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

CRIMINAL APPEAL NO.AAU 0002 of 2020
[In the High Court at Suva Case No. HAC 352 of 2018]

BETWEEN : **RAJIV KRISHAN PADYACHI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. S. J. Stanton and Ms. S. Ravai for the Appellant**
: **Ms. S. Tivao for the Respondent**

Date of Hearing : **21 July 2021**

Date of Ruling : **23 July 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of attempted murder contrary to section 44 (1) and 237 of the Crimes Act, 2009 committed on 15 September 2018 at Colo-I-Suva in the Central Division.

[2] The information read as follows:

'Statement of Offence'

Attempted Murder: Contrary to sections 44 (1) and 237 of the Crimes Act of 2009.

'Particulars of Offence'

Rajiv Krishan Padyachi on the 15th day of September, 2018 at Colo-I-Suva, in the Central Division, attempted to murder Arpana Pratap.

[3] After full trial, the assessors had expressed a unanimous opinion that the appellant was guilty of attempted murder. The learned High Court judge had agreed with the majority opinion and convicted the appellant as charged. The appellant had been sentenced on 11 December 2019 to life imprisonment with a minimum serving period of 15 years.

[4] The appellant's initial appeal only against conviction had been timely (08 January 2020). Subsequently, amended grounds of appeal had been tendered on 09 October 2020 against conviction and sentence. Written submissions on behalf of the appellant had been lodged on 30 November 2020. The state had filed its written submission on 20 January 2021. Although, the appellant's sentence appeal is untimely (late by almost 09 months) his lawyers had not sought enlargement of time to appeal against sentence and even the notice of appeal (09 October 2020) has not sought any relief as far as the sentence is concerned. Therefore, technically this court cannot consider the appellant's belated appeal against sentence for extension of time. However, since his lawyer's lapse should not prejudice the appellant, I shall treat his sentence appeal at this stage according to the principles of law applicable to an application for enlargement of time.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction 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) that will 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] 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?

[7] 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)].

[8] It is clear that the delay in the sentence appeal is nearly 09 months and substantial. The appellant has offered no explanation. Nevertheless, if there is a real prospect of success in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent had not averred any prejudice that would be caused by an enlargement of time.

[9] 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.*

[10] The facts have been summarised by the counsel for the respondent as follows:

> *'Briefly stated, the appellant and the victim were in a relationship. The victim had given multiple loans to the appellant during their relationship totalling to $82,500. The loan was meant to be cleared by the 31st of August 2018. Before the incident the victim had asked the appellant multiple times and pressed him to return the monies to her, lying the appellant made up several excuses asking for more time to repay the monies. On 15 September 2018, she met the appellant who asked her to go with him to Colo-i-Suva for a swim and thereafter they would go to the bank. The victim could not swim, and the appellant knew this. At the pools the appellant proceeds to attempt to drown the victim, lucky the Fiji Police Force boxing team had decided to go to Colo-i-Suva for a training session. The officers had heard the victim scream and ran to assist, they witnessed the appellant looking shocked. They noticed the head of the victim below the water where the appellant was swimming. Immediately the police went to assist the victim and managed to save her.'*

[11] The trial judge had placed before the assessors at paragraph 37 of the summing-up the account of the victim as to what happened on the day of the incident at Colo-i-Suva pool as follows:

> *xxii. After a few moments he has pulled her by her right hand to be in front of him and pushed her to the water. She has landed in the pool about 1 ½ to 2m away from the bank. First she has gone down in the pool then she has managed to come up and get her head above water. While she has managed to come close to the bank where the accused was. The accused was standing at the same position he was and she has asked him repeatedly to pull her out of the water. He has said nothing and has kept on staring at her without any expression on his face. Then she has realized that this is intentional and panicked a little. She has struggled to reach the bank and her foot has touched a rock and was about to jump to hold on to another rock towards the bank.*
>
> *xxiii. Before she did so the accused jumped into the pool and getting hold of her by her hair has dragged her to the middle of the pool. Having dragged her to the middle, he left her there and has gone about 2 meters away and was watching her, while she struggled to keep her head above the water.*
>
> *xxiv. While struggling, she has weighed her options and has prayed to Lord Shiva to give her some solution. The witness explains that she prayed because she didn't know how to swim and realized that the accused intended to kill her. The witness further explains that the realization was due to the facts that he intentionally pushed her into the pool, knowing that she could not swim, he dragged her to the middle, when she was about to save herself, and was*

watching her struggle without trying to save her and when she asked him to take her out, he watched without any expression.

xxv. *After a while, when she managed to keep her head above the water, the accused has come to her again and holding her by her hair above the head has tried to push her in. She has fought with him and while fighting to push him away, she has scratched his face with her right hand. The struggle has been going on for some time and she has managed to grab his shirt and rise herself over him. Then the accused has tried to push her away and while doing that he has scratched her chest.*

xxvi. *Though the accused tried to push her away, she has held tightly on to his shirt, without letting it go. Then she has pushed him away with all her strength and shouted for help at the top of her voice. Then the accused has come back to her, holding her from her hair on the top of her head, and covering her mouth with his other hand has pushed her back into the water. While underwater she has been desperate for breath and struggling with him, she has managed to come to the surface again. The accused has tried to keep her underwater using his feet to thump on her back and the neck area.*

xxvii. *When she managed to come up, the accused grabbed her by the hair as before and pushed her back into the water and thumped his foot on her back to keep her underwater. By that time she has lost most of her energy to keep on fighting and lost all her hope and was mentally preparing herself for her death. She has prayed to Lord Shiva and was waiting for the white light. Though she cannot be exact of the time she was held underwater, she has felt it like ages. She has felt his foot on her back and was almost unconscious.*

xxviii. *The next thing she knew was two men holding her from her arms and bringing her to the surface. As soon as her head came up, above the water she was scared that the accused would be there behind her. When she managed to speak, she has told them that the accused was trying to kill her and pleaded them to save her. They told her that they are police officers and she is safe with them. But she has kept on telling them to save her. They pulled her out of the water and made her sit at a bench. Thereafter many of the police officers surrounded her and asked whether she is OK. Though she was scared that the accused could be behind, she did not have the strength to turn her head and look whether the accused is still there.*

[12] The appellant's version had been summarised at paragraph 48 and the trial judge had informed the assessors that the appellant's stance is that he never attempted or intended to kill Ms. Arpana Pratap:

xix. *At the poolside on that morning, while she walked beside the pool, he has moved to the other side of the pool where man-made steps are and sat on the lowest step. After some time, Arpana has come and sat few steps above him.*

Sometime later, Arpana has come and sat next to him and at that moment a European couple has gone jogging past them. He was conversing with her as to how cold the water may be and whether they should swim or not.

xx. *Having conversed with her, they have stood up and he has pushed her into the water to take the lead and he has followed her afterwards. Describing the way he pushed her the accused states that they were standing very close to the water and it was a light push when she was facing the water. The accused further states that they have swam at the same place before. When pushed in, she went in the water and looked back at him. He has asked her to get to a side for him to jump and she has done so. The accused having jumped in, has swam across to the other side where the car park entrance is. Then he turned around, sitting back on the rocks on the side of the pool at that point Arpana was nearly close to the middle of the pool. Within seconds she called for help and he quickly dived in the water to provide support to her. As soon as he reached her, she tried to put her hand on his head and since he tilted his head a little bit, her finger nails struck across his face.*

xxi. *At that point of time, Arpana was underwater facing towards the steps from the car park and he was facing towards the manmade steps. He was holding on to her shirt while she grabbed on his shirt. He was holding on to her shirt to provide some support for her to come up. Then he turned back to see some people standing by the car park entrance and he has asked for help with his hand and at the same time has called out 'help'.*

xxii. *As soon as he called for help some people out of the ones who were there had dived into the water and tried to drag him towards the bank of the pool. The accused identifies one of them to be PW 3, PC Rova. While they were pulling him towards the bank, the accused has asked them to 'leave me and save the girl, there's a girl in the pool'. The accused states that Arpana was not to be seen by that time. The accused further states that he let her shirt go thinking that the rescuers saw her, but when he noted that they haven't, he informed them.*

xxiii. *The accused states that Arpana was underwater for a short time like 30 seconds. When he told them, one of them went back and another jumped into the water and brought Arpana to the surface. Just as she was brought to the bank of the pool, the head of the team has asked other to take him from there. He was taken to the car park and was informed at there that Arpana has told them that he tried to kill her.*

[13] The appellant's amended grounds are as follows:

(A) The Learned Trial Judge erred in law in applying the law of evidence when in paragraph 4 of his summing up he says "The arguments, questions and comments by the learned counsel for the prosecution or for the defence are not evidence" and in paragraph 7 of his judgment he uses

the question of the learned counsel for the defence to discredit the sworn evidence of the Appellant by saying "It should be noted that these two version are not exactly the same" when the question of the learned counsel for the defence was not evidence could not be used to discredit and/or by adversely used against the sworn evidence of the Appellant.

(B) The Learned Trial Judge erred in law in completely failing to direct the Assessors on the legal provision relating to the offence of Murder under section 237 of the Crimes Act and/or law of murder generally.

(C) The Learned Trial Judge erred in law in completely failing to direct the Assessors on section 44 of the Crimes Act by failing to properly and/or adequately and/or misdirecting and/or not directing the Assessors on the issue of how a "question of fact" on the issue of conduct being more than merely preparatory is to be applied and/or assessed and/or evaluated.

(D) The Learned Judge erred in law in accepting that the evidence as it stood constituted a case to answer with respect to the charge of attempted murder insofar as the evidence was insufficient with respect to the lack of intent that would have enabled the case to go to the assessors in satisfaction of the charge of attempted murder contrary to section 41(1) and 237 of the Crimes Act 2009.

(E) The verdict was unsafe and unsatisfactory.

(F) The Learned Judge erred in law in failing to assess and thereby further erred in law in being satisfied that the evidence adduced was sufficient to establish the elements of the offence of attempted murder beyond "any reasonable doubt" and thereby further erred in directing and holding that he was "...convinced beyond a reasonable doubt that the accused had committed the offence and attempted murder" and as a result thereof, erred in law.

(G) The Appellant seeks to have the leave of the Court to appeal the sentence on the basis that the sentence imposed was, in the circumstances, too severe. The imposition of the minimum term of 15 years for attempted murder was in the circumstances a sentence that was overwhelmingly harsh, unjust and liable to be set aside on account of its severity.

(H) The Appellants seeks the leave of the Court to appeal the sentence on the basis that the Learned Judge erred in law in directing himself in accordance with section 237 of the Crimes Act that the sentence required to be imposed necessitated the imposition of a minimum term. The minimum term imposed was harsh, unjust and severe and, as such, amounted to an error of law in the imposition of the sentence of life imprisonment for attempted murder, with a minimum term of 15 years before being eligible for parole.

(I) Further, with the leave of this Honourable Court the Appellant seeks to appeal the sentence on the basis that the term of imprisonment imposed of life imprisonment for attempted murder was in breach of the sentencing patterns and tariff imposed for like sentences. As such, reconsideration of the sentence imposed is warranted on the grounds that it was indicative of an error of law in equating sentences of murder as valid and applicable to cases of attempted murder, and thereby constituted an error of law in the interpretation of section 44(1) of the Crimes Act in all the circumstances.

[14] Out of the grounds of appeal, (A) to (F) are relevant to the conviction and (G) to (I) are concerned with the sentence. The written submissions of the appellant have not dealt with each of the grounds of appeal separately. Only paragraphs 6-11 of the said written submissions could be regarded as dealing with the conviction appeal. The rest of the paragraphs are either on the test for leave to appeal or sentence appeal. The preparation and the arrangement of the appellant's WS leave much to be desired. It has not lent much assistance to this court particularly in regard to the grounds of appeal on conviction.

01st ground of appeal (Ground A)

[15] The complaint is that the trial judge had said at paragraph 7 of the judgment *'It should be noted that these two versions are not exactly the same'* referring to the suggestion of the appellant's counsel that "..... *Mr. Padayachi from what he tells me, he did indeed pushed you into the pool but he says that was a gentle push and you lost your footing....."* when the trial judge had already advised the assessors at paragraph 4 of the summing-up that *'The arguments, questions and comments by the learned counsel for the prosecution or for the defence are not evidence.'*

[16] It is clear that the trial judge had not used the suggestion of the defence counsel as evidence to discredit the appellant's version but rather to show that the appellant's position taken up in his evidence in not exactly consistent with the instructions given to his counsel as his counsel had put it. Consistency is one of the yardsticks of judging the credibility of a witness along with other considerations such as spontaneity/belatedness, probability/improbability etc. The appellant in his evidence

had not said that the victim lost her steps though he admitted pushing her into the pool.

[17] There was nothing wrong in the trial judge's use of the appellant's counsel's suggestion in the manner he had done in the judgment.

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

02nd, 03rd and 04th grounds of appeal (Grounds B to D)

[19] The gist of the above appeal grounds is that the trial judge had failed to deal with section 237 and 44 of the Crimes Act. For the offence of murder the fault elements are intention or recklessness while for attempted murder it is intention and knowledge. Intention, knowledge and recklessness are defined in section 19, 20 and 21 of the Crimes Act, 2009 respectively. However, in terms of section 21(4) if recklessness is a fault element for a physical element of an offence proof of intention, knowledge or recklessness will satisfy that fault element. Thus, the fault element in the offence of murder can be proved by the proof of intention, knowledge or recklessness while for the offence of attempted murder the fault element should be either intention or knowledge [vide **Vosa v State** [2019] FJCA 89; AAU0084.2015 (6 June 2019)].

[20] I do not agree with the counsel's contention. The trial judge had dealt with section 44 ('attempt to commit an offence') at paragraphs 20 and section 237 (murder) at paragraph 21 though he had not mentioned the word 'murder' or section 237. The trial judge had then described each and every element of attempted murder the prosecution had to prove at paragraphs 22 -27 of the summing-up. He had even addressed the assessors on 'Assault Causing Actual Bodily Harm' under section 275 of the summing-up at paragraphs 29 -33 in case they entertained a reasonable doubt of proof of any elements of murder. The trial judge had thereafter summarised all the evidence in the case at paragraphs 35-50. Finally, he had directed the assessors as follows as to what their approach should be on the version of the appellant:

'54. With the submission of the accused's stance, one of the situations given below would arise;

(i) You may accept the stance of the accused, if so your opinion must be that the accused is 'not guilty' of Attempted Murder.

(ii) Without necessarily accepting the accused's stance you may think, 'well what he suggests might be true'. If that is so, it means that there is a reasonable doubt in your mind and therefore, again your opinion must be 'not guilty' of Attempted Murder.

(iii) In any of the situations above, then you should consider whether the prosecution has proved the lesser count of Assault Causing Actual Bodily Harm. If you have any reasonable doubt as to the proof of necessary elements of the said offence of Assault Causing Actual Bodily Harm, then you should find the accused not guilty of that as well.

(iv) The final possibility is that you reject his stance. But, that itself does not make the accused guilty. The situation would then be that you should still consider whether the prosecution has proved all the elements beyond a reasonable doubt.'

[21] Therefore, these grounds of appeal have no reasonable prospect of success.

05th and 06th grounds of appeal (Grounds E & F)

[22] The appellant's counsel submits under Grounds E that the verdict is unsafe and unsatisfactory. The test in Fiji is not *'the verdict is unsafe and unsatisfactory'*. In **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 the Court of Appeal laid down the correct test as follows:

'.....How is the Court to approach this?

Section 23(1)(a) of the Court of Appeal Act *sets out our powers:*

"23-(1) The Court of Appeal -

(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there

was a miscarriage of justice and in any other case shall dismiss the appeal."

It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest ***the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.***

Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory . That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in ***R v Cooper*** *(1968) 53 Cr. App. R 82.*

> ***Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based****. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.'*

[23] The counsel for the appellant submits under Grounds F that the trial judge had erred in concluding in the judgment that he was satisfied that attempted murder had been proved against the appellant beyond reasonable doubt.

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

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide* ***Mohammed v State*** *[2014] FJSC 2; CAV02.2013 (27*

*February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]'*

[25] I think that in the judgment the trial judge has more than fulfilled his task when he agreed with the assessors. He need not have reiterated everything that he addressed on at the summing-up. **Fraser v State** (supra) also stated:

> *'[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.'*

[26] There is no doubt that the assessors and the trial judge had believed the victim and other prosecution witnesses and rejected the appellant's version. Therefore, once the prosecution case was accepted there was sufficient evidence before court upon which a reasonably minded jury could have convicted the appellant of attempted murder and it cannot be said that the verdict is unreasonable or cannot be supported having regard to the evidence.

[27] In **Sahib v State** the Court of Appeal said:

> *'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

[28] **Sharma v State** [2017] FJSC 5; CAV0031.2016 (20 April 2017):

> *'38. When one considers the evidence placed before the court by the prosecution, the evidence to my mind remains unassailed and bereft of any infirmities. In addition the trial judge would have had the benefit of observing the demeanour and the deportment of the witnesses before deciding to act on the evidence. As such I am of the view this court ought not to disturb such findings unless the petitioner is capable of establishing a grave miscarriage of justice had occurred.'*

[29] It is clear that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt (see **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[30] Therefore, these grounds of appeal have no reasonable prospect of success.

07th, 08th and 09th grounds of appeal on sentence (Grounds G, H & I)

[31] The submissions under these grounds of appeal are repetitive. They all deal with the minimum serving period of 15 years before a pardon may be considered.

[32] I do not find that the learned trial judge has committed any sentencing error in imposing an imprisonment of life which is mandatory in terms of section 237 read with section 44 (1) of the Crimes Act. 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.

[33] The previous decisions involving different facts and circumstances cited by the appellant demonstrate that 07-16 years had been imposed in respect of attempted murder as the minimum period of serving the imprisonment before a pardon may be considered. There does not appear to be a settled or well-established range of

minimum serving period for attempted murder. In fact, a sentencing judge may or may not decide to set a minimum term to be served before pardon may be considered.

[34] 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) 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).

[35] 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)]

[36] 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.'*

[37] The trial judge's reasons for selecting 15 years as the minimum serving period are as follows:

> *'The act was pre-planned and the culpability was high. Level of harm occurred was moderate as for the Victim impact Statement. The relationship between the accused and the complainant falls within the ambit of the Domestic Violence Act of 2009. Breach of trust committed by the accused is an aggravating factor.*
>
> *The accused was only 28 years at the time of the incident. He bears a clean character up to then. Submitted character certificates substantiates the same.*

The learned counsel submits that the accused is remorseful. The accused has paid 50% of the money borrowed. He has been in remand for a period of about 5 weeks' altogether.

In consideration of all the material before me, inclusive of what I have mentioned above, I set the term to be served by you before being considered for pardon at 15 years.'

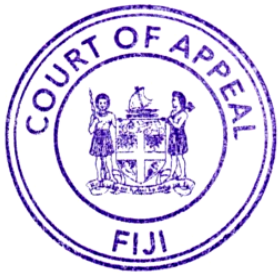
[38] The trial judge seems to have considered the appellant's age and his clear record prior to the offending in setting 15 years as the minimum serving period. The appellant has not demonstrated what other material considerations he placed before the trial judge which the judge failed to take into account that could have impacted upon the minimum period. On the other hand in this case the appellant seems to have come up with a devious plan to kill the victim by making her death appear as a case of drowning and her death was averted and she was saved only because of the unexpected arrival of the police team just in the nick of time.

[39] Therefore, I cannot say that the trial judge had committed a sentencing error in setting 15 years as the minimum serving period and I am not inclined to grant enlargement of time to appeal against sentence as I do not see a real prospect of success in appeal in that regard.

[40] However, 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. The same guidelines would apply to attempted murder as well. Therefore, I allow leave to appeal against sentence.

Orders

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



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