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

CRIMINAL APPEAL NO. AAU 89 of 2022
[In the High Court at Lautoka Criminal Case No. HAC 224 of 2020S

BETWEEN	:	**ARVIND CHAND RAI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar the Respondent**
Date of Hearing	:	**14 June 2024**
Date of Ruling	:	**17 June 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva for having committed murder contrary to section 237 of the Crimes Act 2009. The particulars of the offence are:

Count 1
Statement of Offence

MURDER: *Contrary to section 237 of the Crimes Act 2009.*

Particulars of Offence

ARVIND CHAND RAI *on the 21st day of July 2020, at Lami in the Central Division, murdered* ***FEIYAN CHEN****.*

Count 2
Statement of Offence

ARSON: *Contrary to section 362 (a) of the Crimes Act 2009.*

Particulars of Offence

ARVIND CHAND RAI *on the 21st day of July 2020, at Lami in the Central Division wilfully and unlawfully set fire to the dwelling house of* ***FEIYAN CHEN*** *at Lot 3, Fenton Street, Lami.*

[2] The trial judge convicted the appellant on both counts as charged and sentenced him on 05 August 2022 to mandatory life imprisonment and set a minimum serving period of 28 years for murder. 10 years of imprisonment for arson was directed to be served concurrently.

[3] The appellant's appeal against conviction is timely.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction 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] The grounds of appeal raised by the appellant are as follows:

'**Conviction**

Ground (i)

THAT *the Learned Judge erred in law and in fact in relying on circumstantial and speculated evidence and also on the unproven facts to convict the accused.*

Ground (ii)

THAT *the investigation carried out by the Police was procedurally flawed, prejudiced and detrimental to the interest of justice for appellant, in fact the learned trial judge ignored, therefore he was wrong in law.*

Ground (iii)

THAT *the Learned Judge erred in law and in fact in not properly analysing at the inconsistencies and contradictions nature of the prosecutions witnesses statement that came to light during trial.*

Ground (iv)

THAT *the Learned Judge erred in law and in fact interfering excessively on the process causing a grave miscarriage of justice to the defence case.*

Ground (v)

THAT *the Learned Judge erred in law by ignoring the fact that the deceased death certificate was not submitted before Court which raised a serious miscarriage of justice.*

Ground (vi)

THAT *the Learned Judge erred in law by ignoring the fact that the post mortem report submitted by PW14 (Dr. Praneel Kumar) was uncertain and unreliable, which caused a substantial miscarriage of justice.*

Ground (vii)

THAT *the Learned Judge erred in law by ignoring the fact that the ID of the deceased was not submitted before Court to corroborate the deceased identity.*

Ground (viii)

THAT *the Learned Judge failed to direct himself regarding the dock identification is a risk in Court which has caused a grave injustice.*

[6] According to the sentencing order, the brief summary of facts are as follows:

> *2. The facts as found by the court were as follows. You befriended the deceased's husband, Mr. Sai Kin Yee (PW2) in 2015. At first, you used to ask him for minor financial support to pay for your food, fuel etc. Mr. Yee felt sorry for you and offered some maintenance job to you at his factory in Lami. In 2019, he gave $2,000 to you to buy building material for his factory's maintenance, but you vanished with the same. You offered in July 2020 to repay the above by fixing their leaking roof at their residence at 3 Fenton Street, Lami. Mr. Yee and his wife accepted the above.*
>
> *3. Between 17 to 21 July 2020, you had access to the couple's residence, while fixing their leaking roof. You knew the couple were successful*

business people and often kept a large amount of cash in their residence, to finance their business operations. You knew the couple ran "Sai Yee Foods Industries Ltd" in Lami which processed root crops and sea food and then exports them overseas. On 21 July 2020, you knew Mr. Yee was in Australia visiting his children while Ms. Feiyan Chen (deceased), was managing their business alone in Fiji.

4. *On 21 July 2020, after 8.30 pm, you went to the couple's shop at Kadavu Kava Shop at 3 Fenton Street, Lami. You met Ms. Chen (the deceased) there, and you were seen having a verbal argument with her, before going up to her upstairs residence at 3 Fenton Street, Lami. You were seen strangling Ms. Chen around the neck with an arm and dragging her towards the room. You then repeatedly assaulted Ms. Chen in the face and neck with your fists and a blunt object, causing her extensive injuries to her face and neck. You put her in a room, when she was extremely weak and injured and suffering from serious brain injuries. At the time, you intended to cause her death and was also reckless, in causing her death. You later stole their money, set her house on fire, and calmly walked out of their shop. You later fled the crime scene.*

5. *The shop caught fire. Firefighters later attended to the fire, and put the same out. Ms. Chen's body was discovered by the firefighters and taken to CWM Hospital. It appeared, she was already dead. You had been tried and convicted of murder and arson in the High Court after a 9 days trial.*

Ground (i)

[7] At paragraph 27 of the judgment, the trial judge had stated that:

> *'While PW4 was giving evidence,* ***the accused and his lawyer agreed****, as a matter of fact,* ***that the accused on 21 July 2020, went into Kadavu Kava Shop, with Ms. Feiyan Chen (the deceased) and that they went to the upstairs flat, and later the accused came downstairs, and went out of the shop****. As to the time of going in and out of the shop, the parties agreed that such was to be settled by trial.'*

[8] As to the timing of the appellant going into the shop and coming out, the prosecution had led the following items of evidence:

a. *PW3 Mere Vaganalau whilst on shift she was approached by the appellant three times at the shop front asking for the deceased;*

b. *The deceased was last seen alive on the 21st of July 2020, and the only person she was last seen with was the appellant, and, that they ascended to the top flat(crime scene) together that evening;*

c. *PW3 recalled moments after the deceased and appellant ascended, she heard screams, and calling of her name Chinese name Mia!*

d. *Moments later, the appellant walked out of the back door alone existing the store;*

e. *Smoke began emitting from the top flat as seen by the drivers outside the store who then alerted PW3;*

f. *PW4 saw the appellant and the deceased outside the store, moments later they then headed inside;*

g. *Five minutes later, PW4 heard a sound of someone gasping for air from the top flat(crime scene), he stood at an elevated position;*

h. *He saw through the right top flat window and witnessed the appellant's arms wrapped around deceased's neck;*

i. *Thus, being within range of the crime scene, he witnessed the deceased being strangled at the top flat at the material time;*

j. *Later PW4 saw the appellant exit the store and went towards his car.*

[9] The rest of the circumstantial evidence relied on by the prosecution revealed *inter alia* the following:

a. *The appellant in July of 2020 had told the deceased's husband (PW2) that he was looking to find work, the deceased husband (PW2) offered him to work on the roof of their top flat (crime scene);*

b. *The appellant was working on this residential roof from 16 to 21 July 2020;*

c. *Since the deceased and PW2 were running business, they often withdraw more than $100,000.00 a week;*

d. *This substantial bank withdrawals would cater for bill payments, staff wages, expenses, and business operations;*

e. *The substantial weekly withdrawals would often be broken down into various denominations $5, $10, $20, $50, $100;*

f. *The withdrawals would be kept in the top flat, in one of the rooms;*

g. *Three(3) days after the killing, the appellant was spotted purchasing a $1299.00 phone at Vodafone Shop Nakasi, using 2 bundles of new $5*

notes packed into $500 per bundle with the balance of $300 paid in fresh $5 notes, the appellant purchased a sim and registered using his Voter Card. Subsequent Police investigation at the appellant's abode revealed that the appellant had currencies in his possession.

h. *The firefighter Isoa Tavite(PW9) attended the scene, at the scene he retrieved a Chinese lady's body-he tried reviving to no avail; fellow firefighter PW11 Petero examined the scene and found that the fire started in an area where it should not have started;*

i. *The pathologist confirmed that there were internal bleeding of the brain which was caused by blunt force trauma to the head and neck area and the force deployed must have been substantial.*

[10] Thus, in my view there is no paucity of strong circumstantial evidence just short of eye-witness evidence as to the actual killing that it was none other than the appellant who was responsible for the deceased's death. That was the one and only irresistible conclusion available to the trial judge. The essence of the law that a judge should guide himself in a case based on circumstantial evidence alone is that the prosecution is relying on different pieces of evidence, none of which on their own point directly to the defendant's guilt, but when taken together leave no doubt about the defendant's guilt because there is no reasonable explanation for them other than the defendant's guilt [see **Naicker v State** [2018] FJSC 24; CAV0019.2018 (1 November 2018)]. The trial judge's assertion in the judgment that the prosecution relies upon circumstantial evidence to prove guilt which means that the prosecution is relying upon evidence of various circumstances relating to the crime and the accused when taken together, will lead to the sure conclusion that it was the accused who committed the crime, captures the essence of the established law on circumstantial evidence as there is no prescribed form of direction so long as the judge gets the essence of it. The trial judge had specifically guarded himself against relying on any speculation as opposed to real evidence at paragraph 19 and dealt with the circumstantial evidence led against the appellant at paragraphs 22-32 and 35.

Ground (ii) and (viii)

[11] The appellant complains of lack of ID parades and first-time dock identification as far as PW3 and PW4 were concerned. Both had made dock identifications of the

appellant who was last seen alone with the deceased before she had succumbed to her head injuries on the upstairs of their apartment which went up in flames soon thereafter.

[12] The respondent submits that at paragraph 24 of the Court's judgment, the trial judge highlighted the evidence of PW3 where it is said that she had three encounters with the appellant on the day in question, spoke to him, observed him (unimpeded) for a few seconds, under good lighting conditions. The fourth encounter was when appellant came inside the flat with the deceased and the fifth was when the appellant's descended and exited from the crime scene after the murder. Accordingly, the respondent argues that given the number of times PW3 encountered the appellant, an identification parade would have only confirmed that it was the appellant who was at the crime scene on 21 July 2020 at the material time. Thus, PW3's dock identification cannot be reasonably called as first-time dock identification. It was a case of recognition of a previously known person in the dock.

[13] As far as PW4 was concerned, he had seen the appellant arguing with the deceased outside the shop before both of them headed inside. A few minutes later he heard someone gasping for breath from the first floor (top flat) and saw through the upstairs window the appellant's arms wrapped around deceased's neck. Later he saw the appellant exit the shop/store and went towards his car. Thus, PW4 too appears to have had a reasonable opportunity of observing the appellant at the material time on three occasions before he recognised him in the dock.

[14] If PW3's and PW4's were first-time dock identifications as now argued by the appellant, the weight and value of his criticism on them becomes minimal in the light of admissions that he went into Kadavu Kava Shop (owned by the deceased and her husband) with Ms. Feiyan Chen (the deceased) and that they went to the upstairs, and later he alone came downstairs, and went out of the shop. The sequence of events admitted by him tallies with the testimony of PW3 and PW4 which placed him at the exact crime scene at or about the time of the murder. He had also agreed to the exhibits uplifted at the crime scene. The appellant had remained silent at the trial. He had failed to provide a reasonable explanation how three (3) days after the killing, he

was spotted purchasing a $1299.00 phone at Vodafone Shop Nakasi, using 2 bundles of new $5 notes packed into $500 per bundle with the balance of $300 paid in fresh $5 notes. He had also purchased a sim and registered using his Voter Card. Subsequent police investigation at the appellant's abode revealed that he had currencies in his possession. The deceased's husband (PW2) had said that his wife Ms. Feiyan Chen withdrew $100,000 from their Westpac Bank account on or about 17 or 18 July 2020, and the same were broken down into $5, $10, $20, $50 and $100 bills, to assist in their business transactions. He had also said that the above money were kept in one of the rooms in their top flat at 3 Fenton Street, Lami, and that the accused had access to the top flat between 17 to 21 July 2020, to repair their leaking roof.

Last seen rule

[15] It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible [vide the Indian Supreme Court in **Dharam Deo Yv State of Uttar Pradesh** 2014 AIR SCW 2253, 2014 (5) SCC 509, AIR 2014 SC (CRIMINAL) 1124 CRIMINAL APPEAL NO.369 OF 2006)]. If an accused is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. The failure of the accused to offer a reasonable explanation in discharge of the said burden provides an additional link in the chain of circumstances proved against the accused [vide the Indian Supreme Court in **State Of Rajasthan vs Kashi Ram** Appeal (crl.) 745 of 2000 (7 November, 2006) AIR 2007 SUPREME COURT 144, 2006 (12) SCC 254, 2006 AIR SCW 5768].

[16] The appellant had not provided an explanation as to how and when he parted company with the deceased and therefore his failure to reasonably explain the circumstances in which the deceased and the accused parted company provides an additional link in the chain of circumstances against him.

Ground (iii)

[17] The appellant's argument is based on alleged inconsistencies in PW3 and PW4 relating to time and clothing. Admittedly, there had been some discrepancies among them. However, the respondent submits that they were consistent on a number of material facts namely:

i. *That it was the appellant that was seen within the vicinity of the crime scene moments before the murder;*
ii. *That it was the appellant and the deceased speaking angrily towards each other before entering the building and the crime scene;*
iii. *That it was only the appellant and the deceased that entered the crime scene;*
iv. *That it was the appellant alone that exited the crime scene before the fire engulfed the top flat and the deceased lay dead at the crime scene.*

[18] The Full Court's observations in **Abourizk v State** [2019] FJCA 98; AAU0054.2016 (7 June 2019) at paragraphs 107 and 108 are very relevant in considering the issues of inconsistencies:

> *[107]* ***State of UP v. M K Anthony*** *(1985) 1 SCC 505*
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> *'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ is some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross Examination is an unequal duel between a rustic and a refined lawyer.'*
>
> *[108]* ***State of UP v. Naresh*** *(2011) 4 SCC 32*

'In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and also make material improvement while deposing in the court, it is not safe to rely upon such evidence. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground to reject the evidence in its entirety.

In **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat** (1983) 3 SCC 217 it was stated:

'Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.'

'A witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen..... The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another..... It is unrealistic to expect a witness to be a human tape-recorder ..... In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.... Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on ..... A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross- examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him — Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.'

[19] Thus, it appears that the inconsistencies highlighted by the appellant do not go to the root and shake the foundation of the evidence of PW3 and PW4 and therefore, cannot be annexed with undue importance [**Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)].

Ground (iv)

[20] Though the appellant seems to allege apparent bias on the part of the trial judge towards the prosecution, he has failed to demonstrate tangible instances to substantiate it. No appellate court could and should be expected to go on a voyage of discovery to find out what purported errors on the part of the trial judge have given rise to an appellant's grounds of appeal or the factual or legal foundations thereof (see **Pal v State** [2020] FJCA 179; AAU145.2019 (24 September 2020). Similarly, no party to appellate proceedings should be allowed to adopt a 'scatter gun' approach in drafting the grounds of appeal and not substantiated them with sufficient details at least in the written submissions [see **Silatolu v The State** [2006] FJCA 13; AAU0024.2003S (10 March 2006)].

Ground (v) and (vii)

[21] The appellant contests the issue of the deceased's identity. While this had not been a trial issue at all, for there was no doubt at all that the deceased was Ms. Feiyan Chen whose husband (PW2) had given evidence at to the death of his wife under tragic circumstances and according to PW3 and PW4, she was seen alive last with the appellant (as also admitted by the appellant at the trial) and within minutes the appellant was seen leaving alone and upstairs of the deceased's flat went up in flames and only her body was recovered by the firefighters who doused the fire. Her death is confirmed by the post-mortem report as well. Therefore, these are frivolous grounds of appeal.

Ground (vi)

[22] The appellant challenges the post-mortem report for its lack of lack of authenticity and being a fabrication. The post mortem confirmed that the substantial cause of death (swelling and bleeding of brain) was the blunt force trauma inflicted on the deceased. The pathologist had explained how such swelling and internal bleeding of the brain could have occurred. This ground of appeal is also frivolous.

Sentence

[23] The appellant has not appealed his sentence. However, I indicated to the state counsel at the hearing that I would on my own look into the minimum term of 28 years imposed on the appellant, particularly in the light of the guideline judgment of **Vuniwai v State** [2024] FJCA 100; AAU176.2019 (30 May 2024) delivered recently. In ***Vuniwai*** the court made the following observations:

> *'[72] ……..If the sentencing court decides not to impose a minimum term it must give adequate reasons when exercising the discretion not to impose a minimum term i.e. imposing a 'whole life order'. Similarly, if the court proceeds to impose a minimum term it should demonstrate as to what matters were considered (A) in deciding to set a minimum term and (B) when determining the length of the minimum term. As pointed out below, there may certainly be an overlap in reasons for (A) and (B).'*

[24] Though not specifically mentioned, the trial judge's reasons with regard to both the imposition and the length of the minimum term of 28 years are as follows:

> *8. Mr. **Rai** , your criminal behaviour had caused Mr. Sai Kin Yee and his two children untold miseries. You have deprived Mr. Yee of a loving wife and their two children a loving mother. You intruded into their lives in 2015. They offered to help you by giving you casual jobs. You exploited that by stealing from them, murdering Ms. Chen and setting fire to their residence. You showed Ms. Chen no mercy by repeatedly assaulting her to death. You did this within the confines of her home. Your actions and behaviour on 21 July 2020 at 3 Fenton Street, Lami, was the height of all evil. Obviously, you were motivated by greed, that is, the desire to steal their hard earned money, and cover your evil deeds by setting their house on fire. You will have to be punished in accordance with the law.*
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> *9. I note that you are a first offender at the age of 47 years old. You are single with no child. You are a building contractor by profession. You had been remanded in custody for 1 year 11 months 7 days.*
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> *10. On count no. 1 (murder), I sentence you to the mandatory life imprisonment. Given the matters mentioned above, I set 28 years as the minimum term to be served before a pardon may be considered by His Excellency the President of the Republic of Fiji.'*

[25] What the trial judge had stated above covers several facets discussed under [75] to [80] and [84] in ***Vuniwai.*** Yet, no specific reference had been made whether an appropriate discount had been afforded to the pre-trial remand period in determining the length of the minimum term though it had been mentioned in the sentencing order. The Court of Appeal said:

> *'[119] Therefore, the sentencing courts in Fiji too should, unless a court otherwise orders for adequate reasons, regard the pre-trial remand of the murder convict as a period of imprisonment already served by him and an appropriate discount should be given from the minimum term already arrived at following the 01st , 02nd and 03rd steps.'*

[26] I will now examine whether the minimum term of 28 years is justified in terms of guidelines at [91]to [95] and [117] to [120] in ***Vuniwai.***

[27] Referring to the three categories of seriousness namely 'Extremely High', 'High' and 'Low' discussed at [91], the Court of Appeal said in ***Vuniwai:***

> *[89] ……..In all 03 categories, the ultimate minimum term may be substantially reduced below the normal starting point where the offender's culpability is significantly reduced, and a substantial upward adjustment from the higher starting point may be appropriate in the most serious cases.*
>
> *[128] ……The guideline judgments are 'guidelines' (and not tramlines from which deviation is not permitted), and must not be applied in a mechanistic way.* ***The categories of seriousness themselves typically allow an overlap at the margins****.* ***Sentencing outside the categories is also not forbidden****, although it must be justified [see [54] in* ***State v Chand*** *[2023] FJCA 252; AAU75.2019 (29 November 2023)].*

[28] At first blush, the appellant's case seems to fall into the "High" category in ***Vuniwai***. However, it has more than one characteristic under 'High' category. It seems to have one or more characteristics relating to seriousness set out in paragraphs 1, 2 and 9 under 'High' category. The question is whether, therefore, his case should still be considered under the "High" category.

[29] Considering that the lists of cases described at [92] in ***Vuniwai*** under each of the categories are not exhaustive and given the observations at [89] and [128] it is possible and may indeed be necessary to consider the appellant's case under 'Extremely High' category at [92], ***for any combination of two or more situations in terms of seriousness (already listed in Vuniwai or otherwise) falling under 'High' category may be treated as another instance falling under 'Extremely High' category***.

[30] Alternatively, where a case technically falls under 'High' category in ***Vuniwai*** but overall seriousness exceeds natural and ordinary limits of 'High' category yet falling short of 'Extremely High' category, it is open for sentencing court to take a higher starting point than 20 years (but less than 25 years) and arrive at the final minimum term which may be outside the minimum term range for 'High' category.

[31] Thirdly, sentencing outside the categories is also not forbidden, although it must be justified and therefore while still considering the appellant's case under 'High' category in ***Vuniwai,*** the sentencing court, given the purposes of sentencing, level of culpability, level of harm, all the aggravating factors and mitigating factors, if any, as discussed in ***Vuniwa*** may still impose a minimum term outside the minimum term range for 'High' category. These considerations help judges determine the appropriate length of the minimum period that reflects the gravity of the offense, the offender's degree of responsibility, and the need for deterrence, rehabilitation, and proportionality in sentencing.

[32] I have considered the minimum term of 28 years in the light of ***Vuniwai*** guidelines and do not think that there is a 'striking' or 'startling' or 'disturbing' disparity between the trial court's minimum term and that which this court would have imposed under ***Vuniwai*** guidelines except for the possible failure of the trial judge to give a discount on account of the appellant's pre-trial remand period as the 04th step in ***Vuniwai***. However, no criticism is made of the trial judge as the law at the time of sentencing was that there was no requirement for a trial judge to consider the time spent on remand when imposing a minimum term under section 237 Crimes Act [see **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016). Nor do I

think that the minimum term is unreasonable or plainly unjust or that the minimum term of 28 years is so disproportionate or shocking that no reasonable court could have imposed it except the non-consideration of pre-trial remand period.

[33] It is the law that an appellate Court will not interfere with the sentence imposed by a trial Court unless it is shown to be manifestly excessive in the circumstances or wrong in principle. However, in the interest of justice and fairness, I am inclined to grant leave to appeal on sentence to see whether the Full Court will want to interfere with and adjust the minimum term in the appellant's favour having regard to the appellant's remand period applying ***Vuniwai*** guidelines.

Orders of the Court:

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

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

Solicitors:

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