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

CRIMINAL APPEAL NO.AAU 074 of 2020
[In the High Court at Suva Case No. HAC 399 of 2018]

BETWEEN	**:**	**ROMULUSE SENILEBA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Ms. S. Ratu for the Appellant**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	**:**	**30 August 2022**
Date of Ruling	**:**	**31 August 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of attempted murder of Luisa Volau contrary to section 44 (1) and 237 of the Crimes Act, 2009 committed on 13 October 2018 at Samabula in the Central Division and one count of breaching a domestic violence restraining order Contrary to section 77 (1) (a) of the Domestic Violence Act 2009. He pleaded guilty for the latter.

[2] After 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 18 March 2020 to life imprisonment with a minimum serving period of 12 years for attempted murder.

[3] The appellants' appeal in person only against conviction was filed on 13 August 2020 and late by about 04 months. However, the Legal Aid Commission in the current

application for enlargement of time challenges only the sentence. Accordingly, the appellant tendered a Form 3 to abandon his appeal against conviction at the hearing.

[4] 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? (vide **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).

[5] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. 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. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[6] The delay of the sentence appeal is 01 year 07 months. The appellant's explanation given for his belated conviction appeal is the alleged closure of the Court and the Registry due to COVID 19, his lack of education in law and knowledge as to his right to appeal and non-availability of summing-up, judgment and sentencing order. Thereafter, he claims to have filed the initial appal on 18 August 2020 with the assistance of other inmates. Even if all these factors could explain the initial delay none of them can account for the inordinate delay in his appeal against sentence filed by the LAC for which no explanation has been given. Nevertheless, I would see

whether there is a **real prospect of success** for the belated ground of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time to appeal.

[7] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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)].

[8] The case has been summarised by the trial judge in the judgment as follows:

> *4. There is no dispute that the accused struck his wife Luisa Volau (complainant) with a cane knife. The only issue before the assessors was whether the accused intended to kill his wife. The Defence takes up the position that the accused was frustrated at his wife's refusal to reconcile, angry at seeing a love bite on her neck and his intention was not to kill the wife but only to cause injuries.*
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> *5. The witnesses for Prosecution are consistent and reliable. All of them are independent eye witnesses to the incident. They had no obvious reason to lie to this court. They corroborated each other in material particular. The medical report, the cane knife exhibited and the scars of the injuries on the complainant support the version of the Prosecution.*
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> *6. The evidence is overwhelming to support the version of the Prosecution that the accused had assaulted the complainant with the intention to kill her. It is open for the assessors to draw such an inference on the strength of the evidence led in the trial.*
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> *7. There is no dispute that, prior to this incident, the accused had assaulted the complainant and a DVRO was issued to protect her. Approximately a week prior to this incident, the accused had promised to cut complainant's neck down. This warning had come when the complainant was about to go to the police station to lodge a complaint against the accused.*
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> *8. When the DVRO was in force, the complainant had repeatedly turned down accused's offer to reconcile. As a result of the DVRO, the accused had to leave the matrimonial home. He was no doubt in an embarrassing situation when he had to seek shelter in one of his neighbour's house. The accused had an*

apparent motive to kill the complainant as she had become a problem for the accused.

9. *The accused was desperately trying to convince this Court that the complainant was in an extra marital affair and she should take the blame for what had happened. His evidence that a love bite on complainant's neck made him angry and that the complainant was always on telephone conversations with another man was not appealing to the assessors. His position on telephone conversation was never put by his counsel to the complainant when she took witness stand. It is clear that the accused was trying to defend himself on the basis of a made up story.'*

[9] The appellant's sole ground of appeal against sentence is as follows:

*'**Ground 1***

THAT the Learned Trial Judge erred in his sentence discretion by imposing a sentence with a minimum term of 12 years without taking into consideration the rehabilitation of the appellant.'

[10] The submissions under this grounds of appeal deals with the minimum serving period of 12 years before a pardon may be considered.

[11] 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.

[12] The trial judge has considered several previous sentencing decisions on attempted murder involving different facts and circumstances which demonstrate that 07-15 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.

[13] 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 *inter alia* 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).

[14] 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)]

[15] 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.'*

[16] ***Balekivuya*** has not ruled out consideration of aggravating and mitigating factors when determining whether to fix a minimum serving period and then the length of it under section 237. The process of answering those two questions involves additional considerations such as personal circumstances of the appellant and his previous history. 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.

[17] In exercising his discretion, the trial judge had not given specific reasons for fixing a minimum serving period but his reasons for selecting 12 years as the length of the minimum serving period are given at paragraphs 13 – 19 of the sentencing order where among other things the judge had considered aggravating factors and mitigating factors. In addition the judge had also considered the act of serious

domestic violence perpetrated by the appellant on the complainant who was his legal wife and stated that denunciation and deterrence was the main purpose of sentencing. He had also observed that the appellant was not a first offender.

[18] The judge had not specifically referred to rehabilitation as adverted to in **Darshani v State** [2018] FFCA 79; AAU0064 of 2014 (01 June 2018) in this process. However, in ***Darshani*** the full court had thought that had the sentencing judge considered deterrence and rehabilitation and engaged in a balanced assessment it would have resulted in a lower minimum term to be served before pardon may be considered. The court reduced 20 years minimum period to 17 years.

[19] I cannot say that in this case even if the trial judge had considered rehabilitation it would have resulted in a lower minimum period than 12 years imposed after a reasonably balanced assessment of several factors. Thus, I cannot see a sentencing error in the exercise of the trial judge's discretion in setting 12 years as the minimum serving period. Thus, 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.

Order

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

COURT OF APPEAL FIJI

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