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

CRIMINAL APPEAL NO.AAU 62 of 2018
[In the High Court at Suva Case No. HAC 018 of 2017]

BETWEEN	**:**	**IMSHAD IZRAR ALI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. A. K. Singh for the Appellant**
	:	**Mr. M. Vosawale the Respondent**
Date of Hearing	**:**	**12 July 2021**
Date of Ruling	**:**	**30 July 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva on one count of murder contrary to section 199 and 200 of the Penal Code committed on 01 November 2009 at Samabula, Suva in Central Division.

[2] The information read as follows:

'Statement of Offence'

Murder: *contrary to section 199 and 200 of the Penal Code Act 17.*

'Particulars of Offence'

IMSHAD IZRAR ALI *on the 1st day of November, 2009 at Samabula, Suva in the Central Division murdered Rajeshni Deo Sharma.*

[3] After full trial, the assessors had been of the unanimous opinion that the appellant was guilty of murder. The learned High Court judge had agreed with the assessors' opinion, convicted him for murder and sentenced him on 12 June 2018 to mandatory life imprisonment with a minimum serving period of 18 years.

[4] The appellant's appeal lodged by his lawyers against conviction and sentence had been timely (06 July 2018). His written submissions had been filed on 12 January 2021. The state too had filed written submission on 12 July 2021. Both parties had consented on 16 July 2021 in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions alone without an oral hearing in open court or via Skype.

[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. For a timely appeal, 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) 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] 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 appellant's grounds of appeal against conviction and sentence are as follows:

*'**Ground 1***

THAT the Learned Trial Judge erred in law when he failed to order prosecution to provide full disclosure vide section 290 (c) of the Criminal Procedure Decree such as:

- *(i) CID Station Dairy for Murder Investigation of Rajeshni Deo Sharma.*
- *(ii) Copy of eligible cell book record.*
- *(iii) Copy of Vehicle's running used to convey the Appellant after his arrest on 12th November 2009.*
- *(iv) Investigating dairy of all Police Officers involved in the investigating of this matter.*
- *(v) Duty Roster for all Officers from 12/11/2009 to 16/11/2009.*
- *(vi) Copy of meal Registrar.*
- *(vii) Photograph of the iron rod at the scene.*
- *(viii) DNA report.*
- *(ix) Statement of DC Atish Lal.*

And thereby denying the Appellant to properly prepare his case that resulted in the miscarriage of justice.

Ground 2

THAT there had been a miscarriage of justice when the Learned Trial Judge failed to exclude the Appellant's caution interview and charge statement when there was ample evidence in that the said confession were not voluntary or obtained in breach of his common law rights.

Ground 3

THAT the Learned Trial Judge erred in law when he failed to properly direct the assessors of himself in that there were major omissions, inconsistent, contradictions and discrepancies of prosecution's witnesses evidence to that of their Police statement.

Ground 4

THAT the Learned Trial Judge erred in law when he failed to direct himself or the assessors that Prosecution witnesses were given Police statement prior to trial to retain it like testing their memory. ***(abandoned)***

Ground 5

THAT the Learned Trial Judge erred in law when he failed to direct himself and the assessors that "admitting the statements made during the caution interview does not mean the case is proved, the prosecution should prove the confession. It doesn't mean that they have to prove all of the confession, but the salient and important factors must be proved by independent evidence." Per State v Lutumailagi – Ruling [2012] HAC 022 of 2008. ***(abandoned)***

Ground 6

THAT the Learned Judge erred in law when he failed to direct himself and the assessors that in assessing the evidence before them, the totality of evidence should be taken into account as a whole to determine whether the prosecution had proved their case beyond reasonable doubt.

Ground 7

THAT the Learned Judge erred in law when he failed to direct himself and the assessors that it was mandatory on the assessors to carefully examine evidence presented by the defence to decide, not necessarily whether they believe that evidence or not, but whether such evidence is capable of creating a reasonable doubt in Assessors' minds.

Ground 8

THAT the Learned Trial Judge erred in law and facts when he failed to properly direct himself and the assessors regarding the circumstantial evidence.

Ground 9

THAT the Learned Trial Judge erred in law when he was not allowing the Defence to question prosecution witnesses and was interfering or stopping in defence cross-examination the Prosecution witnesses.

Ground 10

THAT the Learned Trial Judge erred in law and facts when he failed to direct the assessors that:

(i) There was no finger print dusted at the scene or on weapon.
(ii) There was no blood present on the weapon.
(iii) That there would be disturbance to the items on the counter if the electric kettle code would have been thrown after using on the deceased.
(iv) That there was no evidence of any disturbance in the deceased house.
(v) That Ana Naisori woke up at 8pm due to pain in her and heard dragging of the furniture not what he Lordship directed that she went to sleep at 8pm and heard the dragging furniture late in night.

(vi) That there were no evidence how long the dragging of the furniture was.

(vii) There was no evidence to confirm that the confession was truth. ***(abandoned)***

Ground 11

THAT the Learned Trial Judge erred in law when he failed to direct the assessors regarding the evidence stated in the station dairy, cell books that confirms that Appellant's evidence was not voluntary or that his rights were breached when there was specific order from Insp Maha Ram not to allow anyone to communicate with Appellant.

Ground 12

THAT the Learned Trial Judge erred in law and facts when he failed to direct that the evidence of Dr. Wood was contradicting that of Dr. Goundar.

Ground 13

THAT the Learned Trial Judge erred in law when he failed to direct the assessors and himself that prosecution had failed to produce important evidence of DC Atish Lal who was present at the Post Mortem per Ali and others v the State AAU 0041/2010.

Ground 14

THAT the evidence of Dr. Ponnu Swamy Goundar was lack of credible and weight and there was no basis evidence to confirm deceased died between 9 to 11pm on 1st November 2009 per Ali and others v the State AAU 0041 of 2010.

Ground 15

THAT the Learned Trial Judge erred in law when he without any valid reason disbelieve the Defendant and rejected his evidence.

Ground 16 *(sentence)*

THAT the Learned Trial Judge erred in law regarding the sentencing principle when he sentenced Appellant fixed to 18 years as the minimum period Appellant should serve in breach of section 33 of the Penal Code Cap 17.'

01st ground of appeal

[8] The appellant complains that the failure on the part of the prosecution to provide him with the documents set out were critical to his defence and the trial judge's failure to stay the trial proceedings pending those documents prejudiced his defence. He relies

on section 290(1)(c) of the Criminal Procedure Act and several judicial pronouncements.

[9] The respondent's position is that it has provided police statements available and explained the non-availability of certain documents requested by the defence. The state seems to argue that its case was based on circumstantial evidence and admissions in the appellant's cautioned interview and the charge statement. The appellant's position at the *voir dire* had been (vide paragraph 12 of the *voir dire* ruling) that he lied to the police and allowed the police to fabricate the answers and he simply signed the cautioned statement. In evidence (vide paragraphs 54-58 of the summing-up) the appellant had taken up the position that the first and second versions in the cautioned interview were false statements while the third version was a fabrication by the police.

[10] The issue as to whether the lack of those documents (if the same could have been provided to the appellant with reasonable diligence by the prosecution) would have materially prejudiced the appellant in his defence to change the final outcome causing a substantial miscarriage of justice or whether it is no more than speculation or argument that somehow or other, something might have been drummed up from the absent documents to throw a doubt on the prosecution case, cannot be examined without the full transcript of the trail court. Therefore, I have no material before me to conclude that there is a reasonable prospect of success in this ground of appeal at this stage but I would be inclined to grant leave to appeal so that the full court examine this complaint more fully.

02nd ground of appeal

[11] The appellant complains of police assault and threat of death forcing him to make the admissions in the cautioned interview. He also complains of breach of his right to have consulted a lawyer. In gist, he alleges that his admissions of guilt were either deliberate false statements or fabrications by the police.

[12] The state has pointed out that the trial judge had examined (paragraph 07-13) the admissibility of the appellant's admissions in the *voir dire* ruling *vis-à-vis* voluntariness, oppression and general unfairness and directed the assessors at paragraphs 52-65 of the summing-up on the same.

[13] Since the case against the appellant is mainly based on his cautioned interview and the charge sheet, this ground of appeal seems to deserve to be considered by the full court and leave to appeal is therefore granted.

03rd ground of appeal

[14] The appellant's contention is that the trial judge had not adequately directed the assessors on omissions, inconsistences, contradictions and discrepancies in the prosecution case.

[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses (vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)].

[16] The trial judge had addressed the assessors on such infirmities at paragraphs 8, 9, 10, 66, 67 and 72 of the summing-up. He had given his mind to that aspect at paragraph 6 and 7 of the judgment, and concluded that they did not shake the basic foundation of the prosecution case.

[17] The appellant's complaint beyond this cannot be examined at his stage without complete trial proceedings and I am not inclined to grant leave to appeal given that the main pieces of evidence against the appellant were his cautioned statement and charge statement.

06th ground of appeal

[18] The gist of the appellant's argument appears to be that on the whole of the evidence the verdict is unreasonable or it cannot be supported having regard to the totality of evidence although couched as an issue or failure in the summing-up on the part of the trial judge causing a miscarriage of justice.

[19] The respondent in reply has submitted that the trial judge had indeed addressed the assessors on all relevant aspects (paragraphs 13, 17, 28 & 29, 45 and 52-65 of the summing-up).

[20] However, to decide whether verdict is unreasonable or cannot be supported having regard to the evidence or whether there has been a substantial miscarriage of justice the full court will have to examine the complete trial proceedings.

[21] However, in Fiji the test is not whether the verdict is unsafe or unsatisfactory as contended by the appellant (vide **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24).

[22] The test for a verdict supposedly 'unreasonable or cannot be supported having regard to the evidence' is whether 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 **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[23] The test for 'substantial miscarriage of justice' is that if the Court comes to the conclusion that, on the whole of the facts, reasonable assessors, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso to section 23(1) of the Court of Appeal Act has occurred [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015). In the case of error or irregularity affecting the outcome or serious departure from the

proper process of the trial, the court may find a substantial miscarriage of justice even if it is open to the assessors and the judge to convict. However, if the conviction is inevitable in the sense that it is not open to the assessors and the trial judge to acquit there is no substantial miscarriage of justice (**Baini v R** (2012) 246 CLR 469; [2012]. HCA 59 and **Degei & 3 Others v State** [2021] FJCA; AAU 005.2016 (03 June 2021)].

[24] I think this ground of appeal deserves to be considered by the full court and leave to appeal is accordingly granted.

07th ground of appeal

[25] In the light of paragraph 79 of the summing-up I do not think that this ground of appeal has a reasonable prospect of success:

> *79. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;*
>
> *(i) You may believe the explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.*
>
> *(ii) Without necessarily believing you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.*
>
> *(iii) The third possibility is that you reject the accused's evidence. But if you disbelieve the accused, that itself does not make him guilty of the offence charged. The situation would then be the same as if the accused had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.*

08th ground of appeal

[26] The appellant argues that the trial judge had not addressed the assessors properly on circumstantial evidence.

[27] The respondent correctly submits that the trial judge had indeed addressed adequately on circumstantial evidence at paragraphs 48-57 of the summing-up. Considering the decisions of **Senijieli Boila v. The State** (Cr. App. No.CAV005 of 2006S: 25 February 2008), **Tuwai v State** [2016] FJSC 35, CAV0013 of 2015 (26 August 2016) and **Naicker v State** [2018] FJSC 24; CAV0019.2018 (1 November 2018)], I do not think that this ground of appeal has a reasonable prospect of success.

09th ground of appeal

[28] There is nothing to indicate that the trial judge had interfered unduly with the cross-examination of the defence counsel beyond his legitimate right to control the trial proceedings. As submitted by the respondent the cross-examination of the defence counsel had been highlighted in the summing-up.

[29] This ground of appeal does not appear to be having any substance.

11th ground of appeal

[30] The appellant's allegation is that the trial judge had failed to address the assessors on some aspects of evidential matters regarding voluntariness and breach of constitutional rights affecting the admissibility of the cautioned interview and charge statement.

[31] In the light of the *voir dire* ruling and the directions at paragraphs 52-65 and paragraphs 09-21 in the judgment this ground of appeal has no reasonable prospect of success. In any event appeal ground 2 would cover most of these matters.

12th ground of appeal

[32] The appellant complains that the trial judge had not highlighted to the assessors the contradiction between Dr.Wood and Dr. Gounder regarding abdominal laceration of 1cm x 1cm on the appellant.

[33] Considering that Dr.Wood had been a general practitioner and Dr. Gounder, a pathologist and the fact the evidence of both had been referred to by the trial judge the nature of the contradiction highlighted by the appellant was very unlikely to have persuaded the assessors and the judge to change their decision to rely on the cautioned interview and the charge sheet as having been made voluntarily.

[34] Therefore, I do not think that this ground of appeal has a reasonable prospect of success.

13th and 14th grounds of appeal

[35] The appellant having placed reliance on Dr. Gounder's evidence to buttress 12th ground of appeal questions his integrity under these two grounds of appeal because of the adverse remarks based on several aspects as to the cause of death, made on Dr. Gounder by the Court of Appeal in **Ali v State** [2011] FJCA 28; AAU0041.2010 (1 April 2011). In my view those remarks cannot and should not be imported en block into this case to discredit Dr. Gounder's evidence. His evidence should be examined on its merits independent of any remarks in **Ali v State** (supra). On the other hand, the appellant could have called SC Atich Ali if his evidence was so critical to the defence case.

[36] In any event, when the appellant's cautioned interview and charge statement were admitted in evidence, the time of death of the deceased ceased to be of material significance.

[37] Therefore, I do not think that this ground of appeal has a reasonable prospect of success.

15th ground of appeal

[38] The appellant complains that the trial judge had rejected his evidence without giving valid reasons.

[39] This involves the role of the trial judge when he agrees with the assessors. In **Fraser v State** [2021]; AAU 128.2014 (5 May 2021), the Court of Appeal stated on the trial judge's function as follows:

> *'[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)]'*

[40] I think that in the judgment the trial judge has fulfilled his task when he agreed with the assessors. He need not have reiterated everything that he addressed the assessors on at the summing-up nor given 'valid' reasons for rejecting the appellant's account other than what had been stated at paragraph 44 of the judgment. **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.'*

[41] Therefore, I do not think that this ground of appeal has a reasonable prospect of success.

16th ground of appeal

[42] The appellant argues that the trial judge had failed to take into account the fact that the appellant had 04 year old child, his medical condition and age and his 01 year in custody in fixing the minimum serving period of 18 years.

[43] The trial judge had in fact considered all of the above matters in the sentencing order:

> *11. The reason I had to mention the above facts that were submitted to this court in Case No. HAM 32 of 2017 was because your counsel, based on your instructions submitted during the hearing on mitigation and sentencing that, the fact that you have a wife and a four year old son in India and the hardships they will have to face given your impending incarceration should be considered by this court as mitigating factors. The above conduct of yours in fact is a clear indication of your lack of remorse concerning the offence you committed on 01/11/09 in Fiji and your contempt towards the judicial system. If what is submitted regarding your partner in India and the son is true, only you are to be blamed regarding what they would have to endure, and no one else. Such circumstances cannot be regarded as a mitigating factor in this case.*
>
> *12. Your other personal circumstances that were highlighted by your counsel such as your medical condition, your claim that your property was destroyed during Cyclone Winston and your claim that you have no immediate family members in Fiji also do not mitigate your offending. The only factor that could be regarded as a mitigating factor is the fact that you are a fist offender as revealed in the submissions filed by the prosecution.*
>
> *14. I also note that you have spent a period of nearly 01 year and 10 months in custody in view of this offence you committed.*

[44] The respondent had submitted the following in its written submissions:

> *'The Murder of the appellant's de-facto partner occurred on the 1st of November 2009 at Rewa Street, Suva. After Police investigation, the appellant was caution interviewed on the 12th of November 2009, in early 2010 the appellant had suffered kidney disorder which needed urgent medical*

intervention, the High Court had granted bail for the appellant to travel to India and have surgery on his kidney issue. He had a successful operation at Batra Hospital and Medical Research Centre on 3rd February 2011, on the 18th of April 2011 the appellant was required further clinical management for two to three weeks. According to Indian authorities the appellant's medical visa was only valid from 11/1/2011 to 11/07/2011 – this was not extended.

The appellant remained in India after the surgery and did not return to Fiji, even though, he was aware that there was a pending charge of Murder in the High Court. Indian authorities seized the appellant sometime in September 2014 for breach of Foreigners Act 1946 to which he was convicted on 21st May 2015. On 6th December 2016, Fijian Authorities were notified that the appellant had been detained in a deportation camp, to which he was then brought back to Fiji. On 9th December 2016, the appellant was re-charged and produced in the Suva Magistrates Court. It had been almost over 5 years 11 months since the grant of bail in the High Court for the appellant to re-appear again in the Magistrates Court in Fiji.'

[45] I do not see any sentencing error in the trial judge's decision to impose the mandatory life imprisonment (**Nute v State** [2014] FJSC 10; CAV0004 of 2014 (19 August 2014) or a minimum serving period of 18 years (**Yunus v State** [2013] FJSC 3; CAV0008 of 2011 (24 April 2013).

[46] The appellant has not demonstrated a reasonable prospect of success in the appeal sentence.

Orders

1. Leave to appeal against conviction is allowed on 01st, 02nd and 06th grounds of appeal.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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