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

CRIMINAL APPEAL NO.AAU 118 of 2019
[In the High Court at Suva Case No. HAC 200 of 2018]

BETWEEN : **ROZLEEN RAZIA KHAN**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Yunus for the Appellant**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **04 December 2020**

Date of Ruling : **07 December 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of murder contrary to section 237 of the Crimes Act, 2009 committed on 06 May 2018 at Kasavu, Nausori in the Central Division. The appellant is the biological mother of the 04 year old deceased daughter.

[2] The particulars of the information read as follows.

'Statement of Offence

Murder: *contrary to section 237 of Crimes Act of 2009.*

Particulars of Offence

> ***ROZLEEN RAZIA KHAN*** *on the 6th day of May, 2018 at Kasavu, Nausori, in the Central Division, murdered* ***RAHIKA RAHIDA ALI.***

[3] After the summing-up on 12 July 2019, the assessors had unanimously opined that the appellant was guilty of the charge and in the judgment delivered on 16 July 2019 the learned trial judge had agreed with them and convicted the appellant of murder. On 19 July 2019 the appellant had been sentenced to life imprisonment without a minimum term to be served before pardon may be considered.

[4] The law firm, MY LAW had filed a timely application for leave to appeal against conviction and sentence on behalf of the appellant on 15 August 2019. The same lawyers had tendered an amended application for leave to appeal against conviction and written submissions on 04 May 2020. The appellant's lawyers on 24 July 2020 had tendered a notice of abandonment of appeal informing the court that the appellant did not wish to prosecute the sentence appeal and the appellant had followed it up with an application to abandon the sentence appeal in Form 3 on 15 September 2020. The state had responded by its written submission on 15 September 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds

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

'**Appeal against conviction**

'Ground 1: That the Learned Trial Judge erred in law and in fact when he did not hold a voir dire inquiry when there was evidence that the right to remain silent was not properly explained to the Appellant, thus the confession in the caution interview was tainted.

Ground 2: That the Learned Trial Judge erred in law and in fact to admit the caution interview in evidence when there was evidence of breach of the right of the accused that is the right to remain silent enshrined in the Constitution

*Ground 3: That the Learned Trial Judge erred in law and in fact to allow the post mortem report to be tendered in evidence by **D/Cpl Sakiasi Koroi** as this witness was neither the pathologist who conducted the post mortem nor a person holding same qualification and expertise of a pathologist and or the police investigating officer of the matter, nor was the report kept in his custody at all times.*

*Ground 4: That the Learned Trial Judge erred in law and in fact when he directed the assessors that the burden of proving diminished responsibility is on the accused and not the prosecution as **Section 243 of the Crimes Act 2009** does not shift the burden on the accused.*

Ground 5: That the Learned Trial Judge erred in law and in fact when he failed to reduce the charge from murder to manslaughter when there was evidence to back up that the Appellant acted under a state of a mental condition reducing her culpability from murder to manslaughter.

Ground 6: That the Learned Trial Judge erred in law and in fact when he failed to direct or guide the assessors to consider whether the act of jumping in the river with the deceased by the Appellant was done under imminent threat of life, as there was evidence that the Appellant was threatened to death by her husband.

Ground 7: The Learned Trial Judge erred in law and in fact when he failed to direct the assessor about the law on suicide pact and killing in pursuance of the suicide pact, since there was evidence that the Appellant tied her daughter to her chest and jumped in the river to die together and the fact that Appellant intended to kill herself with her daughter by jumping in the river.

[7] The summary of facts as narrated in the sentencing order is as follows.

6. The evidence revealed that, on 06th May 2018, you tied your 04 year old daughter onto your chest using a scarf and jumped into the Rewa River with the intention of killing her. Your daughter died as a result of drowning. According to you, you wanted to kill both yourself and your daughter. The reason you gave was that you were having family problems. You said that the fact that you were served with documents in relation to the custody case filed by your husband led you to take that decision. In your cautioned interview you had stated that, after

you decided to kill yourself and your daughter, you tried to drive your car into the river but the car got stuck in the riverbank and thereafter you jumped into the river with your daughter tied onto your body. However, when you gave evidence you said that you cannot remember how your car ended up at the riverbank and you decided to jump into the river because your husband did not turn up after informing him that there was an accident and because you got scared having heard the police siren. You said that you thought that the only way you can be together with your daughter is by jumping into the river with her because the husband had already applied for custody of your children.

7. However, when the evidence was taken as a whole, it was clear that this was a premeditated killing whether or not you wanted to commit suicide. According to your own evidence, you were aware of the likelihood of your husband filing a case for the custody of your children when you were in Labasa on your own from 30/04/18 to 05/05/18, without your children.

8. Therefore, the serving of the documents in relation to the custody case could not have come as a surprise to you. Nevertheless, it appears that you were disturbed by the fact that your husband got the said documents served on you that day because, according to you, he told you previously when you asked him while you were in Labasa that he will not file a custody case. The evidence suggests that there was a substantial time difference between the time you were served with the documents and the time you killed your daughter. The fact that you wanted to commit suicide would not mitigate the seriousness of your decision to kill your daughter and then killing her.

01st and 02nd grounds of appeal

[8] The appellant argues that the trial judge had erred in law by not holding a *voir dire* inquiry when there was evidence that the right to remain silent was not properly explained to her, thus tainting the confession in the cautioned interview.

[9] The defence counsel had indicated to the trial judge before the commencement of the trial that his client was not contesting the voluntariness of the cautioned interview.

[10] Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to Judges and Magistrates and at a trial before assessors a *voir dire* may be conducted prior to swearing in of the assessors but after the accused has pleaded to the information. **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) had earlier laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

'[24] ***Whenever the court it advised that there is challenge to the confession****, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.*

[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.

[11] Therefore, it is clear that not only did the defence counsel specifically advise court that he was not challenging the cautioned interview but also he did not require a *voir dire*. Therefore, there was no error of law in not holding a *voir dire* inquiry.

[12] However, when the cautioned interview was being read in evidence the trial judge found the following question and answer.

'*Q9: Mrs Rozleen Razia Khan under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or you will answer to the questions?*

A: I will answer the questions.'

[13] The above question by the interviewing officer alerted and prompted the trial judge to consider in the absence of the assessors whether the right to remain silent under section 13(1)(a) and 13(1)(b) of the Constitution of the Republic of Fiji (2013) had been properly administered to the appellant. The right to remain silent is provided in the Constitution as follows.

13.—(1) Every person who is arrested or detained has the right—

(a) to be informed promptly, in a language that he or she understands, of— (i) the reason for the arrest or detention and the nature of any

charge that may be brought against that person; (ii) the right to remain silent; and (iii) the consequences of not remaining silent;

(b) to remain silent;

[14] The trial judge had on his own considered the principles expressed in **State v Matia** [2019] FJHC 188; HAC260.2018 (13 March 2019) and **Ganga Ram & Shiu Charan v R**, Criminal Appeal No.AAU0046 of 1983 (13 July 1984) to decide whether the cautioned interview should be allowed to be led in evidence.

[15] In **State v Matia** (supra) where the only incriminating evidence against the accused was his cautioned interview led by the prosecution and the accused had been found guilty by the assessors, Goundar J had said as follows and acquitted the accused.

> *'.....In Fiji the constitutional right to remain silent must be administered in unqualified terms. Otherwise, the right will become a dead letter. In the present case, the right to remain silent was qualified by an incentive to tell his side of the story to avoid being charged based on the allegation. The qualifications placed on the right to remain silent are inappropriate and objectionable. The qualifications were placed by an experienced police officer without any justification. The qualifications breached the Accused's constitutional right against self-incrimination. For these reasons, the admissions are disregarded and given no weight'*

[16] The trial judge had concluded that the interviewing officer has not properly explained to the appellant the right to remain silent according to the applicable law in Fiji. He had then considered whether, despite the absence of any challenge to the cautioned interview on the basis of voluntariness, it should still be allowed to be led in evidence due to the possible breach of the constitutional right leading to unfairness. The judge following **Ganga Ram & Shiu Charan v R** (supra) had stated that if the court finds that the cautioned interview statement is made voluntarily but general ground of unfairness exists in the manner the cautioned interview was conducted, the court has the discretion whether or not to exclude such cautioned interview statement.

[17] In **Ganga Ram & Shiu Charan v R**, Criminal Appeal No. AAU0046 of 1983 (13 July 1984), the Court of Appeal held:

> *"It will be remembered that there are two matters each of which requires consideration in this area. **First,** it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force,*

threats of prejudice or inducement by offer of some advantage – what has been picturesquely described as 'the flattery of hope or tyranny of fear.' ***Second****, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behave, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or unfair treatment."*

[18] In answering the above question, the trial judge followed the decision in **State v Kumar** [2002] FJHC 194; HAC0003D.2002S (11 July 2002) where Shameem J had said in relation to section 27(1) of the then Constitution which is similar to section 13(1)(c) of the Constitution of the Republic of Fiji (2013) as follows and decided that there was no breach of the accused's constitutional rights, and that the statement should therefore not be excluded on general ground of unfairness.

*'The effects of non-compliance with section 27(1)(c) of the Constitution, or of a finding of an ill-informed waiver, may be the exclusion of any statements obtained thereby (**State -v- Mool Chand Lal** Crim. Case 3/99 Labasa High Court). The discretion to exclude must be exercised after a balancing of the accused's rights, and public interest rights to the efficient investigation of crime.*

[19] Finally, the trial judge had allowed the cautioned interview to be led in evidence by concluding that

'13. Considering the facts and the circumstances of this case and the public interest, I consider it appropriate not to exclude the cautioned interview statement tendered as PE1 based on the fact that the right to remain silent was not properly explained to the accused. I would exercise my discretion to allow PE1 to be tendered in evidence.

14. However, the issues as to whether the accused gave the answers recorded in PE1 and whether those answers are true are to be decided at the trial.

[20] In contrast to **State v Kumar** (supra) where Shameem J had held that there was no breach of the accused's constitutional rights and therefore, his cautioned interview could be admitted in evidence, in the instant case the trial judge had found the appellant's right to silence had not been properly administered but in the exercise of his discretion had still allowed her cautioned interview to be admitted in evidence '*Considering the facts and the circumstances of this case and the public interest*.' The main consideration that had weighed upon the trial judge in this regard appears to have

been the fact that the appellant had given answers voluntarily despite the breach of her right to remain silent having been not given properly.

[21] Therefore, whether the trial judge had exercised his discretion correctly in allowing the cautioned interview to be led in evidence is a question of mixed facts and law. However, it is completely different from the question raised by the appellant whether the trial judge had erred in not holding a *voir dire* inquiry.

[22] Therefore, the appellant's first ground of appeal has no reasonable prospect of success.

03rd ground of appeal

[23] The appellant complains against the post mortem report being produced by D/Cpl Sakiasi Koroi (who was attached to crime scene investigation unit and visited the crime scene and produced the booklet of photographs and the PMR – *vide* paragraph 23 of the summing-up) without calling the doctor who conducted the post mortem examination (PME) or another expert of the same stature, when the witness was neither the investigating officer nor the officer who had the custody of the report. She relies on section 133(3)(k) and (5) of the Criminal Procedure Act, 2009 to buttress her argument.

[24] It does not appear that the appellant had required the doctor who performed the PME to attend as a witness. Therefore, the PMR could have been given in evidence in terms of section 133(1) of the Criminal Procedure Act, 2009 without calling that doctor. Contrary to the appellant's argument, D/Cpl Sakiasi Koroi had not been summoned as an expert witness to refer and comment upon the PMR but just to produce it at the trial.

[25] There was a good reason why the defense counsel had not required the doctor to attend court. Both parties had recorded the fact that the PMR dated 08 May 2018 had revealed the deceased's cause of death as asphyxia upon drowning [see paragraph 16(13) of the summing-up.]. Thus, the tendering of the PMR was only a formality and producing it by D/Cpl Sakiasi Koroi was not in violation of section 133 of the Criminal Procedure Act, 2009. In any event, the appellant had not shown any prejudice caused by the prosecution getting D/Cpl Sakiasi Koroi to tender the PMR at the trial. Had the defense

perceived any such prejudice it should have objected to it at that time and not wait to take it up at this stage simply as an appeal point.

[26] Therefore, this ground of appeal lacks any merits and is frivolous.

04th ground of appeal

[27] The appellant argues that the trial judge had committed an error of law when he directed the assessors in paragraph 26 of the summing-up that the burden of proving diminished responsibility was on the appellant and not the prosecution, as section 243 of the Crimes Decree does not shift the burden of proof that lies on the prosecution.

[28] Section 243 of the Crimes Act, 2009 is as follows.

> *'243. — (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair—*
>
> *(a) the person's capacity to understand what the person is doing; or*
>
> *(b) the person's capacity to control the person's actions; or*
>
> *(c) the person's capacity to know that the person ought not to do the act or make the omission*
>
> *the person is guilty of manslaughter only.*
>
> ***(2) on a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.***
>
> *(3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons.'*

[29] Contrary to the argument raised in the ground of appeal, the appellant admits in her written submissions that in paragraph 46 the trial judge has rightly directed the assessors that the burden of proving diminished responsibility on a balance of probability is on the appellant.

> *'46. The burden is upon the defence to establish this defence on the balance of probabilities. In other words, before you find the accused guilty of manslaughter on this ground you would need to conclude that it was more likely than not, on the evidence, that the accused's responsibility was diminished.'*

[30] Therefore, the appellant also admits that the trial judge had directed the assessors correctly in terms of section 243(2) read with sections 59(1), 60(b) and 61 of the Crimes Act, 2009. It is clear that the appellant was carrying the burden of proof on diminished responsibility under section 243(5) of the Crimes Act, 2009 and that burden of proof was a legal burden of proof [vide section 60(b)] which had be discharged on a balance of probability [vide section 61].

[31] However, the appellant goes onto argue that the direction given by the High Court judge was still inadequate and incomplete in that he had failed to direct the assessors that the prosecution was carrying the burden of disproving beyond reasonable doubt the diminished responsibility in terms of section 57(2) read with section 58(1) of the Crimes Act, 2009.

[32] This argument does not seem to carry much weight because section 57(2) imposes a legal burden of disproving any matter in relation to which the appellant has discharged an evidential burden of proof imposed on her. As admitted by the appellant the burden of proof of diminished responsibility on the appellant was not an evidential burden as defined in section 59(7) but a legal burden as defined in section 57(3) of the Crimes Act. Therefore, section 57(2) does not seem to have any application to the appellant's defense of diminished responsibility.

[33] Further, I do not think that there is any confusion arising from the directions given in paragraphs 26 and 46 of the summing-up as submitted by the appellant. Both have correctly referred to the burden of proof on the appellant *vis-à-vis* diminished responsibility.

[34] Even assuming for the sake of argument that the trial judge should have directed the assessors on the burden of proof based on section 57(2) of the Crimes Act as urged by the appellant, the omission of the High Court judge had not prejudiced the appellant but it had actually been favorable to her. With the existing directions the assessors only had to be satisfied that the appellant had proved on a balance of probability the diminished

responsibility but with the direction suggested by the appellant they were to further inquire whether the prosecution had disproved it beyond reasonable doubt before acting on diminished responsibility to bring the culpability down to manslaughter, for the prosecution through the evidence of Dr. Kiran B. Gaikward (PW4) had already sought to rule out any basis for diminished responsibility as part of the prosecution case.

[35] In any event the appellant was defended by a senior counsel who should have sought redirections in respect of the complaint now being made by the appellant on the summing-up as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). Therefore, technically, the appellant is not entitled even to raise this ground of appeal in appeal.

[36] Thus, I am of the view that there is no reasonable prospect of success in this ground of appeal.

05th ground of appeal

[37] The appellant argues that the trial judge had failed to reduce the charge from murder to manslaughter on the evidence available.

[38] The trial judge in paragraph 24-28 dealt with the evidence of Dr. Kiran B. Gaikward (PW4) whose findings had ruled out any basis for diminished responsibility under section 243 (1) of the Crimes Act, 2009 by stating *inter alia* that there was no evidence or records of the appellant having any mental illness in the past or at the time he interviewed her and from the information given by the appellant the incident appears to have been the result of an impulsive behavior. The judge had directed the assessors to consider his evidence in the following manner

> *'29. PW4 gave his medical opinion based on what he observed and his experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the fourth prosecution witness. Evaluating his evidence will therefore include a consideration of his expertise, his findings and the quality of the analysis which supports his opinion.*

[39] The trial judge also had dealt with the evidence senior psychologist Elenani Vulanivuru (DW2) called by the defense in paragraphs 36 and 37 of the summing-up in support of the appellant's defense of diminished responsibility, who *inter alia* had said that the appellant was psychologically traumatized and was not in a right state of mind at the time of the incident.

[40] The trial judge had devoted paragraphs 44-53 of the summing-up dealing with the issue of diminished responsibility raised by the appellant in the light of the prosecution evidence and that of the appellant herself and directed the assessors to find the appellant guilty of manslaughter if they were to find that it was a case of diminished responsibility. In the process, he had specifically explained to the assessors the concepts of 'diminished responsibility' and 'abnormality of mind' under section 243 of the Crimes Act, 2009.

[41] In agreeing with the assessors the trial judge had directed himself according to the summing-up and then considered the defense of manslaughter based on diminished responsibility in paragraphs 5 and 11-13 of the judgment and discussed the concept of 'abnormality of mind' by referring to Lord Parker in **R v Byrne** 1960 2 QB 396 as follows.

> *'"Abnormality of mind," which has to be contrasted with the time-honoured expression in the M'Naughten Rules "defect of reason," means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts.*
>
> *Whether the accused was at the time of the killing suffering from any "abnormality of mind" in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is no doubt of importance, but the jury are entitled to take into consideration all the evidence, including the acts or statements of the accused and his demeanour. They are*

not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it.

The aetiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence."

[42] He had not considered the cautioned interview of the appellant against her in considering the appellant's culpability and concluded in paragraph 14 of the judgment that

> *'14. I have carefully considered the evidence presented by the defence and also the explanations the accused had provided in her cautioned interview statement. All in all, I am not convinced that the accused suffered from an abnormality of mind that substantially impaired her capacity to understand what she was doing, or the capacity to control her actions, or the capacity to know that she ought not to do the act, when she killed the deceased.'*

[43] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]

[44] On the other hand, the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the

summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[45] On a perusal of the judgment it is clear that the trial judge had performed his task satisfactorily in agreeing with the assessors and in the process had particularly considered the defence of diminished responsibility which was the substantial defence of the appellant. The only material trial issue was whether it was murder or manslaughter and the trial judge had been fully conscious of that and directed himself accordingly.

[46] Therefore, this ground of appeal has no reasonable prospect of success in appeal.

06th ground of appeal

[47] The appellant contends that the trial judge should have directed the assessors as to whether her act of jumping into the river was prompted by her husband's death threat. She never raised a redirection on his alleged omission at the end of the summing-up. She relies on a part of paragraph 35 of the summing-up in support of her contention which in full is as follows.

> *'35. During cross examination, she said that, after listening to everything, she did not know what she was doing when she was driving the vehicle with the deceased. When it was suggested that she was informed by the police officers that she can fight for her children, her answer was "As I was served with the custody papers, I asked my husband 'why you did this', because I asked him before leaving Labasa, that 'have you filed custody for children' and he said 'no'. So, what was that? And he said to me, 'I have just called you to serve the papers'." She agreed that her husband and her family knew that she was having an affair and she said that the husband knew about the affair for the past 5 years. When it was suggested that she had the intention to kill herself and the deceased, she said that "After my car went off the road, I called my husband. He didn't respond to me. So I had no other option and I took my daughter with me and I jumped. Because it was dark and there was no one around to help me out". In answer to another question she said that "I just knew that I didn't know how to swim. So, I will be with her never mind dead or alive".* ***She also said in***

answer to another question that her husband threatened to kill her and the person she was going to stay with.'

[48] It is clear that she had not said that it was her husband's threat to kill her and her partner that prompted her jumping into the river. The husband had never threatened to kill the daughter, the 04 year old deceased for the appellant to jump into the river with the deceased. The purported reasons for her action resulting in the death of the daughter have nothing to do with the so called threats of her husband. Thus, there was no reason for the judge to have given any special direction on the lines suggested by the appellant.

[49] This ground of appeal has no merits and frivolous.

07th ground of appeal

[50] The appellant argues that the trial judge should have directed the assessors on the aspect of suicide pact as set out under section 249 of the Crimes Act, 2009. However, the appellant admits that such a position was never taken up at the trial.

'Suicide pacts

249. — (1) Where it is shown that a person charged with the murder of another killed the other, it shall be for the defence to prove that the person charged was acting in pursuance of a suicide pact between him or her and the other.

(2) for the purposes of this section "suicide pact" means an agreement between two or more persons having for its object the death of all of them, whether or not each is to take their own life, but nothing done by a person who enters into a suicide pact shall be treated as done by that person in pursuance of the pact unless it is done while he or she has the settled intention of dying in accordance with the pact.

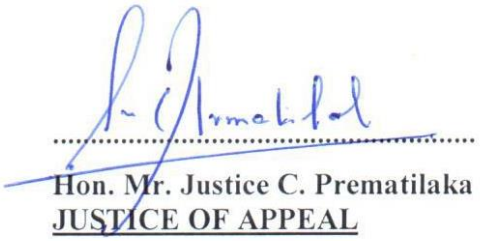
[51] The deceased was just 04 years old and the appellant was her mother of 35 years old. To suggest that there was a suicide fact between the appellant and a 04 year old child is atrocious. This is an absolutely frivolous ground of appeal which the counsel for the appellant should on merits and could in good conscience not have raised in appeal.

[52] Having considered the evidence against this appellant as a whole excluding the cautioned interview, I cannot say the verdict was unreasonable or cannot be supported by evidence.

There was clearly evidence on which the verdict could be based and therefore, there is no reasonable prospect of success of the appellant's appeal under section 23(1) of the Court of Appeal Act [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)]. The trial judge also could have reasonably convicted the appellant on the evidence before him (vide **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020) and **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)].

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL