA 64, **Vosa v State** [2019] FJCA 89; AAU0084.2015 (6 June 2019), **Ali v State** [2020] FJCA 11; AAU31.2015 (27 February 2020), **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019), **Hicks v State** [2020] FJCA 87; AAU02.2017 (23 June 2020), **Godrovai v State** [2020] FJCA 125; AAU0008.2017 (24 July 2020) and **Bhan v State** [2020] FJCA 121; AAU0094.2017 (4 August 2020).

[28] In the context of section 2(1) of the Court of Appeal Act 1968 in UK, Archbold 2020 at page 1347 in paragraph 7-44 states that a conviction based on a plea of guilty may be held to be unsafe on account of erroneous legal advice, or a failure to advise as to a possible defense, notwithstanding that the advice may not have been so fundamental as to have rendered the plea a nullity. If the plea is a nullity the Court of Appeal is in a position to issue a writ of *venire de novo* expressly vested in it by section 53(2) of the Senior Courts Act. But the court will only intervene if it believes that with the benefit of correct advice, there would quite probably have been an acquittal and that, therefore, an injustice has been done (vide ***Boal*** [1992] 1 Q. B 591; (1992) 95 Cr. App. R. 272. ***Mohamed (Abdalla); V. (M); Mohamed (Rahma Abukar); Nofallah***

[2010] EWCA Crim 2400; [2011] 1 Cr. App. R. 35; ***McCarthy*** [2015] EWCA Crim 1185; [2016] Crim.L.R.145).

[29] I do not think that there is any provision on the writ of *venire de novo* similar to section 53(2) of the Senior Courts Act in Fiji but ordering a trial *de novo* or re-trial or new trial is part of the appellate jurisdiction of courts in Fiji [see for example section 23(2) of the Court of Appeal Act]. Similarly, in my view any appeal against conviction, upon a plea of guilty or finding of guilty after trial, should be considered by the Court of Appeal within the framework of section 23(1) of the Court of Appeal Act.

[30] There seems to be two schools of thought in the UK on the approach to a defective plea of guilty. One as pronounced in **Forde** [1923] 2 K.B. 400; (1924) 17 Cr. App. R. 99, CCA and subsequent decisions is that if the defendant can establish that he pleaded guilty without understanding the nature of the charge or without intending to admit that he was guilty of what was alleged, the conviction will be quashed. The second line of thought could be found in **Peace** [1976] Crim. L.R. 119, CA and several subsequent decisions. For example in **Willcock**, The times, 31 March 1982 it was held that firm advice by counsel as to consequences of being found guilty as opposed to pleading guilty did not vitiate a subsequent plea of guilty and in **Nazham and Nazham** [2004] 4 Archbold News 1, CA it was emphasized that there is a burden on the defendant to show not only that there was an irregularity, but also that it so influenced the decision to plead guilty as to render it a nullity.

[31] While the judicial decisions in Fiji have highlighted instances where the appellate court will entertain an appeal against conviction following a guilty plea, in a more recent decision in the UK somewhat directly relevant to the appellant's complaint, it was held in **Saik** [2005] 1 Archbold News 1, CA that where a defendant enters a guilty plea and subsequently appeals on the basis that the plea was entered following erroneous legal advice as to likely sentence and or the likelihood of any confiscation proceedings affecting the security of matrimonial home, the facts must be so strong as to show that the plea of guilty was not a true acknowledgement of guilt; the advice must have gone to the heart of the plea, so as to render it a nullity as not being a free plea; and stated that it was difficult to see how erroneous advice as to the length of

sentence likely to be imposed could ever go to the heart of a plea, except perhaps where the maximum penalty for the offence was understated, for the decision as to the length of sentence lies with the judge or the Court of Appeal. **Evans** [2009] EWCA Crim. 2243 has approved the approach taken in ***Saik.***

[32] The appellant's complaint, however, is slightly different in that he alleged that his plea of guilty for murder was the result of the promise or advice by both counsel that he would be released after serving the non-parole period was over. It is not his position that there was any misunderstanding or miscomprehension on the sentence of mandatory life imprisonment.

[33] In the often cited decision in **Masicola v State** AAU73 of 2015: 10 May 2019 [2019] FJCA 64 , Calanchini P sitting as a single Judge discussed the duty of a trial judge on equivocation of the plea as follows.

> *'[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.*

[34] Given all the factual scenarios discussed above, it is not possible without the complete appeal record at this stage to ascertain whether there is evidence of any equivocation on the record of the appellant's plea of guilty being the result of the alleged promise or advise by both counsel that he would be released after serving the non-parole period was over or whether the allegation of equivocation is simply an afterthought.

[35] Since ***Masicola*** had been adopted in subsequent decision, any change of approach to equivocal pleas taking into consideration the developments in the UK should be taken by the full court and I refrain from expressing any view in that regard. In doing so, I think that it is paramount to keep in mind the provisions of section 23(1) of the Court of Appeal Act.

[36] Therefore, for the purpose of the present appeal I cannot say that the appellant first ground of appeal has a real prospect of success in appeal at this stage.

03rd and 04th grounds of appeal

[37] The appellant's submission under these two grounds of appeal is that the summary of facts had not encompassed all the elements of the charged offence namely murder and the trial judge should have considered manslaughter instead of murder. The appellant cites paragraph 16 of the sentencing order where the trial judge had simply reiterated what the appellant had submitted as *'The Accused submits that this has happened due to anger and not premeditated'* as to the lack of all ingredients of murder, particularly the fault element.

[38] Anger or lack of premeditation does not negate the fault element of intention or recklessness in the offence of murder, for the intention to cause death or recklessness could be formed on the spur of the moment. On the other hand, the appellant's cautioned interview reveals that he had learned from his sister before coming home that the deceased was already in the house. Secondly, his answers to questions 193, 194 and 202 suggest an intention to cause death or at least recklessness as to causing the death of the deceased. Thirdly, the number, nature and where he had attacked the deceased's body too suggest nothing short of the required intention or recklessness on the part of the appellant. Finally, the summary of facts which he had admitted without reservation had specifically stated that the appellant had formed the requisite intent to kill.

[39] Not only the summary of facts, but also the report of the Post-Mortem Examination and the appellant's cautioned interview being part of the disclosures, would have been available to the trial judge for perusal.

[40] Therefore, I see no real prospect of success of the appellant's argument based on lack of elements of the offence of murder.

[41] The appellant's counsel placed a lot of emphasis and strenuously argued that the appellant should not have been convicted of murder because he had acted under provocation and therefore should have been guilty only of manslaughter. In the first

place. I do not think that a trial judge has discretion to reduce a charge of murder to manslaughter when a plea of guilty is tendered for murder unless the prosecution agrees to amend the information.

[42] The appellant relies on the following paragraphs in ***Masicola*** in support of his contention where the issue of provocation had been raised.

> *'[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.'*
>
> *'[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.*
>
> *'[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.'*

[43] The Court of Appeal in **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020) examined the past decisions and principles relating to provocation and stated as follows.

> *'[10] In **Regina v. Duffy** [1949] 1 All E.R. 932 the gist of the defence of provocation was encapsulated by Devlin J. in a single sentence in his summing-up, which was afterwards treated as a classic direction to the jury:*
>
> *"Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary **loss of self-control**, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."*

*[11] The counsel for the appellant heavily relies on the decision in **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017) in support of the sole ground of appeal. In **Codrokadroka v State** [2008] FJCA 122; AAU0034.2006 (25 March 2008) the Court of Appeal in relation to section sections 203 and 204 of the Penal Code dealing with provocation has engaged in an exhaustive analysis and come out with the approach that should be taken as follows.*

> *'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.'*

*[12] The Supreme Court in **Codrokadroka v State** [2013] FJSC 15; CAV07 2013 (20 November 2013) adopted the above propositions as accurately reflecting the approach that should be taken by a trial judge to the issue of provocation.*

*[13] In **Tapoge** the Court of Appeal had applied both the CA and the SC decisions in **Codrokadroka** to section 242 of the Crimes Decree and further observed as follows*

'[15] Provocation is not a complete defence to an unlawful killing. It is a partial defence. Killing with provocation reduces culpability from murder to manslaughter. This lesser culpability is the effect of section 242 of the Crimes Act 2009

'[16] There is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial. The scope of that duty in

relation to provocation was explained by Lord Devlin in ***Lee Chun Chuen v R*** *(1963) AC 220 as follows:*

Provocation in law consists mainly of three elements – the ***act of provocation***, *the* ***loss of self-control***, *both actual and reasonable, and* ***the retaliation proportionate to the provocation***. *The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.'*

[44] Having examined not only the summary of facts but also the cautioned interview of the appellant *in toto*, I am not convinced that it was necessary for the trial judge to have raised the question of provocation with the defense counsel or had reason to believe that the appellant may have acted under provocation as legally defined.

[45] I may reiterate what I stated in ***Bhan v State*** (supra) in this regard.

'[20] Even ***Masicola*** *does not (I think quite correctly) cast a positive duty on the trial judges to embark on an elaborate inquiry into the equivocation of a plea of guilty, particularly when the accused is represented by legal counsel who is expected to carefully consider all disclosures including the confessional statements, if available, and other evidence including medical evidence before advising the accused that the best course of action is a plea of guilty.*

[21] Calanchini J[3] made the following observations in ***Masicola*** *in the context where the trial judge thinks, is of opinion or has reason to believe that the material before him including the agreed summary of facts and/or cautioned statement/charge statement reasonably suggests that the plea of guilty may be equivocal or when the said material reasonably raises a defense.'*

[46] In ***K*** [2017] EWCA Crim 486; [2017] Crim. L. R. 716 it was held that the Court of Appeal would only intervene where it believed that the defendant had been deprived of what was in all likelihood a good defense in law, which would quite probably have succeeded and thus a clear injustice had been done.

[47] There is no real prospect of success in the 3rd and 4th grounds of appeal.

[48] Though not required to dispose of this LA application, I shall briefly consider a few propositions of law raised by the respondent *vis-à-vis* ***Masicol***, ***Ali*** and perhaps ***Hicks*** and express some provisional views on some of the points highlighted by the respondent.

[49] The respondent submits that a trial judge is not required to read the record of interview (cautioned interview) of a legally represented accused prior to accepting a guilty plea. However, it adds that it is a common practice in Fiji for a record of interview to be attached to a summary of facts on a guilty plea even if the accused is represented. It is a sound and safe practice in Fiji for the prosecution to provide the judges with copies of the accused's police interview statements where the accused is not represented [vide **Nawaqa v State** (2001) 1 FLR 123]. It also admits that it is an established principle that there is a duty cast on the trial judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea is accepted the accused should fully comprehend exactly what that plea of guilty involves [vide **Bogiwalu v State** [1998] FJCA 16; AAU0006u.96s (15 May 1998)]. However, the Court of Appeal in ***Bogiwalu*** does not appear to have disagreed with the decision of the Court of Appeal in England in ***R v Tottenham Justices, ex parte Rubens*** [1970] 1 All ER 879, where Bridge J, delivering the principal judgment, had referred to the proposition that the material before the court which may indicate that a plea is equivocal includes not only what is said in court after the plea, in mitigation or otherwise, by or on behalf of a defendant, but also a statement made by a defendant prior to that plea and presented to the court as part of the prosecution case by the prosecution.

[50] The respondent also submits that ***Masicola*** has been wrongly decided for the legal and policy reasons set out. It argues that in an adversarial system by raising the availability of a potential defense in the presence of the accused, the trial judge would be breaching the separation of roles played by prosecution and defense counsel and the judge and undermine the confidence the accused has reposed in the defense counsel as the judge is unaware of the instructions by the accused to his counsel. While Calanchini P has not stated in ***Masicola*** that the inquiry into any possible defense should be raised with the defense counsel in the presence of the accused, the respondent's concern could, in my view, be greatly addressed if the trial judge does so in the absence of the accused. Further, according to Chalanchini P in ***Masicola*** *'A trial judge is required to address the defence of provocation if there is evidence that raises the issue of provocation', 'based on an agreed summary of the facts presented by the prosecution'*. Therefore, it is not in every case that the scenario envisaged by

Calanchini P arises. I have already expressed my views in this regard at paragraphs 20 and 21 in ***Bhan v State*** (supra).

[51] On the other hand, the preparation of the summary of facts does not seem to be governed by any statutory provisions and therefore the contents of it varies from case to case. In some instances such as the present case summary of facts contain factual matters taken from statements of prosecution witnesses given to the police and some selected parts or questions and answers of the cautioned interview of the appellant and his charge statement and the medical reports. These documents may or may not be attached to the summary of facts. Thus, there does not even seem to be a uniformed practice in settling summary of facts. It is not clear as to what input the defense counsel or the appellant could feed into it and at what stage. Thus, there is no assurance of the degree of sanctity attached to the summary of facts which seems to vary from one prosecuting counsel to another depending on his or her competence and experience. Add to this is the fact that in the real world not every defense counsel may be equally competent or experienced in making sure that no injustice is caused to the appellant by his plea of guilty. An unpresented accused's situation could be even more vulnerable. When the consequence of the plea of guilty is mandatory life imprisonment these things can really matter. Therefore, in this context, the trial judge becoming somewhat inquisitorial in his role would cause no harm if demanded by that particular case. In any event the trial judge's role in the case of an unrepresented accused in the matter of a plea is to some extent inevitably inquisitorial.

[52] Therefore, Calanchini P's view that *'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.'* is not without merits. Thus, in as much the trial judge should not be required as a matter of compulsion or duty to read the cautioned interview of a legally represented accused in every case, I am of the view that there should not be an absolute prohibition on trial judges not to do so under all circumstances even when the accused is represented. I think that no trial judge should be placed under that kind of fetter. I believe that it should be best left to the decision of the trial judges who are

in any event privy to the cautioned statement, charge statement, medical reports etc. included in the bundle of disclosures.

[53] The respondent admits that different considerations apply when an accused person is unrepresented and cites **R v Iro** [1966] 12 FLR 104 where the Court of Appeal had said:

> *'In our view there is a duty cast on the trial judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted the accused person should fully comprehend exactly what that plea of guilty involves.'*

[54] The respondent has also submitted that the presence of a defense counsel cannot act as a bar to a complaint that the plea was equivocal. In other words, a court cannot accept an equivocal plea irrespective of whether the accused is legally represented or not. Therefore, the crucial issue for a judge is to be satisfied that the plea is not equivocal, not whether the accused is represented or not. Still maintaining that there is a clear distinction between what is required of the court in the case of an unrepresented accused and what is required in a case where the accused is represented, the respondent has submitted that it is not possible to prescribe a general rule of practice but it must be left to the good judgment of the trial judge in each case to determine whether it is safe to accept the plea and to enter a conviction or whether the facts asserted on behalf of the accused derogate from the plea of guilty or appear to render equivocal what would otherwise have been an unequivocal plea. I think the whole idea of the trial judge having to examine material other than just the summary of facts in any given case, whether the appellant is represented or not, is to ensure that the plea is unequivocal.

[55] The respondent has finally submitted that the consequence of a judge's failure to raise the issue of equivocation or a potential defense with the counsel as stated in ***Masicola*** cannot found a successful appeal against conviction. Such failure renders the proceedings a nullity as per ***Nawaqa***. However, according to **Singh v State** (2000) 2 FLR 127, still it should be found out by examining the record of proceedings and the summary of facts, whether the plea was unequivocal. If the plea is found to be

unequivocal the appeal will not succeed. Thus, the respondent argues the question for the appellate court would be whether the guilty plea was, in fact, an unequivocal plea.

[56] It has been submitted that ***Masicola's*** appeal has not yet been heard before a full court. Therefore, I think most of the respondent's arguments could be considered by the Court of Appeal at the hearing of the main appeal.

[57] The delay for the appeal against conviction is very substantial and the reasons for the delay are unconvincing though an extension of time would not prejudice the respondent.

Order

1. Enlargement of time to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL