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

CRIMINAL APPEAL NO.AAU 0020 of 2018
[In the High Court at Suva Case No. HAC 52 of 2014]

BETWEEN	:	**MATAIASI ULUI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**15 July 2021**
Date of Ruling	:	**16 July 2021**

RULING

[1] The appellant (01st accused in the High Court) had been indicted with three others in the High Court of Suva on one count of murder contrary to section 237 of the Crimes Act, 2009 committed on 14 April 2014 at Nawaicoba Nadi in the Western Division.

[2] The information read as follows.

> ***MURDER:*** *Contrary to section 237 of the Crimes Act 2009.*
>
> ***MATAIASI ULUI,*** *MAIKELE LOKO, RAKESH KUMAR and VINOD SEGRAN on the 14th April 2014 at Nawaicoba Nadi in the Western Division, murdered* ***VASU DEWAN NAIDU.***

[3] After full trial, the assessors had been of the unanimous opinion that the appellant was not guilty of murder but guilty of manslaughter. They had also opinioned that the 02nd accused was also guilty of manslaughter and the 03rd and 04th accused were not guilty of any offence. The learned High Court judge had agreed with the assessors' opinion with regard to the 03rd and 04th accused and acquitted them. He had also agreed with their opinion on the 02nd accused, convicted him for manslaughter and sentenced him to 03 years of imprisonment with a minimum period of 02 years. The trial judge had disagreed with the assessors' opinion on the appellant and convicted him for murder. He had been sentenced to life imprisonment with a minimum period of 15 years.

[4] The appellant's appeal in person against conviction and sentence had been timely. Subsequently, the Legal Aid Commission had filed amended grounds of appeal and written submissions on behalf of the appellant. The state too had filed written submission.

[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 for leave to appeal against conviction and 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] 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.

[7] The evidence of the case had been summarised by the learned trial judge in the judgment as follows.

> *'3] All four accused were colleagues at a small manufacturing company in Nadi Town, (the third accused being the proprietor). The deceased was a subcontractor to that small company and was well known to all of the accused.*
>
> *4] It was suspected that the deceased was using witchcraft to have an effect on one or more of the accused. At a meeting arranged to discuss company business, the discussion turned to his alleged practice of witchcraft and the deceased was asked to account for himself. He was told it had been noted that he had been seen practicing dubious rituals. This verbal challenge turned violent and the deceased was set upon by the first and second accused and perhaps others too. He was assaulted, by both the first and second accused and the assault ended with the first accused picking the deceased up, swinging him around and dashing him head first on to a concrete floor. The deceased sustained severe injuries to the skull and brain as a result and died some 27 hours later.*
>
> *5] The evidence against the first and second accused came from admissions they made in their respective interviews under caution. The admissibility of the records of these interviews was tested in pre-trial proceedings and the Court found then to be voluntary and admissible. There was no contest to their provenance or content at trial.*
>
> *6] The prosecution case against the third and fourth accused was founded on two hypotheses. First, the reported accusations of the deceased himself in the hours before his demise, in which he is said to have named both the third and the fourth accused as two of his assailants. Secondly circumstantial evidence that the State claimed was enough to place them in the joint enterprise.*

[8] Medical findings as to the cause of death had been the deceased's fractured skull and haemorrhages in the membranes between the skull and the brain caused by the application of serious force. Dr. Goundar had stated that had the appellant been punched on the face and then thrown first on to the ground that would have caused such injuries.

[9] The appellant had not given evidence at the trial or called any witnesses on his behalf.

[10] The appellant's amended grounds are as follows.

> ***Conviction***
>
> *1. That the Learned Trial Judge erred in law and in fact when he gave inconsistent verdicts upon conviction to the Appellant and his co-accused's at trial when Joint enterprise was available on the evidence.*
>
> *2. That the Learned Trial Judge erred in law and in fact in not giving cogent reasons for his disagreement with the unanimous decision of the assessors.*
>
> ***Sentence***
>
> *1. That the Learned Trial Judge erred in law and in fact in imposing a sentence with a high minimum term of 15 years.*

01st ground of appeal

[11] The counsel for the appellant has argued that the verdict guilty of murder against the appellant was unreasonable in as much as the 02nd accused had been convicted only for manslaughter as both of them along with the 03rd and 04th accused had been charged on the basis of 'joint enterprise'.

[12] It appears that the only evidence against the 02nd accused had been his admission that he hit the deceased's legs with a sasa broom and according to Dr. Goundar that would not have caused the deceased's death.

[13] The trial judge had stated in the judgment on the 02nd accused:

> *'[18] .....The prosecution has not proved that the second accused could have contemplated that the commission of the offence was a probable consequence of the enterprise that he joined to assault the deceased; in terms of section 46 of the Crimes Act 2009*

[14] However, the trial judge had accepted the assessors' opinion and found the 02nd accused guilty of manslaughter. Had the prosecution not proved 'joint enterprise' the 02nd accused's criminal liability could have been based only on his individual act of hitting the deceased's legs with a sasa broom. In that event, in my view the 02nd

accused could not have been found guilty of even manslaughter. This, I think is reflected in the sentence eventually imposed by the trial judge on the 02nd accused.

[15] Nevertheless, it is not possible to argue that because the 02nd accused had been convicted of manslaughter the conviction of the appellant of murder is not sustainable on the basis of inconsistent verdicts. The test for inconsistent verdicts is whether two verdicts can stand side by side in that it cannot be said that no reasonable assessors or a judge properly directed could have arrived at the guilty verdicts or that the verdicts cannot be reconciled on any rational or logical basis. The verdicts on the appellant and the 02nd accused are not obnoxious to the principles relating to inconsistent verdicts set out in **Balemaira v State** [2013] FJSC 17; CAV0008 of 2013 (06 November 2013) and **Vulaca v State** [2013] FJSC 16; CAV0005.2011 (21 November 2013)] as they can be clearly reconciled on the evidence available against the appellant and 02nd accused.

[16] However, the more substantial issue is whether the conviction of murder against the appellant could be sustained on its own merits. It is clear from the judgment that the trial judge arrived at the verdict of guilty of murder as opposed to manslaughter brought by the assessors on the following purported evidence: *'To throw a person **head first on to a concrete floor** is reckless in the extreme. Any sober and reasonable person would appreciate that indulging in such conduct would risk mortal damage to the head the part of the body most vulnerable to injury.'* (see paragraph 14 of the judgment)

[17] In other words it is clear that the trial judge had based the appellant's criminal liability of his own act and not on the basis of 'joint enterprise'. As pointed out even by the respondent there was no evidence that the appellant threw the deceased **head first on to a concrete floor**. The appellant's admission as adverted to in the summing-up is as follows.

> *[72] 'It is the State's case that Matai has admitted in that interview to assaulting Arun at Rakesh's house that night by punching his mouth and "I stood uphold the collar of his shirt and his trousers lifted him up and threw him down **with his back landing** first" (Q & A 72).'*

[18] In the charge statement also the appellant had admitted having punched the deceased but said that he did not intend for him to die and sought forgiveness.

[19] The deceased (when he was alert, conscious, calm and talking) had told Dr. Victa Vinay Kumar that he had been punched on the face, and he fell on the floor and hit on the back (see paragraph 47 of the summing-up). However, there is little doubt that the necessarily fatal injury had been caused by his fall on a hard surface but the trial judge's assertion that the appellant had thrown the deceased head first on to a concrete floor is not borne out by the evidence.

[20] Obviously, the trial judge had correctly ruled out intention as the fault element as far as the appellant was concerned. He had also correctly directed the assessors to consider the fault element of recklessness as follows.

> *86. Remember your task; evaluate the admitted acts of Matai first. If he was so reckless that his actions carried the risk of death and he would have known that but carried on regardless then he is guilty of murder. If his actions only carried the risk of serious harm then he is guilty of manslaughter. There is no room for a not guilty of anything verdict.'*

[21] The trial judge had once again correctly advised himself in the judgment on the fault element of murder and manslaughter as follows.

> *'13] The differences between the two offences is of course the recklessness as described in sections 237 and 239 respectively of the Crimes Act 2009..*

[22] However, unfortunately the trial judge had erred in applying his own directions in arriving at the verdict of murder due to a factually wrong assertion as pointed out above resulting in a wrong verdict of murder instead of manslaughter as opined by the assessors.

02nd ground of appeal

[23] The counsel for the appellant argues that the trial judge had failed to adduce cogent reasons for overturning the assessors' opinion of manslaughter and substituted that with murder. This complaint is interwoven with the matters already discussed under the first ground of appeal.

[24] In **Fraser v State** [2021]; AAU 128.2014 (5 May 2021) the Court of Appeal stated

> *[24] 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)]'*

[25] Given the discussion above on the 01st ground of appeal, I am of the view that the trial judge's reasons for overturning the assessors' guilty opinion of manslaughter against the appellant are not cogent and cannot withstand independent judicial scrutiny.

[26] In the circumstances, I think the appellant has a reasonable prospect of success with his appeal against conviction for murder on the matters adverted to above.

03rd ground of appeal *(sentence)*

[27] The appellant complains that the minimum serving period of 15 years is too high.

[28] In **Balekivuya v State** [2016] FJCA 16; AAU0081 of 2011 (26 February 2016) the court reduced the minimum serving period from 19 years to 15 years for an appellant who was 19 years at the time of committing the offence though the minimum period of serving the sentence was still a matter of discretion on the part of the trial judge in terms of section 237 of the Criminal Procedure Act, 2009.

[29] In **Darshani v State** [2018] FJCA 79; AAU0064.2014 (1 June 2018) where there was a brutal and nasty series of crimes committed against a mother and her baby on the one hand and against the mother's three other older children on the other hand, the Court of Appeal reduced the minimum term of 20 years imposed by the trial judge before a pardon may be considered to 17 years *inter alia* because in his sentencing decision the learned Judge has made no reference to the issues of deterrence or rehabilitation.

[30] The trial judge had remarked as follows in the sentencing order in deciding the minimum term.

> *'9.] Murder by recklessness will attract a lesser minimum term than murder by intent, the rationale being that the perpetrator did not set out with a premeditated plan to take someone's life. That allowance must not of course detract from the seriousness of any murder be it by intent or recklessness. One would find it hard to imagine an act more reckless than throwing a person head first on to a concrete floor, with a force said by the pathologist to have been severe. This act was done without provocation, but in reaction to some swearing by the deceased who was denying rumours of witchcraft founded on the unproven claim of an observer seeing him muttering and sprinkling grog on the ground.*

[31] The trial judge could be said to have correctly recognised that murder by recklessness will attract a lesser minimum term than intentional murder, the rationale being that the perpetrator does not set out with a premeditated plan to take someone's life. However, as already pointed out his assertion that '*One would find it hard to imagine an act more reckless than throwing a person head first on to a concrete floor*' which obviously had made an impact on the minimum serving period, does not seem to be supported by evidence. At the same time, the trial judge had correctly stated that the appellant's act of assault had been done without provocation in the context that he had determined that the appellant was guilty of murder and not manslaughter. In the circumstances, I cannot see a sentencing error requiring the intervention in the trial judge's discretion by this court as far as the minimum period for murder is concerned merely on the basis that he had made no reference to the issues of deterrence or rehabilitation.

[32] However, in view of the issues discussed under the conviction appeal which has a reasonable prospect of success this ground of appeal against sentence may become redundant before the full court.

Orders

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

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