

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

CRIMINAL APPEAL NO.AAU 48 of 2020
[In the High Court at Lautoka Case No. HAC 86 of 2017]

BETWEEN : **MONISH NISCHAL PRASAD**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **29 November 2022**

Date of Ruling : **01 December 2022**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of attempted murder contrary to section 44(1) and section 237 of the Crimes Act, of Rishma Rohini Lata on 10 April 2017 at Ba Town in the Western Division.

[2] He had been represented by Ms. S. Khan up to the *voir dire* ruling on 26 November 2019. The trial proper had been fixed from 17 to 21 February 2020. Prior to the commencement of the trial, the appellant had pleaded guilty to the charge and summary of facts had been filed on 18 February 2020 and read over to him on 21 February 2020. He had been sentenced to life imprisonment with a minimum serving period of 15 years on 28 February 2020.

[3] His appeal against conviction and sentence is timely. 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 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)].

[4] The summary of facts read as follows:

The accused, Monish Nischal Prasad, 21 years old, unemployed of FSC, Ba is charged with one count of Attempted Murder contrary to Section 44 (1) and Section 237 of the Crimes Act, 2009. The accused on the 10th of April, 2017 had attempted to murder the victim Rishma Rohini Lata, 20 years old, student of Varadoli, Ba by striking and stabbing the victim several times with a kitchen knife.

The accused and the victim were in a relationship as boyfriend and girlfriend.

Incident

Approximately 3 weeks before the incident, the accused and the victim had an argument about the victim being on Facebook. The victim then ended the relationship with the accused. The accused however, did not like the fact that the victim ended their relationship as boyfriend and girlfriend and was very angry about this.

The accused continued to contact the victim by sending messages on her phone. This continued on 8th April 2017 where the accused sent the victim a message on her phone telling the victim that Monday (10th April 2017) will be her last day. (TAB A is the screenshots of the phone messages between the accused and the victim).

On the 10th of April 2017, the accused sharpened and prepared a kitchen knife and kept it in his bag. The kitchen knife was a 7 inch stainless steel blade with a black handle. The accused then took his bag which contained the kitchen knife and waited for the victim at Ba bus stand.

When the victim arrived at the bus stand at 6.45 am on 10th April 2017, the accused came to the victim and placed his left hand on her shoulders. The victim told the accused to remove his hands from her shoulders but he refused. The accused then told the victim to go with him to Courts Home Centre. At this point in time, the victim tried to get away from the accused but the accused did not let her go. The victim was with her friends namely Rashika and Elvis. When they saw that the accused was holding the victim, Elvis went towards two Police Officers who were standing near Ba Market.

It was at this point in time that the accused told the victim that Police Officers were coming and whether he will kill the victim or not, he will be going to Prison. The accused then took out the kitchen knife and stabbed the victim 3 times on her stomach. The victim fell down to the ground yelling for help. The accused then attacked the victim's neck with the same knife and struck the victim's neck 2 times. The accused then continued to strike the victim's left side of her face with a knife and the victim tried to save herself by raising her right hand when the accused struck the victim's right hand at three places with that same kitchen knife. Fortunately, two itaukei men and two Police Officers ran to the victim's rescue and stopped the accused from striking the victim with the knife.

The victim was immediately taken to Ba Hospital and was immediately taken to the emergency room. The victim had injuries on her face, shoulder, neck, multiple lacerations and deep wounds on her body. According to the medical report of the victim (TAB B), from the multiple lacerations and the nature of the injuries, it was evident that there was an intention to kill. The victim had deep stab wounds which were actively bleeding on her shoulder and her back. The victim was later transferred to Lautoka Hospital.

The accused was arrested by the Police Officers who had stopped him and was immediately taken to Ba Police Station for his safety as bystanders were trying to assault him. The accused was caution interviewed on the same day and fully admitted to the offence. When the accused was accused at question 82 why he struck the victim several times with a knife on her neck, head and stomach, the accused replied "so that she does not survive". Moreover, at question 85, the accused admitted that he wanted to kill the victim, (TAB C is the caution interview of the accused).

The accused at question 13 of his charge statement (TAB D) said that if the victim is not his then she cannot be of anyone else. The Police Officers also took photographs of the crime scene and the kitchen knife was uplifted from the scene. (TAB E are the photographs of the crime scene).'

[5] The appellant urged the following grounds of appeal before this court:

'Conviction

THAT *the Appellant now desires to appeal against conviction and sentence on the grounds as amended:-*

- (a) *The Appellants right to fair trial was infringed by lack of legal representation.*
- (b) *The Appellant's plea was equivocal.*

Sentence

THAT *the Appellant now desires to appeal against the sentence on the grounds as amended:-*

- (a) *That the learned trial judge erred in his sentencing discretion as a result the sentence was harsh and excessive.'*

01st ground of appeal

[6] The appellant complains that his right to fair trial was violated due to lack of legal representation at the trial and his plea was equivocal.

[7] It is not clear at what stage the counsel for Legal Aid Commission had started appearing after the *voir dire* ruling for the appellant. Her appearance had been recorded on the sentencing order on 28 February 2020. It is Ms. J. Singh as counsel for the appellant whose name had found its way to the sentencing order and it is the same counsel who had filed the appellant's amended notice of appeal and later written submissions. Although, she had submitted in her written submission that the appellant had moved for an adjournment of the trial to secure alternate legal representation on the day of the trial as he had withdrawn his case from his previous private counsel due to financial constraints, the counsel had not said from when she was retained to represent the appellant. Mr. Fesaitu submitted that Ms. J. Singh had been available to file the appellant's mitigation submissions and thereafter. None of these facts are revealed in the sentencing order or through affidavits by the appellant or Ms. J. Singh.

[8] The trial judge had recorded that:

2. *Before the commencement of the trial, Mr. Monish Nischal Prasad, the accused, having well understood the contents of the information and the consequences of such plea, pleaded guilty to the above count.*
3. *Thereafter, the State having filed the Summary of Facts, on the 18th of February 2020 the said Summary of Facts were read over and explained to you on 21st of February 2020. You having understood, agreed and accepted the said summary of facts to be true and correct and have taken full responsibility for your actions.'*

[9] Therefore, it is clear that even if the appellant had no counsel on 17 February 2020 the charge and the sentence had been explained if he was to tender a plea of guilt. The trial judge had been satisfied that the appellant had understood both the charge and the consequences before tendering his guilty plea. Ms. J. Singh at paragraph 5.9 of her submissions confirms that that appellant indeed instructed her that the trial judge informed him on the consequences of the plea namely that he would be given a mandatory life sentence.

[10] It is also clear that there had been a hearing on 21 February 2020. Thus, Ms. J. Singh may have filed mitigation submissions either before or after 21 February 2020. In any event, if the appellant's plea was not unequivocal, he had time since 17 to 28 February 2020 to withdraw his plea of guilt. If he could not do it on his own for whatever the reason, he had Ms. J. Singh through whom he could have communicated to court that he was withdrawing his plea. Ms. J. Singh had not said anywhere in her submissions that the appellant ever wanted to retract his plea or he did not mean to plead to the charge or he was ignorant of the consequences of the plea.

[11] Right to counsel is not absolute and the question is whether there was a possibility that the appellant was adversely prejudiced by his lack of representation to the point of depriving him of a fair trial (vide **Prasad v State** [2019] FJSC 3; CAV0024.2018 (25 April 2019) para [31]).

- [12] My answer to that question is in the negative. On the contrary, given the overwhelming direct evidence in the form of the victim, eyewitnesses and his admitted confessional statement, the appellant had been left with no ground to prevent the inevitable conviction had he preferred to go to trial. Therefore, his guilty plea appears to be the result of accepting the inevitable.
- [13] The onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged of it being ‘equivocal’ [see **Bogiwalu v State** [1998] FJCA 16 & **Tuisavusavu v State** [2009] FJCA 50; AAU0064.2004S (3 April 2009)].
- [14] A person may plead guilty upon grounds which extend beyond that person’s belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where **the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence** [vide **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132]
- [15] Therefore, I am of the view that no miscarriage of justice had occurred as a result of the trial judge accepting the appellant’s plea of guilt. He had understood the nature of the charge and having been explained the consequences the appellant had taken a well-informed decision to plead and the summary of facts would prove every element of attempted murder. I see no equivocation in his plea.
- [16] Therefore, I see no reasonable prospect of success in the first ground of appeal.

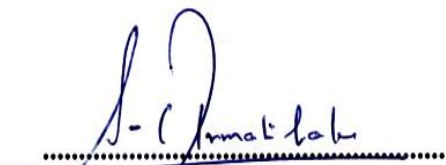
02nd ground of appeal

- [17] 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)].
- [18] The appellant contends that the minimum serving period imposed is harsh and excessive and referred to **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016).
- [19] The trial judge had discussed in detail the guidance provided in ***Balekivuya*** in his sentencing order before deciding that he was inclined to (i) impose a minimum serving period and (ii) that period would be 15 years.
- [20] I see no sentencing error in the minimum period of 15 years for this premeditated and cold-blooded offending.

Orders of the Court:

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




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