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

CRIMINAL APPEAL NO.AAU 31 of 2021
[In the High Court at Suva Case No. HAC 124 of 2020]

BETWEEN : **THE STATE**

Appellant

AND : **SAILOSI CABENAGAUNA NAIVALURUA**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. R. Kumar for the Appellant**
: **Mr. S. Waqainabete for the Respondent**

Date of Hearing : **19 December 2022**

Date of Ruling : **20 December 2022**

RULING

[1] The respondent had been indicted in the High Court at Suva with one count of murder of TEVITA QALOBULA contrary to section 237 of the Crimes Act, 2009 on 21 April 2020 at Suva in the Central Division.

[2] The assessors' unanimous opinion was that he was not guilty of murder but guilty of manslaughter. The trial judge had acquitted him of the charge of murder and convicted him only of manslaughter under section 239 of the Crimes Act, 2009. He had been sentenced on 12 February 2021 to 03 years' imprisonment with a non-parole period of 02 years, and 02 years of that sentence to be served and the remaining term of 01 year was suspended for 03 years. Considering the time spent in custody, the

time remaining to be served before the suspension of the sentence comes into operation was to be 01 year, 09 months and 04 days.

[3] The State's appeal against conviction and sentence is timely. In terms of section 21(2) (a) (b) and (c) of the Court of Appeal Act, the appellant could appeal against acquittal on a question of law alone without leave or only with leave of court on question of mixed law and fact and against sentence. 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)].

[4] 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)].

[5] According to the sentence order and judgment the deceased was a 40 year old work colleague of the respondent. In the morning of 21 April 2020, the respondent's mobile phone went missing while it was kept inside the changing room and he suspected the deceased for the theft and confronted him. It had appeared to the respondent that the deceased did take his phone but did not want to give it back. Then the respondent had met the deceased with a cane knife and after an argument with him (who was hanging empty sacks as part of his duties) he struck him thrice with the cane knife. The first

strike was delivered while the respondent stood behind the deceased and it caused a 20mm laceration. This was out of frustration because the deceased was not interested in what the respondent tried to explain to him. Then the deceased got hold of a piece of timber and struck the respondent twice with it. In trying to protect himself from that attack the respondent swung the cane knife towards the deceased, twice. The second time when he swung the knife, he saw the knife struck the left side of the deceased's chest and then his left forearm, and then he noticed that the deceased's left hand was missing. Subsequently, the deceased slipped and while he was sitting on the ground, the respondent slapped him using the flat side of the cane knife and then fled the scene while the deceased was bleeding. The deceased was admitted to the hospital and he died on 23/04/20 due to loss of blood, after the doctors tried to replant the severed hand. The cause of death was hypovolemic shock that is caused by excessive blood loss and the amputation of the left hand of the deceased resulted in excessive blood loss.

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

Conviction:

a) *THAT the Learned Trial Judge erred in law when he misdirected the assessors and himself that, in order to constitute the offence of Murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt whereas the correct position is that the prosecution must prove beyond reasonable doubt that the accused was aware of a substantial risk of death occurring as a result of his conduct.*

Sentence:

b) *THAT the Learned Sentencing Judge erred in principle when he failed to take into account the high level of recklessness displayed by the respondent at the time of the incident as an aggravating factor.*

c) *THAT the Learned Sentencing Judge erred in principle when he allowed for extraneous or irrelevant matters to guide or affect him when he considered without any evidential foundation that medical negligence had caused/contributed to the death of the deceased.*

d) *THAT the Learned Sentencing Judge erred in principle when he allowed excessive credit for the respondent's mitigation.*

<u>Grounds of appeal against conviction</u>

[7] The State argues as a pure question of law that the trial judge had erred at paragraph 43 of the summing-up (which he had directed himself on as well) that *'in order to constitute the offence of Murder by recklessness, actual awareness of* ***the likelihood of death*** *occurring must be proved beyond reasonable doubt*' whereas the correct position is that the prosecution must prove beyond reasonable doubt that the accused was aware of a substantial risk of death occurring as a result of his conduct. At paragraph 45 also the trial judge had posed the question to the assessors that *'are you sure that the accused foresaw that death of the deceased was a* ***probable*** *consequence of swinging the cane knife or the* ***likely*** *result of that act, and having realized that he decided to go ahead and swing the cane knife towards the deceased?'*

[8] Section 21 of the Crimes Act, 2009 reads thus:

> *'21. — (1) A person is reckless with respect to a circumstance if —*
>
> *(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(2) A person is reckless with respect to a result if —*
>
> *(a) he or she is aware of a substantial risk that* ***<u>the result will occur</u>****; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(3) The question whether taking a risk is unjustifiable is one of fact.*
>
> *(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.'*

[9] The Court of Appeal without specifically defining 'recklessness' discussed it in **<u>Rawat v The State</u>** AAU 0186 of 2016 (24 November 2016) as follows:

> *'[17] Recklessness has been described in common law as the state of mind of a person who foresees <u>the possible consequences</u> of his conduct, but acts without any intention or desire to bring them about. A man is said to be reckless with respect to the consequences of his act, if he foresees <u>the probability</u> that it will occur, but does not desire it nor foresee it as certain. It may be that the doer is quite indifferent to the consequences, or that he does not care what happens. In all such cases, the doer is said to be reckless towards the consequences of the act in question. In other words, recklessness is 'an attitude of mental indifference to obvious risk'.*
>
> *[18] Thus, recklessness involves subjective awareness of the risk of harm but a reasonable person would have regarded the risk to be unjustifiable.'*

[10] Thus, common law appears to have made no serious distinction between *'possible consequences*' and *'probable consequences*' and used both interchangeably with regard to the foreseeability aspect of recklessness. However, the 'likelihood' or 'certainty' of the consequence/result has not been considered as or associated with a necessary requirement of foreseeability. The State submits that as opposed to the anticipated result being 'likely' or 'probable', it need only be merely 'possible' under recklessness. In other words, the State's argument is that it is sufficient if the accused could foresee that mere 'possible' consequences of his conduct would be death but he need not have foreseen that the 'likely' or 'probable' consequences of his conduct would be death.

[11] However, in order for the full court to more fully consider this aspect of fault element of recklessness particularly what meaning should be assigned to the words '***<u>the result will occur'</u>*** in section 21(2)(a) of the Crimes Act, 2009, I consider it as a question of law only and formally grant leave to appeal (though technically leave is not required).

<u>Grounds of appeal against sentence</u>

[12] The gist of the challenge to the sentence is that it is manifestly lenient in all the circumstances of the case.

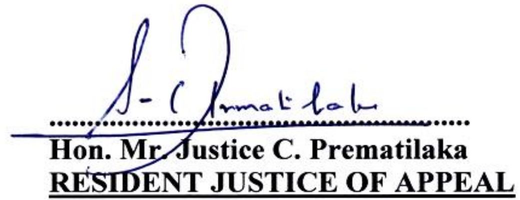
[13] The trial judge had followed the two tired system of sentencing and considered the low end of the tariff of 05-12 years of imprisonment as a starting point (05 years). He had added 04 years and subtracted 4 ½ years for aggravating and mitigating factors to reach the sentence of 4 ½ years of imprisonment. He had discounted 1/3 for early guilty plea and arrived at 03 years.

[14] It looks as if the aggravating factors should have resulted in a higher enhancement than 04 years and perhaps a lesser discount for mitigating factors. An early guilty plea need not mechanically and automatically fetch a 1/3 discount either. In cases of serious offences the discount for the early guilty plea should be much less (see **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018), for *inter alia* the respondent may have pleaded because the conviction was inevitable [see **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012)].

[15] Therefore, considering the above factors, I am inclined to grant leave to appeal against sentence so that the full court can objectively look at whether the sentence imposed on the respondent fits the crime. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

Orders of the Court:

1. The appeal may proceed to the Full Court against conviction on the question law.
2. Leave to appeal against sentence is allowed.



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