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

CRIMINAL APPEAL NO. AAU 107 of 2020
[In the High Court at Suva Criminal Case No. HAC 031 of 2020]

BETWEEN	:	**FATAI PENI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. P. Mataika for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**12 December 2023**
Date of Ruling	:	**13 December 2023**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva for having committed the murder of his wife, Apete Bale on 29 December 2019 at the victim's home at Nasinu in the Central Division contrary to section 237 of the Crimes Act 2009.

[2] The appellant represented by the Legal Aid Commission had pleaded guilty to the count of murder on 14 July 2020. Summary of facts had been admitted by the appellant.

[3] The learned High Court judge had convicted the appellant on his guilty plea and sentenced him on 30 July 2020 to mandatory life imprisonment and set a minimum serving period of 20 years. His appeal filed in person against sentence is timely but the conviction appeal filed on his behalf by the LAC is late by 02 years and 09 months.

[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] The delay in the conviction appeal is 02 years and 09 months which is very substantial. The fact that the appellant had appealed in a timely manner against sentence shows that there was no impediment for him to appeal the conviction without delay. It appears from his affidavit that it was on the advice of the LAC that a belated conviction appeal had been filed. I am not satisfied that the appellant has presented a credible explanation for the inordinate delay in his conviction appeal. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction 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.

[6] 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].

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

> '***Conviction:***
>
> ***Ground 1:***
>
> *THAT whether the Learned Judge erred in law in failing to take into consideration the availability of the defence of provocation upon perusal of the Summary of Facts.*

Sentence:

Ground 2:

THAT the Learned Trial Judge erred in law and fact in granting a harsh and excessive sentence against the accused.

[8] According to the sentencing order the brief facts are as follows:

> *'[1] The offender is 54 years old. He has pleaded guilty to the murder of his spouse (the victim). The couple had been married for twenty five years. Together they had five children (daughters). He is from the island of Oneata in Lau. The couple started having problems in their marriage when she moved to Suva for their children's education. He remained on the island with their youngest child doing farming and financially supporting his family in Suva. She lived in Kinoya, Suva and worked as a cleaner to support her family. She was 47 years old.*
>
> *[2] In March 2019, the offender learnt of an extra-marital affair of his wife while he was visiting her in Suva. He confronted her and she admitted to the affair. After warning her to cease the affair he returned to the island.*
>
> *[3] In December 2019, the offender returned to Suva for a visit. The incident occurred on 29 December 2019 at the victim's home in Kinoya. On this day the victim had gone to work. The offender had stayed back home. During the day the offender learnt from a neighbour that the victim was continuing with her extra-marital affair. After that conversation with the neighbour he returned home and sliced a fish for dinner. He noticed that the knife he had used to slice the fish was blunt. He sharpened the knife and left it on the kitchen sink together with other utensils. He did other preparations for the dinner and waited for the victim to return home to cook.*
>
> *[4] The victim returned home at around 8pm. She cooked and the couple went to bed after having dinner. He asked her for sex. She refused. In rage, he went to the kitchen and returned with the knife he had sharpened earlier in the day. He stabbed the victim twice on the chest. She tried to defend herself. He stabbed her back. When she could not resist, he held her head back and slit her throat with the knife. She sustained multiple stab wounds. She died at the scene. The fatal injury was a large, deep, gaping incised or slash wound on the neck.*
>
> *[5] After slitting the victim's throat, the offender stood up and washed the knife. He left the knife on the kitchen sink and left the house. He went straight to his eldest daughter's home where all his children were and informed her that he had killed their mother. He gave the house keys and some money to his daughter and presented himself to Valelevu Police*

Station at about 11.30pm that same evening. He informed the police that he had killed his wife.

01st ground of appeal

[9] The appellant submits that the trial judge should not have accepted the appellant's plea of guilty for murder in the face of a narrative of possible provocation on the summary of facts. The Court of Appeal analyzed the application of the partial defense of provocation on in great detail in **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017). The state counsel has submitted that there was no evidence of provocation that would satisfy the elements under section 242 of the Crimes Act which could possibly bring the appellant's culpability down to manslaughter.

[10] The Supreme Court has reiterated the law relating to provocation as a partial defense as follows in **Masicola v State** [2023] FJSC 27; CAV0011.2021 (30 August 2023):

> *[9] Under s 242(1) of the Crimes Act 2009, murder is reduced to manslaughter where the killer "does the act which causes death in the heat of passion caused by sudden provocation ... before there is time for the passion to cool". Relevantly, "provocation" is defined in s 242(2) as:*
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> > *"The term "provocation" means ... any wrongful act or insult of such as nature as to be likely when—*
> >
> > *(a) done to an ordinary person;*
> >
> > *...*
> >
> > *to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."*
>
> *[10] In **Codrokadroka v The State,**[1] the Supreme Court approved the following principles from the judgment of the Court of Appeal[2] as accurately reflecting the approach that a trial judge should take to the issue of provocation:*
>
> > *"1. The judge should ask himself/herself whether provocation should be left to the assessors **on the most favourable view** of the defence case.*

[1] *Codrokadroka v The State* [2015] FJSC 15; CAV07.2013 (20 November 2013) at para [17].
[2] *Codrokadroka v The State* [2008] FJCA 122, AAU0034.2006 (25 March 2008) at paragraph [38].

2. *There should be "a credible narrative" on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*

3. *There should be "a credible narrative" of a resulting loss of self-control by the accused.*

4. *There should be "a credible narrative" of an attack on the deceased by the accused which is **proportionate** to the provocative words or deeds.*

5. *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.*

6. *There must be an evidential link between the provocation offered and the assault inflicted."*

[11] The authorities establish that a trial judge has the responsibility to raise provocation where there is the necessary "credible narrative" on the facts even if an accused is represented by counsel and does not wish to raise the defence. The authorities recognise that this can, in some circumstances, place the judge in a difficult position.[3]

[11] I am unable to see from the summary of facts, which I have perused, any credible narrative of events suggesting the presence of the three elements namely the act of provocation, the loss of self-control, actual or reasonable, and the retaliation proportionate to the provocation. To me, the refusal by the deceased to have sexual intercourse with the appellant was not an act of provocation sufficient to deprive him of his power of self-control and to induce him to commit the brutal assault on the deceased which could bring the appellant's liability to manslaughter under section 242(1) of the Crimes Act 2009.

02nd ground of appeal

[12] The main plank of the appellant's grievance appears to be on the minimum serving period of 20 years. **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26

[3] See, for example, the discussion in *Ram v The State* [2012] FJSC 12; CA V0001.2011 (9 May 2012).

February 2016) has very pertinent observations with regard to setting the minimum period. The Court of Appeal said that there is no guidance or guidelines as to what matters should be considered by the sentencing judge in deciding whether to set a minimum term and as to what matters should be considered when determining the length of the minimum term, however the trial judge should give reasons when exercising the discretion not to impose a minimum term and he should also give reasons when setting the length of the minimum term.

[13] The trial judge had given his own reasons for the decision to set a minimum serving period at paragraph 7 of the sentencing order and the trial judge seems to have relied on the same reasons for fixing the length of the period at 20 years.

> *'[7] I have decided to set a minimum term in this case. The killing was gruesome. The victim was the wife of the offender, she was the mother of his children and a grandmother. When the victim chose her own course in life the offender was not willing to accept that his wife had a right to make that choice. The motive for killing reflects the entrenched patriarchal view that women have no right to self-autonomy. Men turn to respond with violence when their partners seek self-autonomy in relationships. The courts duty is to denounce family violence and impose sentence that has the effect of deterrence both personal and general.'*

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.

[14] 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:

01st category

- *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.*

02nd category

- *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.*

03rd category

- *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.*

04th category

- *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.*

[15] 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.'

[16] 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 a 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.

[17] Section 2(1) states that if—

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when the offence was committed, the appropriate starting point is a whole life order.

[18] It is important to note that what is stated under the four categories 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.

[19] Given the facts of the case, it appears to me that the starting point for the appellant may be taken as 25 years as his case falls into the third category and then after adjusting for many aggravating factors and perhaps the only mitigating factor of guilty plea, the minimum serving period of 20 years cannot be overtly criticized. I see no sentencing error or a real prospect of success in the appellant's sentence appeal on the ground that the minimum period is excessive or harsh.

Orders of the Court:

1. Enlargement of time 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

Solicitors:

Legal Aid Commission for the Appellant
Office for the Director of Public Prosecutions for the Respondent