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

CRIMINAL APPEAL NO. AAU 80 of 2022
[In the High Court at Suva Criminal Case No. HAC 286 of 2019]

BETWEEN	:	**KIALA MARCELLINO PENAKOY HENRI LUSAKA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person** **Ms. E. Rice for the Respondent**
Date of Hearing	:	**18 January 2024**
Date of Ruling	:	**22 January 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva for having committed the murder of his wife, Jennifer Anne Downes on 23 July 2019 at Suva in the Central Division contrary to section 237 of the Crimes Act 2009. The charge was as follows:

> *'**COUNT ONE***
>
> ***Statement of Offence***
>
> ***MURDER:*** *Contrary to Section 237 of the Crimes Act, 2009.*
>
> ***Particulars of Offence***
>
> ***KIALA MARCELLINO PENAKOY HENRI LUSAKA*** *on the 23rd of July 2019, at Suva, in the Central Division murdered* ***JENNIFER ANNE DOWNES.****'*

[2] After trial, the learned High Court judge had sentenced him on 12 August 2022 to mandatory life imprisonment and set a minimum serving period of 20 years.

[3] The appellant's appeal filed in person against conviction and sentence is timely.

[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 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)].

[5] 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].

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

> ***Ground 1:***
>
> *THAT the Judge erred in fact and in law when he failed to substitute the murder conviction against the appellant for the lesser offence of manslaughter in view of the overwhelming evidence of the defence which supported the diminished responsibility of appellant for psychiatric reasons at the actual time of death of the victim.*

Ground 2:

THAT the Judge erred in law and in facts when he overlooked and or, disregarded expertise evidence without careful independent scrutiny and investigations which he substituted with his subjective opinion based on erroneous assumptions of facts and ill-conceived conclusions that were prejudicial and detrimental to the appellant's interest or rights to attain justice.

Ground 3:

THAT the Judge erred in fact and in law when the prosecution had proven its case beyond reasonable doubt, the judge convicted and sentenced accordingly.

Ground 4

THAT the Learned Judge erred in law with the circumstantial evidence of judgments paragraphs 52 to 63 that failed to produce an eye witness; on either an exhibited material evidence to prove that the appellant committed the murder of Jennifer Anne by manual strangulation thus the 2013 Fiji Constitutional rights chapter 2 Section 14 subsection 2(a).

Ground 5

THAT the Learned Judge erred in law with his judgment paragraphs 120 to 124 when he failed either intentionally or unintentional; to seriously consider in totality the:

i. Mental element (insanity, neurotic, psychotic, disturbed).
ii. Diminished responsibility, to and of the appellant in view of the 2009 Fiji Crimes Act 243.

Ground 6

THAT the sentence ordered against the appellant in view of the facts presented in evidence is extremely harsh and excessive.

[7] In the sentencing order the trial judge had briefly recapped the facts revealed by the prosecution as follows:

3. If I may recap your offending on the 23rd of July 2019 your wife Jennifer was found dead in her bedroom. As to what happened within your house that day was known only to you and if at all your 3 kids. However, the circumstances and the pathologist's evidence enable the prosecution to enlighten this court with certainty as to what happened during the last moments. According to the pathologist, Jennifer's death was due to the assailant coming in front of her and exerting pressure on her neck with bare hands maybe for a period between 3 to 8 minutes until her life was virtually squeezed out of her. It is a death due to asphyxia caused by manual strangulation. The circumstances proved that the assailant was you. The Pathologist explained that Jennifer had struggled and fought for her life. She had several bruises, internal

hemorrhages and continuations which clearly proved that she struggled during the last moments when you held onto her neck, very likely pinning her down to the ground whilst looking straight in to her. This by all means is an extremely cruel death brought about by your own hands.

4. *You embarked upon and pursued this violent and horrible act behind locked doors whilst your young kids were in the house. There is no doubt they certainly would have known, heard and understood what exactly was happening, at least the two elder children may have.*

5. *No doubt your suspicion and belief of her infidelity did cause agitation and turmoil in your mind which developed into psychosis due to your consumption of cannabis and alcohol. According to both the psychiatrists you have been suffering from this state of substance induced psychosis at the time you committed this gruesome and cruel act of murder. However, though you were so suffering from psychosis the evidence was more than sufficient to convince this court that you knew and was aware as to the nature of the act that you committed. Your conduct and effort to conceal what actually happened, what you told Noel and utterances made when the police arrived at your door step bear testimony to this fact. Though you said, that you were unaware and confused this is entirely at odds with what you did and uttered immediately before and after the offending. You knew that killing Jennifer was morally wrong and your actions after killing her speak for themselves; you knew what you had done was wrong and did not want to be caught. That said so, your mental illness is relevant to the length of your minimum period of imprisonment and will be considered.*

6. *Your suspicion of your wife's infidelity certainly had sparked off great anger and agitation upon which you embarked upon a voyage of dispensing your anger, frustration and revengeful thoughts not only to the deceased but her father and family too. This is what the several messages, photos, screen shots and the utterances made to Mr. Downes told us. You did finally give effect to your revengeful thoughts by manually strangling your wife and you watched her asphyxiate and die. Then you placed coins on eyes of her lifeless body and sent a photograph or a screen shot to Mr. Downes with the message "you lose motherfucker, I win" and in a recorded message said "this is what you made me do".*

[8] The trial judge had captured the appellant's defense in the judgment as follows:

6. *……. The defence taken up by the Accused is not straight forward and clear cut. The Accused takes up position that he did not kill his wife however if he has done so he cannot remember. Simultaneously defence led the evidence of a psychiatrist suggestive of some form of mental sickness or an abnormality of mind of the Accused. In view of this uncertain approach the probable defence, may be either a denial, mental impairment (insanity) or diminished responsibility.'*

01st, 02nd and 05th grounds of appeal

[9] The foundation of these grounds of appeal is based on section 243 of the Crimes Act 2009 on diminished responsibility based on which the appellant argues that he should have been convicted of manslaughter and not murder.

[10] The Court of Appeal had dealt with the scope and burden of proof of diminished responsibility in detail on more the one occasion in the recent past[1]. The trial judge had dealt with the appellant's defense at length at paragraphs 85-114 of the judgment and concluded that self-induced psychosis which the appellant was suffering did not come within the scope of section 243 and therefore he was not entitled to the benefit of this defence.

[11] Notwithstanding his conclusion, the trial judge had further considered at paragraphs 116-120 whether in any event the abnormality of mind substantially impaired the appellant's capacity to understand or control or know and concluded that notwithstanding that he was suffering from an abnormality of mind he certainly was aware and understood what he was doing and was in control of his actions and also, he knew that he had done something which he ought not to have done and that the evidence proved that the abnormality of his mind had not substantially impaired his mind or his capacity to understand or control or know. Therefore, the judge had concluded that in any event the defence of diminished responsibility could not succeed in this case.

[12] Having pursued the judgment and the analysis of evidence undertaken meticulously by the trial judge in the context of relevant judicial pronouncements, I see no reason to disagree with any of the above conclusions.

[1] **Godrovai v State** [2023] FJCA 46; AAU0008.2017 (24 February 2023); **Khan v State** [2023] FJCA 263; AAU118.2019 (29 November 2023)

03rd and 04th grounds of appeal

[13] This basis of the appellant's grievance under these two grounds of appeal is that the verdict is either unreasonable or cannot be supported having regard to the evidence. As for the appellant's compliant that the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence, as follows (which is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> *'[23] ……the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence.* ***These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors****'*

[14] As expressed by the Court of Appeal in another way, before a judge alone the question is whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)

[15] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a

supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court.

[16] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[17] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[18] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carried out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). This exercise seems to combine both subjective and objective elements. However, they do not exist in watertight compartments.

[19] I have considered the matters raised by the appellant under these grounds of appeal but do not find them to be in anyway adequate to render the verdicts unreasonable or unsupported by evidence. The judge had fully ventilated the evidence led by both sides and engaged in an independent evaluation and assessment of before arriving at the verdict of guilty. On the judgment, the evidence against the verdict seems to be overwhelming as to leave no reasonable doubt of the verdict of guilty.

06th ground of appeal

[20] The only issue to be considered appears to be the minimum serving period of 20 years. **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 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 (i) whether to set a minimum term and as to what matters should be considered (ii) 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.

[21] The trial judge had considered the victim impact statement, aggravating and mitigating factors for the decision to set a minimum serving period in 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.

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

[22] 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.*

[23] 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.'

[24] 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.

[25] 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.

[26] 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.

[27] Given the facts of the case, it appears to me that the starting point for the appellant may be taken as 15 years as his case falls into the fourth category and then after adjusting for significant degree of planning or premeditation among many aggravating factors and for the fact that the appellant had been suffering from psychosis during the time of offending among other mitigating factors, 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. 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

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent