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

CRIMINAL APPEAL NO.AAU 02 of 2017
[In the High Court at Suva Case No. HAC 179 of 2016S]

BETWEEN	**:**	**BERNARD HICKS**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Appellant in person**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	**:**	**12 June 2020**
Date of Ruling	**:**	**23 June 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of murder contrary to section 237 (a) (b) and (c) of the Crimes Decree, 2009 committed on 01 May 2016 at Suva in the Central Division.

[2] The information read as follows.

Statement of Offence

MURDER: *Contrary to section 237 (a) (b) and (c) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BERNARD HICKS *on the 1st day of May, 2016 at Suva in the Central Division, murdered* ***LAVENIA RADINITAVEA****.*

[3] On 05 August 2016, in the presence of his counsel, the appellant had pleaded guilty to the information. The case had been adjourned to 19 August 2016 for the prosecution to present the summary of facts. The court having inquired from the appellant through his counsel as to whether or not he was agreeing to the summary of facts, and whether or not he was admitting all the elements of the offence of 'murder', the learned High Court judge had convicted the appellant of murder on 19 August 2016. The case had been adjourned to 26 August 2016 for the appellant to file written plea in mitigation and for both parties to submit their submissions on sentence. Having considered all the material before him, the learned High Court judge had sentenced the appellant on 02 September 2016 to mandatory life imprisonment with a minimum serving period of 16 years.

[4] The appellant within the appealable period had by himself sought enlargement of time to file his appeal by way of a letter dated 17 September 2016 (but reached the Court of Appeal registry on 30 December 2016) followed up by an application for leave to appeal out of time with grounds of appeal that had reached the CA registry on 16 March 2017. Thereafter, several sets of grounds of appeal against conviction and sentence and written submissions (06 June 2018 and 02 May 2019) had been received by the CA registry from time to time on behalf of the appellant. The state had filed written submissions on 21 November 2019.

[5] In terms of section 21(1)(b) and (c) 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 and **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). This threshold is the same with leave to appeal applications against conviction and sentence.

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

'**Appeal against conviction**

1. *THAT the Learned Trial Judge erred in law and in fact when he convicted the Appellant / Accused on a murder as charged and not on manslaughter and in details in particular when effectively directing himself to consider and pursued the appellants guilty plea on the fact that he [Judge] infer that the appellant desired the consequence in order to conclude that the accused intended to murder "Lavenia Radinitavea" as stated in the sentence page 3, paragraph 3, lines 3 – 9 when there was no spellings of word "INTENTION" was presented in the Caution Interview, charge particulars and no confirmation given by the appellant that prosecution can prove that he/accused admitted the offence through his Counsel that he intended to murder the deceased. Therefore there was a substantial risk tantamount to a miscarriage of justice."*

2. *THAT the Learned Trial Judge erred in law and in fact when he failed to analyze proper the nature/act surrounding this case as implicated under the criminal laws against the appellan's guilty plea and in particular the fact that murder requires "a specific meanings on intention…to kill or to inflict serious bodily harm" rather than the definition of murder. Therefore such failure to extend the category of murder beyond that of strictly intended killings substantial to a grave miscarriage of Justice in a court of law.*

3. *THAT the Learned Trial Judge erred in law and in fact in accepting the appellants guilty plea as charged when he failed to adequately/sufficiently/directing/putting/considering on the terms on provocation and intoxication made and taken by both parties surrounding the case before convicted the appellant on murder charge although there were evidence which require a strictly decision as needed to be carefully implement by the Judge to a lesser offence which nature the offence as a result of the deceased provoked act which was too combustion and irresistible to cool off the appellant's feelings. Therefore there was a miscarriage of justice in a Court of Law.*

4. *THAT the Learned Trial Judge erred in law and in fact in not convicting the appellant on a lesser charge but strictly convicted the appellant as charged when there were adequate provocation is established that fulfilled to warrant the reduction that the deceased provoked act induce rage and anger in the accused, the accused have been actually provoked for hours, there was no time/period between the provocation and the stabling within which a reasonable person would cooled off and finally the accused have not even cooled off during that period. Therefore there was a substantial miscarriage of justice in the eyes of the Law.*

5. *THAT the Appellant respectably submit that the charge particulars are lacking in precision and wanting in details and in details in particular*

the fact that the charge was without a specific location about the crime scene and the time the alleged offence took place as required by law to prove place, date and time. Therefore failure to state this particulars in a charge tantamount substantially to unfair trial before a Court of Law.

6. *THAT the Learned Trial Judge erred in law and in fact in not balancing himself well on the accused caution interview statement that the prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the prosecution case and as such the benefit of doubt ought to have been given to the appellant to a lesser offence "manslaughter" when there was no evidence to prove the Act of intention have established in the offence.*

7. *THAT the Appellant humbly submits, he was not fully represented by his Counsel even though he hired a private Lawyer who was fully paid to represent him well in the process and proceeding of the case "Trial Proper" which ended by advising the accused to plead guilty to the charge of Murder offence.*

8. *THAT the Learned Trial Judge erred in law and in fact by not properly and adequately, sufficiently, referring, directing, putting and considering himself about the appellant's guilty plea by giving himself [Judge] a warning or caution on the nature of the offence before convicting the appellant as charged when the learned Judge is bound duty to decide the preliminary question as to whether or not the explanation given by the appellant in the caution interview constituted the elements of a Murder charge. Failure by the learned Judge to identify the crucial factual issues and direct himself with a warning caused a substantial miscarriage of Justice.*

Appeal against Sentence

9. *That the Appellant appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.*

10. *THAT the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration and not taking into relevant considerations.*

11. *THAT the Learned Trial Judge erred in law and in fact in not taking into consideration the provision of the Sentencing and Penalties Decree 2009, when sentencing the appellant.*

12. *THAT the Learned Trial Judge erred in principle in imposing a minimum term of 16 years imprisonment which was excessive and also erred in failing to take into account the following relevant considerations when arriving at the minimum term of 16 years imprisonment for the appellant:-*

1. *The period spent in remand by the Appellant*
2. *It was not a premeditated or calculated murder*
3. *The victim provoked the appellant*
4. *The victim and the appellant were intoxicated*
5. *The personal circumstances of the victim and the appellant were good in their apartment /room in Safs at the day before the victim's dad interrupt them.*

13. *THAT the Learned Trial Judge erred in law and in fact when he did not properly analyzed the case in terms and in respect of the reckless elements of manslaughter.*

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

> *"...On the 1st day of May, 2016 Lavenia Radinitavea [deceased] aged 33 years, a receptionist at Saf's Apartment Motel and Bernard Hicks [accused] aged 50 years, a diver of Saf's Apartment had consumed liquor at the apartment and later after midday left for Wainibuku in the Nakasi area to visit the relatives of the deceased. The two had continued to consume liquor at Wainibuku. Both the deceased and the accused were living together in a de fecto relationship for the past 5 years and were renting a room at Saf's apartment.*
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> *On the evening of the 1st May 2016, the accused and the deceased returned to their flat at Saf's Apartment. Upon arrival an argument broke out between the two where the accused was under the suspicion that the deceased was having an affair with another man. The argument went to a stage where the accused picked up a kitchen knife and stabbed the deceased eight times (8) underneath the deceased right arm pit on the chest area. The accused then left the deceased lying in a pool of blood in their apartment and went to the Suva Market Police Post to report the matter at about 10.00 pm in the evening. The stabbing incident was reported to PC 5286 Sefanaia by one Jolame through the mobile phone of the accused. The accused was conversing with Jolame through his mobile phone and gave it to Police Constable Sefanaia to receive the report.*
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> *PC Sefanaia after receiving the report left to visit the scene at Saf's apartment and attend to the report. Upon arriving at the scene at room 7 of Saf's Apartment PC Sefanaia peeped through the window and saw an I Taukei lady who was the deceased lying on the floor. The officer entered the said room and saw heavy blood stain on the right side of the deceased. PC Sefanaia called deceased's name five times but she did not respond. The deceased was conveyed to the CWM hospital where she was pronounced dead by the doctor on duty.*
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> *On 3rd May 2016 the body of the deceased Lavenia Radinitavea was identified by her nephew Waseroma Koroiwaca before post mortem was conducted. Later post mortem examination was conducted and caused of death as determined by the pathologist was*
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> *(i) Excessive loss of blood due to multiple stab wounds*

The caution interview statement of the accused was recorded and he had confessed and made admissions on questions and answers 111, 112, 114, 115, 116, 117, 121, 122 and 128. A white handle long blade kitchen knife was shown to the accused and he confirmed and identified that it was the same kitchen knife he had used to stab the deceased. The accused had admitted that he stabbed the deceased many times underneath her right armpit on the chest area. Question and answer 139 of the accused caution interview statement reads:

Q: what was the status of your mind at the time you were stabbing Lavenia?

A: I wanted to pay back what she did to me and I know I will kill her at the time I was stabbing her.

The accused was formally charged with one count of murder pursuant to section 237 (a) (b) and (c) of Crimes Decree No. 44 of 2009 and was apprehended in Court accordingly..."

1st, 2nd, 6thand 8th grounds of appeal.

[8] The above grounds could be considered together as they seem to have raised more or less the same issue as to whether on the summary of facts the appellant should have been convicted of manslaughter and not on murder on the basis that he could not be said to have entertained an intention to cause the death of the deceased.

[9] Where the appellant had pleaded guilty to an offence of attempted murder but challenged his conviction in appeal, the Court of Appeal in **Vosa v State** [2019] FJCA 89; AAU0084.2015 (6 June 2019) *inter alia* examined grounds of appeal relating to incompetence of defense counsel, ambiguous pleas and whether the admitted facts did not disclose the offence in detail.

[10] The Court of Appeal in ***Vosa*** cited **Masicola v State** AAU73 of 2015: 10 May 2019 [2019] FJCA 64 where Calanchini P sitting as a single Judge discussed the duty of a trial judge on equivocation of the plea and regarding the availability of any alternative defense or verdict on the evidence though the ground of appeal against conviction related to the defense of provocation.

*'[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.'

'[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

[11] In ***Vosa*** where the Court of Appeal found that the trial judge had proceeded on the fault element of 'intention to cause death' without having considered the appellant's caution interview and the charge statement attached to the amended summery of facts to see whether the facts in the caution interview and the charge statement unequivocally satisfy the fault element of intention to cause death, the court proceed to hold as follows

'[50] Having considered all the material available to the High Court Judge, particularly the amended summery of facts, appellant's caution interview, his charge statement and the medical reports, I am of the view that one cannot draw an unequivocal inference of an intention to cause the death of the victim by the appellant.

'[52] Therefore, in all circumstances of the case scrutinized by me, I believe that this is a fit case for this court to act on section 24(2) of the Court of Appeal Act which reads as follows.

> *'(2) Where the appellant has been convicted of an offence, and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the Court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.*

[53] Therefore, I would substitute for the conviction of attempted murder entered by the trial judge a verdict of guilty of the offence of 'Act with Intent to Cause Grievous Harm' under section 255 (a) of the Crimes Act, 2009……

[12] However, in **Ali v State** [2020] FJCA 11; AAU31.2015 (27 February 2020) the Court of Appeal upheld a similar complaint to that of ***Vosa*** of the appellant who had pleaded guilty to a charge of attempted murder but sent the case back to the High Court for the appellant to plead to the information afresh.

[13] Unfortunately, I cannot see from the sentencing order that the prosecution had submitted to the learned trial judge copies of the appellant's cautioned interview, charge statement and the medical report along with the summary of facts. I have been informed by a state counsel on another occasion that they have been advised to do so and in fact do that in cases where the accused tender pleas of guilty.

[14] I think it is very important, if not essential to place before the trial judge all such material for him to independently evaluate the plea of guilty to the information before convicting the accused irrespective of whether the appellant is represented by counsel or not. As correctly pointed out in ***Masicola*** if the trial judge has doubts on the issues of equivocation or as to whether the facts could establish the elements of the offence in the light of all the material before him he could then raise such concerns with the counsel or not proceed to accept the plea of guilty to the information. This should particularly be considered indispensable in cases where an accused pleads to a charge of murder or any other grave crime.

[15] The reasons as to why the learned trial judge decided to convict the appellant on his plea of guilty for murder is found in paragraph 03 of the sentencing order as given below.

> *'The court then checked with you, through your counsel, on whether or not you are agreeing to the prosecution's summary of facts, and whether or not you are admitting all the elements of the offence of "murder". Through your counsel, you admitted that on 1 May 2016, at Suva in the Central Division, you stabbed the deceased several times under her right arm pit on the chest area with a kitchen knife (conduct); and the above conduct caused serious internal injuries to the deceased, resulting in her death thereafter (conduct causes the deceased's death). Through your counsel, you also admitted that when you did the above conduct, you intended to cause the deceased's death. Through your counsel, you admitted the prosecution's summary of facts, subject to the above. As a result of your above admissions, the court found you guilty as charged, and convicted you accordingly.'*

[16] The above paragraph seems to reinforce my suspicion that the learned trial judge had not had the benefit of examining the entirety of the cautioned interview though the summary of facts had quoted the following question and answer.

> *'Q: what was the status of your mind at the time you were stabbing Lavenia?*
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> *A: I wanted to pay back what she did to me and I know I will kill her at the time I was stabbing her.'*

[17] The written submissions of the respondent had quoted several other questions namely 79, 80, 88, 102, 107, 109 and answers given by the appellant and question 10 of the charge statement and the answer which collectively seem to suggest that the appellant's plea of guilty to the information may not be all that unequivocal as indicated in question 139 and the answer in the cautioned interview quoted in the summary of facts.

[18] It is also not clear to me from paragraph 03 of the sentencing order whether the learned trial judge had simply recorded what the summary of facts had stated or whether he had made inquiries from the appellant through his counsel on each of the matters mentioned therein and got affirmative answers. What matters is not only what the appellant or his

counsel orally informs court when questioned by the trial judge but also what an objective assessment of all the material including the summary of facts, the appellant's cautioned interview, charge statement (if relevant) and the medical report by the trial judge.

[19] It appears that the learned trial judge had not been equipped to undertake that sort of assessment due to lack of vital information such as copies of the appellant's cautioned interview, charge statement (if relevant) and the medical report.

[20] Therefore, the appellant's complaint under these grounds could be examined properly only with the help of the full appeal record by the full court. Though, I do not intend to grant leave to appeal against conviction as at this stage I am not in possession of the cautioned interview, charge statement and the medical report to see that there is a reasonable prospect of success, I think this issue should be closely considered if the appellant decides to renew the appeal before this court.

03rd and 04th grounds of appeal

[21] The appellant's complaint is that the learned trial judge had failed to consider the question of provocation and intoxication in convicting the appellant on murder. He seems to argue that there was sufficient material for the learned trial judge to do direct himself on those 'defenses'. I do not think so. On the summary of facts alone the trial judge had no material to consider the defense of provocation or even intoxication. The prosecution had not adverted to those facts in the summary of facts except to state that an argument had ensued between the deceased and the appellant and it had gotten to a stage where the accused picked up a kitchen knife and stabbed the deceased. This does not capture all what actually transpired between the two preceding the stabbing.

[22] Once again without the appellant's cautioned interview and the charge statement parts of which had been quoted (as stated above) in the written submissions of the respondent, the learned trial judge could not have examined whether defense of provocation or intoxication could work in favour of the appellant. The state concedes that the learned trial judge should have at least addressed the issue of provocation in the light of what

had been quoted from the appellant's cautioned interview and the charge statement which were, however, not available to the trial judge.

[23] The summary of facts had not been fairly drafted and important documents such as appellant's cautioned interview and the charge statement had not been annexed to the summary of facts. I think the prosecutors should be careful to avoid this sort of flows in cases where they are called upon to provide summaries of facts where the fate of the accused is dependent on the same.

[24] However, an appellant's burden is high when it comes to canvassing a conviction on the grounds of provocation (or intoxication) as held in **Codrokadroka v State** [2008] FJCA 122; AAU0034.2006 (25 March 2008) which summarized the approach 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.*

[25] In my view, the number of blows amounting to 08 delivered on the area of the deceased's body where vital organs are found and other attendant circumstances may well militate against the successful defense of provocation. However, this ground of appeal too can only be examined by the full court with the help of the full appeal record.

05th ground of appeal

[26] The appellant complains that the charge against him lacked in particulars and was not precise; in particular it was without a specific location of the crime scene and the time of the alleged offence.

[27] The main consideration is whether the appellant knew what the charge or allegation against him that he had to meet [see **Saukelea v State** [2019] FJCA 24; CAV0030 of 2018 (30 August 2019)]. Whether the appellant was misled in his defense by lack of particulars is also another consideration.

[28] I do not think that the appellant's complaint has any merit. The disclosures provided to the appellant prior to the trial would have made it very clear everything relating to the charge of murder. Further, the summary of facts too has given a long description of the circumstances leading to the death of the deceased at the appellant's hand including dates, locations and times.

07th ground of appeal

[29] The appellant complains against his private counsel in the High Court and Legal Aid Commission counsel in the Magistrates court on the basis that both had wrongly advised him to plead guilty.

[30] Having examined several decision in the UK, the Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) set guidance on the procedure to be followed in criminal cases involving criticism of former counsel which should be adopted *mutatis mutandis* even when an appellant appears in person. The steps in the process are as follows.

> *(i) When allegations are made against former counsel, the new counsel should not settle or sign grounds of appeal unless he is satisfied that they are reasonable, have some real prospect of success and are such that he is prepared to argue before court. However, when they are properly made the new counsel must promote and protect fearlessly his client's best interests without regard even to fellow members of the legal profession.*
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> *(ii) The new counsel should not regard the allegations as 'reasonable' to draft grounds of appeal based on them unless, at the very least, he is in possession of a signed statement of facts and a unequivocal signed waiver of privilege from the client which should be obtained after advising him of the consequences of waiver. The client should also be advised that the allegations against his former counsel are unlikely to carry any weight with court unless they are supported by oral testimony.*
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> *(iii) Such grounds criticizing the conduct of defense counsel at trial should not be advanced unless the new counsel feels that in the light of the information*

available to the former counsel, no reasonably competent counsel would sensibly have adopted the course taken by the former counsel.

(iv) The compliant or allegations should be set out with precision and clarity in the notice of appeal or application for leave to appeal or for extension of time (grounds of appeal may be perfected later) and it should be lodged accompanied by the waiver of privilege along with the client's signed statement and any request for former counsel to provide any material etc. in the registry without delay. It is proper for the new counsel to speak to the former counsel as a matter of courtesy before grounds are lodged to inform him of the allegations to be made against him.

(v) On behalf of the court, the registrar of the appellate court should then send to the former counsel the client's signed statement and waiver of privilege along with other relevant material inviting him to respond to the allegations made against him within a given time.

(vi) The former counsel should send his response to the registrar either within the time given or further time obtained from the registrar.

(vii) The registrar should send the response received to the new counsel who may reply to it. Then the grounds of appeal, waiver and responses would be placed before the single judge.

(viii) Where there is a factual dispute between the client and former counsel both of them may be required to give evidence and be subjected to cross-examination in court to resolve the issue of fact.

[31] Having followed the above procedural steps if an appellant still raises an appeal ground based on allegations against counsel, still he must prove that there had been a miscarriage of justice (see **Prakash v State** [2016] FJCA 114; AAU44 of 2011 (30 September 2016).

[32] Therefore, in the light of ***Chand*** I am unable to entertain the appellant's 07th ground of appeal at this stage. In any event the appellant seems to have ample opportunity and time from 05th August 2016 to 02 September 2016 to withdraw the plea of guilty if he had entertained any reservations of it prior to the sentencing.

[33] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim**

Nam Bae v The State Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

09th and 10th grounds of appeal

[34] The appellant's argument that the sentence is harsh and excessive has no merit in as much as the law (section 237 of the Crimes Act, 2009) provides mandatory life sentence for murder and the sentencing judge had no discretion in the sentence other than imposing the life sentence.

11th and 12th ground of appeal

[35] The Sentencing and Penalties Act has no application to sentences for murder (see ***Prakash***). The only discretion that is vested in the judge is setting the minimum serving period before pardon may be considered but it is not mandatory for a sentencing judge to fix such a minimum period in every case. In **Aziz v The State** [2015] FJCA 91; AAU 112 of 2011 (13 July 2015) the Court of Appeal stated:

> *'6……The provisions of section 18 of the Sentencing Decree will have general application to all sentences, including where life imprisonment is prescribed as a maximum sentence unless a specific sentencing provision excludes its application. In my judgment a sentencing court is not expected to select either a non-parole term or a minimum term when sentencing for murder under section 237 of the Crimes Decrees. As a result any person convicted of murder should be sentenced in compliance with section 237 of the Crimes Decree…'*

[36] The learned trial judge has stated as follows in fixing the minimum serving period of sentence.

> ***'4.*** *The matter was then adjourned to 26 August 2016, for you to file your written plea in mitigation and for the parties to submit their submissions on sentence. I note that you have a clear record in the last 10 years. I have noted your antecedent history and the victim impact report. I have also noted your well prepared written plea in mitigation and sentence submission, submitted by your counsel.*
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> ***9.*** *I take on board your genuine remorse by pleading guilty to the charge 3 months after the first call in the High Court. I also noted that you had a clear record in the last 10 years. I note also that you had been remanded in custody for approximately 4 months. I had taken into account the mitigating factors advanced by your counsel, especially your guilty plea, and the fact that by doing so, you had saved the court's time. I have also noted Lavenia's father's comments in the Victim Impact Report. His and his family's life had been severely affected with the loss of Lavenia. She was always supporting them financially.*
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> *10. For the offence of "murder", there is only one mandatory sentence and that's life imprisonment. I therefore sentence you to the mandatory life imprisonment. Given the matters I mentioned above, I set 16 years as the minimum terms to be served before a pardon may be considered.'*

[37] At the same time, in paragraphs 06 to 08 of the sentencing order, the learned trial judge had directed his mind to the gravity of the crime the appellant had committed with all its attendant circumstances. Perhaps, the fact that lack of preplanning may have prompted the trial judge to even fix the minimum serving period. In any event, the trial judge cannot be said to have committed any sentencing error in fixing 16 years as the minimum serving period.

13th ground of appeal

[38] The appellant seems to argue that the trial judge had not considered that he may have been reckless as to causing the death of the deceased as opposed to having intended to cause her death which should have featured in fixing the minimum serving period. I do not agree. Murder is murder whether it comes under section 237(a) or (b) which should have no role to play in the matter of fixing the minimum serving period.

[39] Therefore, the appeal against sentence too has no reasonable prospect of success.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.