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

CRIMINAL APPEAL NO.AAU 36 of 2018
[In the High Court at Lautoka Case No. HAC 154 of 2014]

BETWEEN	:	**SUILASI NASARA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**27 September 2021**
Date of Ruling	:	**01 October 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of murder Contrary to section 237 of the Crimes Act 2009 and one count of aggravated robbery Contrary to section 311 (b) of the Crimes Act 2009 committed at at Lautoka in the Western Division on 16 November 2014.

[2] The information read as follows:

'FIRST COUNT

Statement of Offence

***MURDER**: Contrary to Section 237 of the Crimes Act 2009.*

Particulars of Offence

SULIASI NASARA *on the 16th day of November 2014, at Lautoka in the Western Division, murdered* ***NITIN NAVINESH KUMAR****.*

SECOND COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311 (b) of the Crimes Act 2009.*

Particulars of Offence

SULIASI NASARA *on the 16th day of November 2014, at Lautoka in the Western Division, robbed NITIN NAVINESH KUMAR of Nissan Vanette Van Registration Number CG 638 valued at $3000 belonging to Vijay Lakshmi and at the time of the robbery used an offensive weapon namely, a wheel spanner.'*

[3] At the end of the summing-up the assessors had unanimously opined that the appellant was not guilty of murder but guilty of manslaughter and aggravated robbery. The learned trial judge had disagreed with the assessors' 'not guilty' opinion on murder, convicted the appellant of murder and aggravated robbery and sentenced him on 13 June 2017 to mandatory life imprisonment with a minimum serving period of 18 years on murder and 10 years and 09 months' imprisonment with a non- parole period of 09 years on aggravated robbery; both sentences to run concurrently.

[4] The appellant had appealed in person against conviction and sentence out of time (26 April 2018). Thereafter, the Legal Aid Commission had sought enlargement of time to appeal accompanied by an affidavit, amended grounds of appeal and written submission on 05 February 2021. The state had tendered its written submissions on 10 February 2021. Counsel for both parties took part at the hearing *via* Skype.

[5] 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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time 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?

[6] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[7] The delay of the appeal (being 09 ½ months) is substantial. The appellant had stated that he had given his appeal to Natabua prison authorities within time but they had misplaced it. However, what he had stated in his appeal papers filed on 26 April 2018 is that he had first filed his appeal in Lautoka High Court but made no mention of misplacement of the appeal papers by prison authorities. Thus, his explanation for the delay cannot be accepted. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The ground of appeal urged on behalf of the appellant against conviction is as follows:

> ***Conviction***
>
> *'**Ground 1***
>
> *THAT the conviction for both counts are unreasonable and not supported by the totality of the evidence in terms of the fault element or intention.*

Ground 2

THAT the Learned Trial Judge erred in law and in facts by not providing cogent reasons to differ with the unanimous opinions of the assessors on the first count of murder.

Ground 3

THAT the Learned Trial Judge erred in law and fact when he admitted the caution interview of the Appellant without independently assessing the same against the medical findings.

Sentence

Ground 1

THAT the Learned Trial Judge erred in law and fact in imposing a sentence with a high minimum term of 18 years.

[9] The trial judge in the sentencing order had summarized the evidence against the appellant as follows:

> *4. The deceased was providing night time public transport to people in Lautoka Town. You hired deceased's van pretending that you are going home. As the deceased lawfully reacted against the physical violence on him and the threat of robbery you overpowered him and incessantly attacked with a wheel spanner several times on the deceased's head. Then you took the van out of deceased's possession together with the radio fitted into the van.*
>
> *5. You used a wheel spanner, an offensive weapon. The deadly strokes had landed on deceased's head, the most vulnerable part of the body. Whilst the deceased was on the ground motionless you struck deceased's head again about three times with the wheel spanner. You took no effort to transport the deceased to the hospital and fled the scene in his van.*
>
> *6. The deceased had received severe traumatic head injuries caused by blunt force trauma. According to the pathologist, a high energy force had been used to cause such an extensive damage. Pathologist noted multiple injuries over the back of the head and the top part of the head. He also noted extensive subarachnoid hemorrhage and also pockets of subdural hemorrhage.*

[10] The appellant had opted to remain silent at the trial.

01st and 02nd grounds of appeal

[11] It is convenient to consider both grounds of appeal as they are interconnected.

[12] The trial judge had overturned the opinion of not guilty on murder charge by the assessors which he was entitled to do. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

[13] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) and **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

Test of 'unreasonable or cannot be supported having regard to the evidence'

[14] At a trial by the judge assisted by assessors the test has been formulated as follows. Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the

complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence. (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493).

[15] When the above test is recalibrated to a situation where the trial judge disagrees with the assessors or the trail is by the judge alone it may be restated as follows. The question for an appellate court would be whether upon the whole of the evidence acting rationally it was open to the trial judge to be satisfied of guilt beyond reasonable doubt against the assessors' opinion; whether the trial judge must, as distinct from might, have entertained a reasonable doubt about the accused's guilt; whether it was 'not reasonably open' to the trial judge to be satisfied beyond reasonable doubt of the commission of the offence.

[16] The appellant's complaint is that the cautioned interview was not enough to prove the murderous intention on the part of the appellant. However, murderous intention is not the only fault element of murder. Recklessness too is a fault element of murder. The assessors had found the appellant not guilty of murder because most probably they may not have been satisfied with the fault element of murder, for otherwise they would not have found him guilty of manslaughter. However, it is very clear that the assessors had been fully satisfied that it was the appellant who had caused the death of the deceased in the sense that he was responsible for the acts of violence on the deceased constituting the physical element of the deceased's death. If not, they would have found him not guilty even of manslaughter.

[17] The question is whether the trial judge had independently satisfied himself beyond reasonable doubt of any one of the fault elements of murder. The trial judge had clearly understood his task as demonstrated by the following paragraph.

> *7. The Assessors have basically accepted the version of the Prosecution except as regards the malicious aforethought or mens rea of Murder. Assessors by their decision in finding the Accused guilty of Manslaughter have rejected the version of the Prosecution that Accused, at the crucial time, had been activated by a murderous intention or recklessness as to causing the death of the deceased. Therefore, I will focus my discussion to explain as to why I do not agree with Assessor's opinion on the fault element of Murder. Since the Defence vehemently challenged the truthfulness of the caution interview at the trial, I would also give reasons as to why I decided to rely on confessions of the Accused.*
>
> *8. The Accused had admitted in answer to question 61 of the caution interview that he struck a wheel spanner several times on the deceased's head until the deceased was found dead. Accused had also admitted that he, after having struck the deceased with a wheel spanner, took the vehicle CG 638 out of deceased's possession together with the radio fitted into the van. Basically he had confessed to both offences in the Information.*

[18] Thereafter, the trial judge had first analysed the evidence with regard to the contentious issue of truthfulness of the cautioned interview from paragraphs 09-22 and concluded at paragraph 23 as follows:

> *23. Having considered these pieces of evidence, I am satisfied that the contents of the caution statement and charge statement are truthful statements of the Accused. At the end of the day, the only inference that could be drawn from the facts proved by the Prosecution is that it is the Accused and nobody else is responsible for the death of the deceased.*

[19] The trial judge had also concluded at paragraph 24 of the judgment that it was the appellant's acts that had caused the death of the deceased.

[20] He had then embarked on considering the fault element from paragraphs 25-29.

> *25. I am also satisfied that the Prosecution had proved the fault element of Murder. Accused's Murderous intention, not to mention his recklessness, can be inferred from the circumstances established by evidence although*

Accused had stated in his charge statement that "I admit that I killed, I did not mean to kill the Indian boy".

[21] In the process the trial judge had also considered the defence of self-defence from paragraphs 30-39 since the appellant seems to have taken it up in the course of the cautioned interview despite the fact that the appellant's trial counsel had indicated that she was not relying on the defence of self-defence. The trial judge had then concluded as follows:

> *'39. In view of this statement, I find that the Accused had not lawfully exercised his right to self-defence even if his exculpatory statements were to be relied upon by this Court. The inevitable conclusion that this Court can draw from these pieces of evidence is that the Accused, at the time of the attack, was activated by a murderous intention.*
>
> *40. I accept the version of the prosecution, and reject that of the Defence and also the unanimous opinion of the Assessors on count one.*
>
> *41. I find the Accused guilty of Murder as charged.'*

[22] Therefore, the trial judge had satisfactorily discharged his burden in disagreeing with the assessors and convicting the appellant of murder according to law. He had embarked on an independent assessment and evaluation of the evidence and given 'cogent reasons' based on the weight of the evidence for differing from the opinion of the assessors and the reasons are, in my view, capable of withstanding critical examination in the light of the whole of the evidence presented at the trial. The verdict of murder entered by the trial judge, in my opinion, cannot be said to be 'unreasonable' or the verdict can be supported having regard to the evidence.

[23] Therefore, I do not see any real prospect of these two grounds of appeal succeeding.

03rd ground of appeal

[24] The genesis of this ground of appeal is that the trial judge had admitted the cautioned interview without taking into account of the lip injury the appellant had. The

cautioned interview had been admitted after a *voir dire* injury. The medical evidence at the *voir dire* inquiry was as follows:

> *8. Patient had no complaints whatsoever. He noted that the patient had a laceration on inner aspect of the upper lip and there wasn't any active bleeding. It was fresh and would probably have been caused within 24 to 48 hours. There were no other obvious physical injuries that were noted, no hematoma, no laceration and no contusions.*
>
> *9. Under cross examination, doctor said that the police officer was always standing beside, throughout the examination. He could not recollect as to who provided history of the patient. He did not rule out the possibility that the police officer who brought the patient would have relayed the history. He agreed that if the patient was assaulted or punched on his face, one of the injuries that could occur would be a laceration on the lip.*
>
> *10. Under re-examination, the doctor admitted that, if the patient was punched on the face, he would have had abrasions or lacerations or soft tissues swelling, or even scratches marks elsewhere on the face.*

[25] The trial judge unlike in **Nacagi v State** [2015] FJCA 156; AAu49 of 2010 (03 December 2015) had thoroughly ventilated this issue at the *voir dire* ruling *vis-à-vis* voluntariness. He had scrutinised the prosecution evidence (paragraphs 7-32) and the appellant's evidence (paragraphs 33-42) very closely and concluded that the appellant had received his injury on the upper lip before he was taken into custody and not as a result of police brutality. He had given convincing and logical reasons for his conclusion from paragraphs 47-56 and found that the prosecution had proved beyond reasonable doubt that the appellant's cautioned interview and charge statement were obtained voluntarily and fairly and held the caution interview statement and charge statement to be admissible in evidence.

[26] On a different note, even the assessors had entertained no doubt about the voluntariness of the cautioned interview despite the availability of the same medical evidence of the appellant's injury at the trial, for if not they would not have found the appellant guilty of manslaughter. The trial judge had given necessary and correct directions to the assessors as to their approach to the cautioned interview particularly at paragraph 79 of the summing-up. Therefore, the trial judge and the assessors were

on the same page on the making of the cautioned interview, its truthfulness and voluntariness. They differed from each other only regarding the fault element.

[27] Therefore, I do not see any real prospect of this ground of appeal succeeding.

04th ground of appeal (sentence)

[28] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

> *(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.*

[29] I have examined the sentencing order and find that the trial judge had *inter alia* stated as follows:

> *'12. In the sentencing process, I bear in mind the objectives in imposing a term of imprisonment under Section 4(1), the general principle of sentencing under Section 15(3) of the Sentencing and Penalties Act, and jurisprudential underpinnings so as to balance competing interests of the offender, the victim and the society at large.*
>
> *19. As regards the offence of Murder, I sentence you to life imprisonment as I am mandatorily required to. Upon a careful consideration of the provisions of Sections 4 and 15 of the Sentencing and Penalties Act, the facts and circumstances as set-out above, and the remand period, I order that you serve a minimum term of 18 years' imprisonment.'*

[30] Therefore, it is not possible to agree with the appellant's contention and unlike in **Dharshani v State** [2018] FJCA 79; AAU 064 of 2014 (01 June 2018) the trial judge had in deed or should be deemed to have considered deterrence and rehabilitation in imposing the minimum serving period of 18 years. However, the trial judge had said

little specifically about the aspect of rehabilitation as deterrence appears to have been the predominant thinking (given the facts of the case) behind the minimum period though the judge had admitted that this was not a premeditated murder. Robbery was, of course, pre-planned.

[31] The trial judge had stated in the sentencing order as follows:

> *'8. You stand today before me to receive sentences against you. The maximum sentence for the offence of Murder is mandatory imprisonment for life while the court having discretion to fix a minimum term, after weighing the aggravating circumstances and mitigating factors.'*

[32] I think the statement that *'The maximum sentence for the offence of Murder is mandatory imprisonment for life…'* does not state the law correctly. Life imprisonment is not the maximum sentence but the only and mandatory sentence available for murder (see **Nute v State** [2014] FJSC 10; CAV0004 of 2014 (19 August 2014).

[33] The provisions of section 18 of the Sentencing Act will have general application to all sentences, including where life imprisonment is prescribed as a maximum sentence (such as for rape & aggravated robbery) as opposed to the mandatory sentence unless a specific sentencing provision excludes its application. A sentencing court is not expected to select a non-parole term or necessarily obliged to set a minimum term when sentencing for murder under section 237 of the Crimes Act. As a result any person convicted of murder should be sentenced in compliance with section 237 of the Crimes Act for a mandatory sentence of life imprisonment. For the same reason the discretion given to the High Court under section 19(2) of the Sentencing and Penalties Act, being an enactment of general application, does not apply to the specific sentencing provision for murder under section 237 of the Crimes Act. Under section 119 of the Constitution any convicted person may petition the Mercy Commission to recommend that the President exercise a power of mercy by amongst others granting a free or conditional pardon or remitting all or a part of a punishment. Therefore, the right to petition the Mercy Commission is open to any person convicted of murder even when no minimum term had been fixed by the sentencing

judge in the exercise of his discretion (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015).

[34] The minimum period to be served before a pardon may be considered is a matter of discretion on the part of a sentencing judge depending on the facts and circumstances of the case. However, the discretion to set a minimum term under section 237 of the Crimes Act is not the same as the mandatory requirement to set a non-parole term under section 18 of the Sentencing and Penalties Act. Specific sentence provision of section 237 of the Crimes Act displaces the general sentencing arrangements set out in section 18 of the Sentencing and Penalties Act. The reference to the court sentencing a person to imprisonment for life in section 18 of the Sentencing and Penalties Act is a reference to a life sentence that has been imposed as a maximum penalty, as distinct from a mandatory penalty. Examples of life imprisonment as the maximum penalty can be found, for example, for the offences of rape and aggravated robbery under the Crimes Act [vide **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016)]

[35] In **Balekivuya v State** (supra) the Court of Appeal dealt with the issues surrounding the discretion to set a minimum period and how the length of that term should be determined.

> *'[42] Balekivuya also challenges the length of the minimum period set by the trial Judge. As I observed earlier,* ***there is no guidance as to what matters should be considered by the judge in deciding whether to set a minimum term. There are also no guidelines as to what matters should be considered when determining the length of the minimum term.***
>
> *[43]* ***He should however give reasons when exercising the discretion not to impose a minimum term****.* ***He should also give reasons when setting the length of the minimum term.*** *Some guidance may be found in the decision of* ***R v Jones*** *[2005] EWCA Crim. 3115, [2006] 2 Cr. App. R (S) 19 for the purpose of deciding whether a minimum term ought to be set. The Court of Appeal observed at paragraph 10:*
>
> > *"A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life."*

In determining what the length of the minimum term should be a trial judge should consider the personal circumstances of the convicted murderer and his previous history.

[48] It is clear that the sentencing practices that were being applied prior to the coming into effect of the Crimes Decree, the Sentencing Decree and the Constitution no longer apply. ***Whatever matters a trial judge should consider when determining whether to set a minimum term and the length of that term under section 237, the process is not the same as arriving at a head sentence and a non-parole period.*** *In my judgment the decision whether to set a minimum term and its length are at the discretion of the trial judge on the facts of the case.*

[36] Having considered the provisions of Sections 4 and 15 of the Sentencing and Penalties Act, facts and circumstances of the case, aggravating circumstances and mitigating factors, the trial judge had imposed the minimum serving period of 18 years. However, the trial judge does not seem to have set out as to what matters were considered in deciding whether to set or not to set a minimum term in the first place.

[37] I think that there is a need for the Court of Appeal or the Supreme Court to give some guidelines (i) as to what matters should be considered by the trial judge in deciding whether to set a minimum term and (ii) as to what matters should be considered when determining the length of the minimum term in sentencing an accused under section 237 of the Crimes Act.

[38] Considering all the above matters discussed, I am inclined to allow leave to appeal against sentence so that the full court *inter alia* could consider the issue relating to the minimum serving period of 18 years.

Orders

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

.....

Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL