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

CRIMINAL APPEAL NO.AAU 176 of 2019
[High Court at Labasa Case No. HAC 21 of 2018]

BETWEEN : **TEVITA VUNIWAI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **27 October 2021**

Date of Ruling : **28 October 2021**

RULING

[1] The appellant had been indicted in the High Court at Labasa on a single count of murder contrary to section 237 of the Crimes Act, 2009 committed on 07 March 2018 at Labasa in the Northern Division. The information read as follows:

'*Statement of Offence*

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

Particulars of Offence

TEVITA VUNIWAI *on the 7th day of March 2018 at Labasa in the Northern Division, murdered* ***AMELIA BALETAGICI TUIMA***.

[2] Represented by counsel (two from Legal Aid Commission), the appellant had initially pleaded not guilty to murder and indicated that he was ready to plead guilty to manslaughter which was treated as a 'not-guilty' plea. The matter then proceeded to trial and on the trial date namely 25 November 2019 the appellant represented by counsel had changed his mind and pleaded guilty to murder. He had admitted the summary of facts too. Upon being satisfied that the appellant had fully comprehended the legal effect of the plea of guilty and his plea was voluntary the trial judge had convicted him on 27 November 2019 and sentenced the appellant to mandatory life imprisonment with a minimum serving period of 18 years.

[3] The appellant had in person filed a timely appeal against conviction and sentence. He had filed amended grounds and submissions on 24 March 2021 and 14 April 2021. He had also filed supplementary grounds of appeal on 14 October 2021 (signed on 08 July 2021). The State had tendered its written submissions on 20 July 2021. The appellant participated at the leave hearing *via* Skype.

[4] The summary of facts have been set out by the trial judge as follows:

> '3. *According to the summery of facts, which you admitted in open court, you and deceased were married with one son, who is now four years old. During the month of February in 2018, the deceased had complained about domestic violence caused to her by you. She had then moved to another place and obtained a Domestic Violence Restraining order against you on the 21st of February 2019. You were aware of the said order as the deceased informed you about it on the 6th of March 2018. On the 7th of March 2018, you came in a taxi and picked the deceased from a bus stop. You then took her to a location close to Coca Cola warehouse in Naseakula, Labasa. You then had a conversation with the deceased for a while. When she wanted to leave to attend her classes, you took a pocket knife which you were carrying with you and struck the deceased on her abdomen, causing a gapping laceration on her abdomen measuring 20 mm x 10 mm x 120 mm. You have further struck her on the right side of her neck with the said pocket knife causing a deep incise slash wound measuring 70 mm x 30 mm over the right aspect of her neck, which had caused a transection of the muscles, trachea and blood vessels. She was admitted to the hospital, but 30 minutes after her admission, she succumbed to death due to those injuries.'*

[5] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test in a timely appeal for leave to appeal against sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The ground of appeal urged on behalf of the appellant is as follows:

Ground 1

THAT the Learned Trial Judge erred in law and failed to consider that the appellant's guilty plea was equivocally due to wrong advice by the legal aid counsel that the charges will drop to manslaughter and the sentence be on manslaughter charges.

Ground 2

THAT the Learned Trial Judge erred in law in considering equivocally plea on the charges of murder thus failed to consider the seriousness of the charges and the appellant first time offender further the appellant is without a proper knowledge law or proceeding.

Ground 3

THAT the Learned Trial Judge erred in law and failed to consider in the first appearance the appellant pleaded not guilty that the counsel wrong advice the appellant by mistakes pleaded guilty see sentencing (2) paragraph (2).

Ground 4

THAT the Learned Trial Judge erred in law and failed to ask the appellant that the plea is on your own freewill or not thus failed to take into consideration the Trial Judge proceed to sentence the appellant.

<u>Ground 5</u>

<u>THAT</u> the Learned Trial Judge erred in law failed to consider the fact that deceased died in hospital after half an hour. Thus the Trial Judge failed to direct the prosecution to amend the charges from murder to manslaughter.

<u>Supplementary grounds</u>

<u>THAT</u> *the Learned Judge erred in its duty by sentencing the appellant on the plea being equivocal on the fundamental basis as follows:*

1. *Failure to form, aware, consider and to independently assess the possibility on the question whether the appellant initial indication that he was willing to plead guilty on the lesser count of manslaughter should have triggered a sense of attention to avoid equivocality, enquire or to investigate on the record available whether there is an indication on the available record showing that the plea entered on murder cannot be satisfied alone only on the basis of the summary of facts whereas the appellant had clearly informed the police that he was acting under provocation caused by the decease due to a heated argument over ongoing mistreatment, discovered adultery affairs, dishonesty and the interim DVRO by the deceased.*

2. *Plea entered without peruse of the appellants interview records and charge statement for the dispensation of justice to understand that the elements of facts, contained in the summary of facts do not contain the evidence nor support the offence charged to which the appellant pleaded guilty in that the judge was wrong in law.*

3. *Failure to determine whether plea of guilty is unequivocal due to the defect agreed summary of fact, withstanding the appellant was engaged in a very uncontrolled heated argument and received unapprehend provocation words on the day of the stabbing. The prosecution summary of facts alleges that the appellant had intended to murder his wife however the appellant stabbed her due to the uncontrolled and provocative words uttered by the deceased causing the appellant to loss self-control and acted uncontrollably in rage on that particular instant, later felt sorry meaning that he did not intent to murder his wife in anyway.*

4. *Failure to provide reasons why the court cannot accept the initial indication by the appellant to plead guilty on the lesser charge of manslaughter during the sentencing was a denial of justice.*

01st and 03rd grounds of appeal

[7] The appellant's complaint amounts to an allegation against his trial counsel that they wrongly advised him that the charge would be reduced to manslaughter and he would be sentenced for manslaughter upon his plea of guilty.

[8] The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground of appeal in so far as it criticises the trial counsel cannot be even entertained.

[9] In **Masicola v State** [2021]; AAU 073.2015(29 April 2021), the Court of Appeal said:

> *'[14] ………guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (see R v Murphy [1975] VR 187) and a valid plea of guilty is one that is entered in the exercise of a free choice (see Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).'*

[10] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court said:

> *'[21] …………It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client…….'*
>
> *[22] Where, as here, the defence counsel indicates to prosecuting counsel that his client will plead guilty, the defence will wish to see the summary of facts. If the facts are accepted by defence counsel's client, the Accused, the plea can proceed. If not, the case must proceed on a not guilty plea and a trial must take place……'*

[11] Earlier in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter that:

> *'[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).'*

[12] It was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132);

> *"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*

[13] There is no material before this court to substantiate that the trial counsel had advised the appellant that the charge of murder would be reduced to manslaughter and he would be sentenced for manslaughter, if he pleaded guilty.

[14] As a matter of fact the appellant had made no such allegation in his appeal papers signed on 17 December 2019. He had come out with this allegation against his trial counsel in his amended appeal papers signed on 22 March 2021 and thereafter. That shows that it is afterthought. Secondly, there was no reason for the counsel to

persuade the appellant to plead guilty by such a promise as they obviously knew that after he pleaded guilty to murder there was no way that the trial judge could reduce it to manslaughter or sentence him for manslaughter.

[15] Given the summary of facts, I do not see any signs of 'flagrant incompetence' on the part of the appellant's trial counsel in this instance in advising the appellant to plead guilty to the information [see **R v Birks** (1990) 48 A Crim R 385; (1990) 19 NSWLR 677, 688–9, Sir Thomas Eichelbaum NPJ in Court of Final Appeal (Hong Kong) in **Chong Ching Yuen v Hksar** (2004) 7 HKCFAR 126; [2004] 2 HKLRD 681and **Nasilasila v State** [2021] FJCA 138; AAU156.2019 (3 September 2021)]

[16] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd and 04th grounds of appeal

[17] The appellant complains that the trial judge had failed to consider whether his plea of guilty was unequivocal or not.

[18] The trial judge had clearly indicated in the sentencing order that he was satisfied that the appellant had fully comprehended the legal effect of the plea of guilty and his plea was voluntary. In addition, the appellant was represented by counsel from the LAC. Having pleaded not guilty initially the appellant had tendered the guilty plea on the trial date *i.e.* 25 November 2017. Obviously, he had sufficient time to reflect on the matter again before tendering the plea of guilty. The sentence was meted out on 27 November 2017 and the appellant had two days to withdraw his plea if it was not unequivocal. Thus, there was no obligation on the part of the judge to make further inquiries. There is no evidence of equivocation on the record – **Nalave v State** [2008] FJCA 56; AAU 4 and 5 of 2006 (24 October 2008).

[19] The appellant had further raised supplementary grounds of appeal based on 'equivocal plea' based primarily on 'provocation'.

01st and 03rd supplemental grounds of appeal

[20] Under the first and third supplemental grounds of appeal the appellant has taken up the position that the trial judge had failed to consider that he was acting under provocation. Provocation could have helped to get his culpability reduced to manslaughter only if there had been a "credible narrative" (i) on the evidence of provocative words or deeds of the deceased to the accused (ii) of a resulting loss of self-control by the accused (iii) of an attack on the deceased by the accused which was proportionate to the provocative words or deeds [see **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020) and **Masicola v State** (supra)].

[21] However, the summary of facts admitted by the appellant has not even a semblance of any narrative of provocation. No evidential basis for running a case of manslaughter based on provocation simply did not exist before the trial judge [see **Darshani v State** [2018] FJSC 25; CAV0015.2018 (1 November 2018)]. On the contrary the appellant's brutal attack on the deceased appears to have been pre-planned and premeditated. In the circumstances, it is no surprise that the appellant's trial counsel had advised the appellant to plead guilty to murder, if they had done so.

01st and 02nd supplemental grounds of appeal

[22] The appellant had also argued under the first and second supplemental grounds that the trail judge had not perused his cautioned interview and charge statement where he had informed the police that he was acting under provocation.

[23] What evidence or material could be relied upon in deciding that a plea of guilty is equivocal was discussed by the Supreme Court in **State v Samy** (supra) where it was held that the primary source of a guilty plea is the summary of facts. Nevertheless, the Supreme Court had approved limited use of disclosure statements (without, however, going on a voyage of discovery looking into the case record and drawing inferences) but disapproved over-reliance on them as they are, without a trial, unsworn and untested (unless an agreed fact) and also because, procedurally, upon a plea no formal

evidence is taken and the plea cannot be taken as an admission of the bundle of disclosure witness statements. It was further held that:

> *'[21] Frequently it can happen that after an offence has been committed, about which an Accused person feels deeply ashamed, that various explanations are given to the police or to the court. Subsequently an Accused can retract some or all of those explanations. It is not for a court to inquire into the advice tendered by counsel to his client.'*

[24] Therefore, it is clear that even if the appellant had informed the police that he acted under provocation (provocation is very unlikely to be made out in the facts and circumstances of this case) by accepting the summary of facts he had decided to retract it for good reasons best known to him and his counsel. The trial judge need not have considered his cautioned interview and charge statement in this situation.

[25] Thus, there is no reasonable prospect of success in these grounds of appeal.

05th ground of appeal

[26] The appellant complains that the trial judge had erred in law and failed to consider the fact that the deceased died in hospital after half an hour. Thus the trial judge failed to direct the prosecution to amend the charge from murder to manslaughter.

[27] This ground of appeal simply does not have merits at all.

04th supplemental ground of appeal

[28] The appellant's argument is that the trial judge had not given reasons why he could not accept the appellant's initial indication that he was ready to plead to the lesser charge of manslaughter prior to the sentence was pronounced.

[29] The appellant may have indicated his willingness to plead to manslaughter but for that to happen the respondent had to amend the information which was the prerogative of the State. That did not certainly prevent to trial judge from entertaining his guilty plea

for murder on the date of the trial with the admission of summary of facts. On my perusal of the complete summary of facts, I do not find anything that suggests that there was any basis for the trial judge to contemplate or raise with the appellant's counsel anything relating to manslaughter.

[30] This ground of appeal has no reasonable prospect of success.

<u>Sentence</u>

[31] The appellant had indicated in the initial appeal papers signed on 17 December 2019 that the notice of appeal was against conviction and sentence. However, he had not elaborated or even mentioned about the sentence in any of the subsequent papers submitted. Yet, the court inquired about his sentence appeal at the hearing at the request of the counsel for the respondent as the appellant had not abandoned the sentence appeal. He indicated to court that he was more concerned with his conviction appeal and made no further oral submissions on the sentence but the respondent's counsel did make some oral submissions. In the circumstances the court thinks that it is appropriate to deal with the sentence as well in this ruling.

[32] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **<u>Naisua v State</u>** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **<u>House v The King</u>** [1936] HCA 40*;* (1936) 55 CLR 499, **<u>Kim Nam Bae v The State</u>** Criminal Appeal No.AAU0015 and **<u>Chirk King Yam v The State</u>** 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.*

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

> '4. *The punishment for the offence of Murder is a mandatory sentence of imprisonment of life. However, the sentencing court has been given a*

> *judicial discretion to set a minimum term to be served before pardon may be considered. In order to set a minimum term to be served for the offence of Murder, the court is required to consider the level of culpability, level of harm, aggravating factors and mitigating circumstances of the crime. Murders which are brutally carried out without any form of remorse or respect to human life must be given longer minimum period.'*

[34] As the trial judge had remarked, life imprisonment is the only and mandatory sentence available for murder (see **Nute v State** [2014] FJSC 10; CAV0004 of 2014 (19 August 2014). Therefore, the only matter that needs attention is the minimum serving period of 18 years.

[35] 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).

[36] 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)]

[37] 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.'

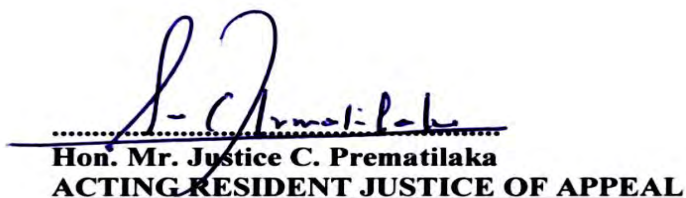
[38] Having considered *the level of culpability, level of harm, aggravating factors and mitigating circumstances of the crime* the trial judge had imposed the minimum serving period of 18 years. However, the trial judge does not seem to have set out as to what matters were considered in exercising his discretion whether to set or not to set a minimum term in the first place.

[39] 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.

[40] Considering all the above matters discussed on the sentence, I believe that if the appellant decides to renew the sentence appeal before the full court, the Court could go into the above two issues and in that process decide whether the minimum period of 18 years should be affirmed or not. However, since the appellant did not pursue his sentence appeal with any enthusiasm and court looked at it on its own at the request of the respondent, I am not inclined to grant leave to appeal but leave it to the appellant to decide whether he is interested to renew it before the full court.

Orders

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



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