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

CRIMINAL APPEAL NO.AAU 0066 of 2019
[In the High Court at Lautoka Case No. HAC 63B of 2015]

BETWEEN : **SHALENDRA KRISHNA SAMI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **13 July 2022**

Date of Ruling : **14 July 2022**

RULING

[1] The appellant had been indicted in the High Court at Lautoka on one count of murder contrary to section 237 of the Crimes Act, 2009 committed on 16 April 2015 at Lautoka in the Western Division.

[2] The assessors had expressed a unanimous opinion that the appellant was guilty of murder. The learned High Court judge had agreed with the assessors and convicted the appellant as charged. The appellant had been sentenced on 26 March 2019 to life imprisonment with 12 year minimum serving period.

[3] The appellant's appeal (signed on 02 May 2019) is out of time by about a week. Since had had filed the appeal against conviction in person, the delay could be excused and the appeal will be treated as timely.

[4] Legal Aid Commission has urged a single ground of appeal against conviction before this court:

> *(1) The Learned Trial Judge erred in law and in facts by mot directing the assessors on the defense of provocation which is available on the evidence*

[5] The evidence in the case in a nutshell as given in the sentence order reads as follows.

> *3. The deceased was your own brother. You lived in the same house with the deceased, his wife, his two children and your parents. The evidence revealed that there had been continuous disputes between you and your deceased brother. Eruption of fights had been a frequent occurrence and you had a strained relationship with the deceased according to the evidence of the deceased's wife. On 16 April 2015 you had a fight with your deceased brother. Only you and the deceased were at home. You received injuries in one of your fingers as a result of the fight. Later the deceased brought a kitchen knife and you started struggling with him. During the struggle you pushed the deceased's hand so hard and the knife struck the deceased's neck. Having seen the knife struck the deceased's neck, you pushed the knife further into his neck. After the deceased fell on the floor, once again you stabbed the deceased on his back. As per the medical evidence you caused two independently fatal wounds on the deceased resulting instant death. Later you called your mother who was at a neighbour's house and you confessed to her that you killed your brother. The incident was reported to the police as a case of suicide. Later upon investigations you were arrested and charged for murder. You admitted to the offence in your caution interview.'*

[6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test in a timely appeal 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) distinguishing 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)].

01st ground of appeal

[7] The appellant's contention is that the trial judge had erred in law and facts by not directing the assessors and himself on the defence of provocation. In terms of section 242 (1) of the Crimes Act, 2009 a plea of sudden provocation could bring murder down to manslaughter where the death of the deceased has been caused by the accused in the heat of passion caused by such provocation before there is time for the passion to cool.

[8] The law is that the judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case. Then, for the plea of sudden provocation to succeed there must be a credible narrative (i) on the evidence of provocative words or deeds of the deceased (*the source of the provocation can be one incident or several; To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case; However cumulative provocation is in principle relevant and admissible*), (ii) of a resulting sudden loss of self-control by the accused, (iii) of an attack on the deceased proportionate to the provocative words or deeds and (iv) an evidential link between the provocation offered and the assault inflicted. Though, there is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial, the defence cannot require the issue to be left to the jury unless a credible narrative of events suggesting the presence of these elements has been produced [vide **Masicola v State** [2021] FJCA 176; AAU073.2015 (29 April 2021)].

[9] In other words, there must be an evidential basis for running the defence of provocation. The appellant has run his case on self-defence. The appellant had said in evidence that there was a fight between him and his deceased brother where the deceased had hit him on his fingers on the right hand with a spear. He had tried to save himself with his hand. He then had gone and called his mother and nothing else happened. However, he had also said that the deceased was lying down on the floor and he did not know why. He

had further said that when he was trying to save himself the spear hit the neck of his brother. In cross examination the appellant had clearly said that he acted in self-defence.

[10] According to medical evidence, it would need significant force to cause an injury of the nature of the stab wound in left front of the neck of the deceased. This injury was necessarily fatal and could have been caused with the knife produced at the trial. The second injury too on its own had been necessarily fatal and could have been caused with the same knife with a significant force when the deceased was stabbed when he was lying his face down. The doctor had said that the two injuries could have been caused by a spear only if it had same dimensions as the knife with a single sharp end and a blunt end. However, it is common knowledge that unlike a knife a spear has two sharp ends. Thus, one or both injuries could not have been caused with a spear as claimed by the appellant.

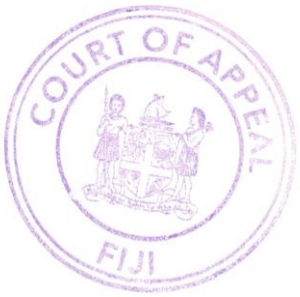
[11] The narrative given by the appellant in his cautioned interview led in evidence uncontested by him shows that the appellant had a fight with the deceased when only he and the deceased were at home. The appellant had received injuries in one of his fingers as a result of the fight. The deceased had brought a kitchen knife and the appellant had started struggling with him. During the struggle the appellant had pushed the deceased's hand so hard that the knife struck the deceased's neck. Having seen the knife struck the deceased's neck, he had pushed the knife further into his neck. After the deceased fell on the floor, once again the appellant had stabbed the deceased on his back.

[12] Given the above evidence, one need not be surprised why his 'self-defence' did not succeed. Further, I am convinced that there was no evidential basis/credible narrative for the trial judge to have put defence of provocation to the assessors or for him to have considered it himself in the judgment. This explains why the appellant's counsel had not asked for a re-direction on provocation either.

[13] In the circumstances, I do not see a reasonable prospect of success on the above ground of appeal.

Order

1. Leave to appeal against conviction is refused.



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