

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

CRIMINAL APPEAL NO. AAU 127 of 2020
[In the High Court at Labasa Criminal Case No. HAC 42 of 2019]

BETWEEN : **VILIAME RATUBUKETE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. M. Vosawale for the Respondent**

Date of Hearing : **14 August 2023**

Date of Ruling : **15 August 2023**

RULING

- [1] The appellant had been charged and convicted in the High Court at Labasa for having committed the murder of Sanjesh Kumar on 28 July 2019 at Seniwaloa in the Northern Division contrary to section 237 of the Crimes Act 2009.
- [2] After the assessors' majority opinion that the appellant was guilty of murder, the learned High Court judge had convicted the appellant and sentenced him on 28 August 2020 to mandatory life imprisonment and set a minimum serving period of 25 years.
- [3] An appeal against conviction and sentence had been lodged in person by the appellant out of time but within 03 months and it could be treated as a timely appeal.
- [4] 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 Caucou 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)].

[5] Further guidelines for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vide Bae v State [1999] FJCA 21; AAU0015u.98s (26 February 1999), Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; House v The King [1936] HCA 40; (1936) 55 CLR 499). For a ground of appeal timely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a reasonable prospect of its success in appeal.

[6] The ground of appeal raised by the appellant are as follows:

Conviction:

Ground 1

THAT the Learned Judge erred in fact and law when he allowed the video caution interview (PE1) to be adduced as evidence and when he relied on the same to convict the appellant.

Ground 2

THAT the learned Trial Judge has erred in law and in fact when he convicted the appellant for murder when the fundamental element of the offence were not fully proven beyond reasonable doubt.

Sentence:

Ground 3

THAT the Learned Trial Judge erred in principle in imposing a non-parole period which was excessive and erred in failing to take into account the following relevant conditions when arriving at the non-parole period of the appellant:

- (i) It was not premeditated or calculated murder*
- (ii) The appellant and both the accomplices were intoxicated*
- (iii) The personal circumstances of the appellate such as family, young age etc.*

[7] According to the summing-up the brief facts are as follows:

[28]*It is not in dispute that in a formal caution interview on 29 July 2019 by Cpl Tudru the Accused elected to remain silent and not to make any statement.....*

[30] *It is not in dispute that the Accused is a 26 year old farmer of Seniwaloa, Waiqele, Labasa. The deceased, Sanjesh Kumar was 33 years of age and was a taxi driver. He drove a taxi registration number LT5997.*

[31] *It is not in dispute that on the afternoon of 27 July 2019 the Accused accompanied his two friends, Janeet Lal (aka Sonu) and Samu Boa (aka Samu) to a kava shop at Naseakula. They drank kava and played billiard until they came to a nightclub in town where they drank alcohol. From the nightclub they went to a place called Bouma near the hospital and joined another group and drank homebrew. They returned to town in the early hours of the morning at around 4am. A girl by the name Tavaita Suvirara who was with the other group at Bouma accompanied the three men to town. They walked all the way to the Y-Corner junction and boarded the victim's taxi. The victim was directed to a farmhouse at Nakama belonging to Baram Deo.*

[32] *The point of contention is when the four passengers arrived at Nakama. The prosecution case is that the true version of the events that followed is contained in the statements made by the Accused to the police in a video (PI).*

[37] *In the video conversation the Accused told the police that when they arrived at Nakama, other passengers got off the vehicle a bit far down from the place where the incident occurred while he continued to the farmhouse. He said when they arrived at the farmhouse, they got off the vehicle and when the taxi driver flashed the light from his phone on his face he punched the driver on the jaw and he fell down. He said that when the driver fell down he kicked his rib cage multiple times and hit his back with a timber and then stomped his head with his safety boot.*

[45] *The prosecution relies upon the photographs to show that the Accused's admissions are consistent with how the body of the victim was found outside*

the farmhouse with visible facial and head injuries and with one of his shoes out and lying on the wooden veranda of the house. The photographs taken during the post mortem are relied upon by the prosecution to show the nature and gravity of the external and internal injuries sustained by the victim. Some of the photos taken at the scene and during the post mortem examination are fairly graphic.....

[47] *The final witness for the prosecution was Ms Naomi Tuitoga, a senior Forensic Scientific Officer with the Fiji Police Force. She carried out the DNA tests in this case. The findings of the DNA tests are contained in a report compiled by Ms Tuitoga. The DNA report is an agreed document and is marked P10 and is at Tab 5 of the Admitted Facts. The findings contained in the report are not in dispute. Some relevant findings are:*

DNA obtained from the timber (P4) matched with the DNA profile of the victim, Sanjesh Kumar.

Swabs taken from the back seat, passenger seat and the steering wheel of the vehicle LT5997 matched with the DNA profiles of Sanjesh Kumar, the Accused, Samu Boa and Janeet Lal.

DNA found on the right fingernail clipping of Sanjesh Kumar matched with the DNA profiles of Sanjesh Kumar, the Accused, Samu Boa and Janeet Lal.

DNA found on the safety boots (P7) of the Accused matched with the DNA profiles of Sanjesh Kumar, the Accused, Samu Boa and Janeet Lal.

[8] The post mortem report of the deceased was an agreed document (P9). The findings of the pathologist Dr. James Kalougivaki were contained in the report and were not in dispute. The victim had sustained extensive facial injuries including a crooked nose and contusive injuries on his left upper arm, right forearm and right shoulder. There was also a contusive laceration on scalp completely exposing the skull. The fatal injuries were the head injuries. The victim died of bleeding in his brain. Dr James said that the injuries were caused by blunt force trauma to the face and the head such as stomping, kicking with a safety boot such as P7 or using a timber such as P4. He said that severe amount of force was required to cause the external injuries found on the victim and that extreme amount of force was required to cause the internal injuries found on the victim.

[9] The appellant's version at the trial was as follows (see the summing-up):

- [53] *When they arrived at the farmhouse the victim drove to the front of the house and stopped. The Accused said that when the vehicle came to a stop, Janeet Lal removed and threw the taxi meter from his side of the window to the other side of the vehicle. The Accused said that at that point the victim got out of his vehicle to pick up the taxi meter. The Accused said that Janeet Lal jumped on the driver's side and got out of the vehicle. The Accused said that Janeet Lal went and punched the back of the victim's head at the spot where the taxi meter was thrown. The Accused said that Samu Boa jumped out of the vehicle and joined Janeet Lal in assaulting the victim. The Accused said that Samu Boa punched the victim's left side of the face while Janeet Lal held the victim's collar. The victim fell down and Janeet Lal and Samu Boa continued punching him. The Accused said he saw Samu Boa kick the left ribs of the victim when he was sort of like crawling.*
- [54] *The Accused said that when he saw the assaults, he got out of the taxi and went in front of the vehicle. He said that when he came to the front of the vehicle the victim crawled towards him and at the same time Janeet Lal shouted out to him to punch the victim. The Accused said that at first he refused to punch the victim because he did not know why his friends were assaulting him but when Janeet Lal shouted again to punch the victim, the Accused said that he punched the victim once on his forehead using his right hand.*
- [55] *The Accused said that after he threw the punch at the victim, the victim sat back and Janeet Lal and Samu Boa continued assaulting him on the face and nose and kicked his chest and ribs. The Accused said Janeet Lal was wearing a black flip-flop while Samu Boa was wearing a canvass. The Accused said that he was wearing safety boots. The Accused said that he was standing and watching the assault. The Accused said that when he saw the victim was bleeding he was terrified and shocked. He got back into the taxi and sat there. When Samu Boa questioned him what he was doing the Accused drove away the taxi leaving the victim, Janeet Lal and Samu Boa behind. The Accused said that when he left the scene the victim was alive.*
- [56] *From Sarava the Accused drove the vehicle to Qalewaqa and then to Wailevu to buy groceries. He took the victim's phone and wallet containing money that was left inside the taxi. After buying groceries he went to his residence at Seniwaloa to drop the groceries at around 12 noon. After dropping the groceries at his home he changed his clothes and shoes and drove the taxi back to Qalewaqa and spent some time with his parents and siblings. From Qalewaqa he drove the taxi to Bocalevu where the vehicle went off the road and into a drain. He abandoned the vehicle at Bocalevu and went to Tabucola. From Tabucola he went to Vakasigani where he had a nap at a bus shelter. After the nap he went back to his home at Seniwaloa, ate some food and went to sleep.*

01st ground of appeal

- [10] The appellant’s argument appears to be that the trial judge should not have allowed his video recorded confession as evidence. The appellant had challenged the admissibility on the grounds of voluntariness or general unfairness.
- [11] The voir dire ruling dated 13 August 2020 shows that while the prosecution had called relevant police officers to give evidence at the inquiry, the appellant while remaining silent had called one witness on his behalf.
- [12] The trial judge had thoroughly and most thoughtfully analysed all the evidence relating to voluntariness and constitutional safeguards of the appellant and guided himself in accordance with the principles laid down in **State v Vasuitoga & Qurai** HAC 008/06S (12 February 2007) and **Deo v State** [2003] FJCA 20; AAU0015.2000S & AAU0016.2000S (16 May 2003) in the voir dire ruling.
- [13] In ***Deo***, the Court of Appeal adopted the approach that the exclusion of statements obtained in breach of the Bill of Rights is discretionary and the approach should be rights – centred to meet a country’s obligations under the international covenant on civil and political rights as evidenced in its own legislation, and the circumstances of the particular case must be carefully considered and added as follows:

“What circumstances are relevant to the weighing process?”

There was considerable discussion in argument of the possible relevance of particular factors. So much depends on the particular facts of the case that it would not in my view be wise to embark on any discussion of hypothetical cases. Sufficient to say that a trial Judge should consider all relevant circumstances. Without expressing any view as to their possible significance I note that Lamer J in Collins at pp. 208-209 sited as those factors the Canadian Courts had most frequently considered: What kind of evidence was obtained? What Charter right was infringed? Was the charter violation serious or was it of a merely technical nature? Was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith? Did it occur in circumstances of urgency or necessity? Were there other investigatory techniques available? Would the evidence have been obtained in any event? Is the offence serious? Is the evidence essential to substantiate the charge? Are other remedies available?”

[14] In *Vasuitoga & Qurai*, Shameem J had summarized the governing principles as follows:

"When a suspect gives an inculpatory statement to a person in authority, it must be shown by the prosecution to have been obtained voluntarily and without unfairness or oppression. Further the prosecution must prove that the confession was obtained in accordance with the Constitution, and if there were breaches of the rights of suspects under the Constitution, that the suspect was not thereby prejudiced. The prosecution must prove all these issues to the satisfaction of the court, beyond reasonable doubt.

The test for voluntariness is whether the suspect gave his statement freely, without oppression or hope of advantage, or fear of disadvantage. The purpose of the rule of admissibility and of the suspect's rights under the Constitution is to remove the inherent imbalance of power which exists when a suspect is questioned in custody, whilst preserving the right of the police to question anyone in the course of proper investigations and in the public interest. In the determining of issues relevant to the admissibility of confession, these are the principles to be considered, and balanced."

[15] The trial judge had then considered these issues raised by the appellant in the summing-up at paragraph 19, 20 and the judgment at paragraphs 4, 5 and 7 as well. The trial judge had no doubt that the appellant's confession was voluntary and not vitiated by breach of the appellant's constitutional rights.

02nd ground of appeal

[16] The gist of the appellant's complaint appears to be that the verdict is unreasonable and not supported by evidence. In addition to the confession (P1) in the form of video recording by a mobile phone, the prosecution had led other circumstantial evidence in the form of DNA evidence connecting the appellant with the crime as stated by the trial judge at paragraphs 22-26 of the summing-up and paragraph 11 of the judgment.

[17] The trial judge had found the appellant's confession to be consistent with the forensic evidence and DNA evidence coupled with the photographs at the crime scene. The Learned judge had rejected the appellant's evidence under oath where he had attributed the bulk of the assault on the deceased to his two friends Janeet Lal and Samu Boa and minimized his participation only to one punch on the appellant's forehead, whereas according to P1 they had got off the taxi some distance away from the farmhouse where had had attacked the deceased mercilessly to death. The fact that

the appellant alone fled the scene in the taxi with the deceased's money may suggest that Janeet Lal and Samu Boa were not part of the assault on the deceased.

[18] Therefore, there is no merit to the appellant's contention that the verdict is unreasonable and not supported by evidence and the elements of the offending were not proved.

[19] However, I will flag one aspect of the DNA evidence for the consideration of the full court if the matter reaches there. I cannot find an explanation in the summing-up or the judgement as to how DNA found on the right fingernail clipping of Sanjesh Kumar matched with the DNA profiles of Samu Boa and Janeet Lal and how DNA found on the safety boots (P7) of the appellant matched with the DNA profiles of Samu Boa and Janeet Lal, if Samu Boa and Janeet Lal had no part at all on the attack of the deceased. Is these DNA findings consistent with at least part of the appellant's narrative under oath and inconsistent at least partly with his confession where the appellant had also said that Janeet Lal aka Sonu knew that the deceased would be punched indicating some prior agreement or at least knowledge of the attack on the part of Sonu.

03rd ground of appeal

[20] The main plank of the appellant's submission is on the minimum serving period of 25 years. **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) has very pertinent observations with regard to setting the minimum period. The trial judge had given some reasons for the 25 year period particularly at paragraphs 07-09 of the sentencing order.

What matters should be considered whether to set a minimum period and if so, in deciding the length of that period? Some helpful guidance from UK.

[21] In UK, depending on the facts of the offence the starting point for the minimum time to be served in prison for an adult ranges from 15 to 30 years. For the purposes of setting the starting point for the minimum term Schedule 21 to Sentencing Act 2020 in UK sets out four categories.

- *In cases such as a carefully planned murder of two or more people, or a murder committed by an offender who had already been convicted of murder the starting point for an offender aged 21 or over is a whole life tariff. For an offender aged 18-20 the starting point would be 30 years and for an offender aged under 18 it is 12 years.*
- *In cases such as those involving the use of a firearm or explosive the starting point is 30 years for an offender aged 18 or over and 12 years for an offender aged under 18.*
- *In cases where the offender brings a knife to the scene and uses it to commit murder the starting point is 25 years for an offender aged 18 or over and 12 years for an offender aged under 18.*
- *In cases that do not fall into the above categories the starting point is 15 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

[22] Schedule 21 to Sentencing Act 2020 in UK has given some aggravating and mitigating factors to be considered for the determination of minimum term in relation to mandatory life sentence for murder as follows:

- ‘9. *Aggravating factors (additional to those mentioned in paragraphs 2(2), 3(2) and 4(2) that may be relevant to the offence of murder include—*
- (a) *a significant degree of planning or premeditation,*
 - (b) *the fact that the victim was particularly vulnerable because of age or disability,*
 - (c) *mental or physical suffering inflicted on the victim before death,*
 - (d) *the abuse of a position of trust,*
 - (e) *the use of duress or threats against another person to facilitate the commission of the offence,*
 - (f) *the fact that victim was providing a public service or performing a public duty, and*
 - (g) *concealment, destruction or dismemberment of the body.*
10. *Mitigating factors that may be relevant to the offence of murder include—*
- (a) *an intention to cause serious bodily harm rather than to kill,*
 - (b) *lack of premeditation,*
 - (c) *the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered the offender’s degree of culpability,*

- (d) *the fact that the offender was provoked (for example, by prolonged stress) but, in the case of a murder committed before 4 October 2010, in a way not amounting to a defence of provocation,*
- (e) *the fact that the offender acted to any extent in self-defence or, in the case of a murder committed on or after 4 October 2010, in fear of violence,*
- (f) *a belief by the offender that the murder was an act of mercy, and*
- (g) *the age of the offender.'*

[23] Factors mentioned in paragraphs 2(2), 3(2) and 4(2) are as follows:

2(2) Cases that would normally fall within sub-paragraph (1)(a) include—

- (a) *the murder of two or more persons, where each murder involves any of the following—*
 - (i) *a substantial degree of premeditation or planning,*
 - (ii) *the abduction of the victim, or*
 - (iii) *sexual or sadistic conduct,*
- (b) *the murder of a child if involving the abduction of the child or sexual or sadistic motivation,*
- (c) *the murder of a police officer or prison officer in the course of his or her duty, where the offence was committed on or after 13 April 2015,*
- (d) *a murder done for the purpose of advancing a political, religious, racial or ideological cause, or*
- (e) *a murder by an offender previously convicted of murder.*

3(2) Cases that (if not falling within paragraph 2(1)) would normally fall within sub-paragraph (1)(a) include—

- (a) *in the case of an offence committed before 13 April 2015, the murder of a police officer or prison officer in the course of his or her duty,*
- (b) *a murder involving the use of a firearm or explosive,*
- (c) *a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),*
- (d) *a murder intended to obstruct or interfere with the course of justice,*
- (e) *a murder involving sexual or sadistic conduct,*
- (f) *the murder of two or more persons,*
- (g) *a murder that is aggravated by racial or religious hostility or by hostility related to sexual orientation,*

- (h) *a murder that is aggravated by hostility related to disability or transgender identity, where the offence was committed on or after 3 December 2012 (or over a period, or at some time during a period, ending on or after that date),*
- (i) *a murder falling within paragraph 2(2) committed by an offender who was aged under 21 when the offence was committed.*

4(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—

- (a) *commit any offence, or*
- (b) *have it available to use as a weapon,*
and used that knife or other weapon in committing the murder.

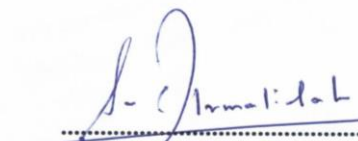
[24] It is important to note that what is stated at paragraph [21] above are starting points only. Having set the minimum term, the judge will then take into account any aggravating or mitigating factors that may amend the minimum term either up or down. The judge may also reduce the minimum term to take account of a guilty plea. The final minimum term will take into account all the factors of the case and can be of any length.

[25] Given the facts of the case, it appears to me that the starting point for the appellant may be taken as 15 years and then after adjusting for aggravating and mitigating factors the final minimum period could be arrived at. However, I would leave the decision on the minimum period for the full court if it thinks useful to seek some guidance from the above guidelines in the UK.

Orders

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




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