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

CRIMINAL APPEAL NO.AAU 119 of 2018
[In the High Court at Suva Case No. HAC 163 of 2014LTK]

BETWEEN : **MOHAMMED YASIN**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. A. Singh for the Respondent**

Date of Hearing : **20 January 2021**

Date of Ruling : **21 January 2021**

RULING

[1] The appellant had been indicted on one count of murder contrary to section 237 of the Crimes Decree, 2009 committed on 16 November 2014 at Wailailai, Ba in the Western Division.

[2] The information read as follows.

Statement of Offence

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

Particulars of Offence

MOHAMMED YASIN *on the 16th day of November 2014 at Wailailai, Ba in the Western Division murdered* ***MAIMUM NISHA.***

[3] After the summing-up on 17 October 2017 the assessors had unanimously found the appellant guilty as charged. The trial judge on the same day had agreed with the assessors and convicted the appellant of murder. On 18 October 2017 the appellant had been sentenced to mandatory life imprisonment with a minimum serving period of 18 years.

[4] The appellant had filed an untimely notice of appeal against conviction and sentence on 09 November 2018. The delay is about a year. The Legal Aid Commission on 03 August 2020 had filed an application for enlargement of time and an affidavit from the appellant. Amended grounds of appeal and written submissions had been tendered by LAC on 24 September 2020. The state had responded by its written submissions on 04 November 2020. The appellant had also filed an abandonment notice on his sentence appeal in Form 3 on 23 September 2020.

[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, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

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

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

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

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

[8] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> '*(a)........*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*
>
> *(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.*
>
> *(d) 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.*
>
> *(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'*

[9] Sundaresh Menon JC also observed

> *'27.......... It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'*

[10] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

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

Length of delay

[11] The delay is about 01 year and very substantial.

[12] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In* ***Julien Miller v The State*** *AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave.'*

[13] However, I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

> *'... that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

Reasons for the delay

[14] The appellant's excuse for the delay is that he was expecting his trial counsel to come back to him for the appeal but he was not visited by them and being a layman he was unable to file appeal papers on his own. The appellant had been defended by two lawyers form Legal Aid Commission. Had he instructed them to appeal against his conviction and sentence there is no reason why they never turned up. On the other hand even the belated appeal had been filed by him in person ad he could have done the same within the appealable time. The appellant had not mentioned any of those reasons in his notice of application tendered on 09 November 2018. It is clear that the appellant had not shown any desire to appeal against his conviction and sentence but

had decided otherwise later as an afterthought. Therefore, his explanation for the delay is not acceptable.

Merits of the appeal

[15] In **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[16] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[17] The grounds of appeal raised by the appellant are as follows.

> *'Ground 1- That the learned trial judge erred in law and in fact when convicted the Appellant when the totality of the evidence led by the state said not support the charge of murder.*
>
> *'Ground 2- The learned trial judge erred on law and in fact when he prejudged the case in his summing-up to the assessors thus causing a grave miscarriage of justice towards the appellant.*

[18] The facts briefly narrated by the trial judge in the sentencing order are as follows.

> *'2. The brief facts of the case were as follows. You and your deceased wife had been married for 27 years. Initially, you two had a happy marriage. You two raised two daughters and a son and all your children are now married and have their own families. You worked as a taxi driver and your wife was engaged in domestic duties. In 2014, your marriage went through a crisis. You and your wife argued a lot, resulting in your wife taking out a "Domestic Violence Restraining Order" (DVRO) against you in March 2014. You two also separated. Your wife began to have affairs. This upset and angered you a lot. On 16 November 2014, while your wife was visiting your mother, you stabbed her to death.'*

[19] The case against the appellant had been based on his cautioned interview, charge statement, the evidence of two witnesses at the crime scene who had testified to the appellant's conduct soon after the stabbing of the deceased and medical evidence. On the day of the incident, the deceased was visiting the appellant's mother who had come from abroad at the appellant's sister's house and the appellant had arrived there and seeing the deceased in the kitchen, he had stabbed her with a kitchen knife on her neck because he had recalled the stories of the deceased having affairs with other men making him angry. The knife had penetrated the neck, cut the large neck vein, wind pipe, and the tip of the right lung resulting in massive bleeding. She had been pronounced dead on admission to hospital.

[20] The appellant had given evidence and taken up self-defense. His position had been that he went to the kitchen and his wife had attacked him with a kitchen knife and they struggled suggesting that in defending himself he had stabbed the deceased. He had admitted having stabbed the deceased on the neck at questions and answers 18, 26, 29, 33, 37 and 40 of the cautioned interview.

01st ground of appeal

[21] The appellant seems to argue that the prosecution had not proved the third element of murder *i.e.* the intention to cause death or alternatively recklessness in causing the death.

[22] When an appellant complains that the verdict cannot be supported by the totality of evidence the test to be applied by the appellate court is clear. It is to be found in the powers conferred on the appellate court under section 23 of the Court of Appeal Act. The test is whether having considered the admissible evidence against the appellant as a whole, the appellate court could say that the verdict was unreasonable; In other words whether there was admissible evidence on which the verdict could be based [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)].

[23] In other words, could the trial judge also have reasonably convicted the appellant on the admissible evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[24] In drawing an inference of the fault element of murder, be it intention or recklessness, the assessors or the trial judge was not confined to the cautioned interview or the charge statement of the appellant, for an accused would rarely admit that he intended to cause the death of the deceased or was reckless in causing the death. Fault element should be gathered from all circumstances of the case. Therefore, the appellant's statement in the charge statement that it was not his intention to kill is not decisive.

[25] I have no doubt that the assessors and the trial judge had enough material in the form of the fatal injury caused by the appellant to the neck of the deceased by the kitchen knife (the deceased appears to have been injured in the arm and the stomach too though they may not have been fatal) and his attempt to cause more injuries to the deceased by stabbing with the same weapon while she was lying injured in the vehicle waiting to be transported to hospital to conclude that the necessary fault element for murder did exist.

[26] Therefore, there is no real prospect of success of this ground of appeal.

02nd ground of appeal

[27] The second complaint of the appellant is focused on paragraph 35 of the summing-up where the trial judge had said as follows. The appellant criticizes the last sentence at paragraph 35.

> '35. *Alternatively, was the accused aware of a substantial risk that his wife would die if he stabbed her on the neck? And having regard to the circumstances known to him, was it justifiable to take the risk of stabbing her neck, at the material time? In my view, he was not justified in taking the risk. Stabbing the neck would obviously cause fatal injuries leading to death.'*

[28] However, the trial judge had followed it up with the following directions.

'36.Furthermore, consider the evidence of Mohammed Iqbal (PW3) and Manasa Ratu (PW4). Both witnesses were at the Crime Scene at the material time. Both PW3 and PW4 said they assisted in carrying the wounded victim to a car to be taken to Ba Mission Hospital. Both PW3 and PW4 said, the accused was still armed with the kitchen knife and trying to stab his wife, who was lying seriously injured in the car. PW4 said, he and others had to push the accused to the ground, to prevent him from further stabbing his wife. What do these actions tell you? <u>Did he really intend to kill his wife, while she laid fatally injured in the car, which was to take her to hospital? Was he reckless in causing his wife's death? How you answer the above questions is entirely a matter for you.</u>

'37. If you find all the elements of murder proven by the prosecution beyond reasonable doubt, you may find the accused guilty as charged. If otherwise, you may find him not guilty as charged.'

[29] The impugned direction has to be read with paragraph 36, 37 and 01 of the summing-up where the trial judge had said *inter alia*

'01. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.'

[30] Therefore, I do not think that too much could be read in to the disputed statement of the trial judge at paragraph 35 of the summing-up. It has not deprived the overall summing-up of being fair, objective and balanced. As stated in **<u>Tamaibeka v State</u>** [1999] FJCA 1; AAU 0015u of 97s (08 January 1999) a judge is entitled to comment robustly on either the case for the prosecution or the case for the defense in the course of the summing-up. One cannot say that the trial judge had made the assessors feel bound to accept his view of the appellant's recklessness.

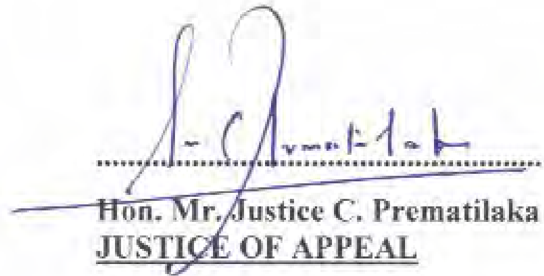
[31] Therefore, I do not think that the second ground of appeal has a real prospect of success.

Prejudice to the respondent.

[32] The respondent has not pleaded any prejudice as a result of enlargement of time. However, given that the offence had taken place in 2014 there may be difficulties in getting the witnesses in case of any fresh litigation.

Order

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



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL