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

**CRIMINAL APPEAL NO. AAU 054 of 2022**
**[In the High Court at Labasa Criminal Case No. HAC 49 of 2020]**

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| **BETWEEN** | : | **KINIVILIAME COLAITINIYARA RABICI** |
| | | ***Appellant*** |
| **AND** | : | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, RJA** |
| **Counsel** | : | **Mr. V. M. Bukayaro for the Appellant** |
| | : | **Ms. L. Latu for the Respondent** |
| **Date of Hearing** | : | **04 March 2024** |
| **Date of Ruling** | : | **06 March 2024** |

# RULING

[1] The appellant had been charged and convicted in the High Court at Labasa for having committed attempted murder of Lemeki Nacolaivalu on 23 July 2020 at Bagasau, Savusavu in the Northern Division contrary to section 44(1) and 237 of the Crimes Act 2009.

[2] The trial judge convicted the appellant and sentenced him on 27 June 2022 to mandatory life imprisonment and set a minimum serving period of 08 years. A timely appeal against conviction and sentence had been lodged by the appellant through his solicitors.

[3] In terms of section 21(1) (a) and (b) 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 **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)].

[4] 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].

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

***Conviction***

***Ground 1***

*THAT the Learned Trial Judge erred in admitting circumstantial evidence when he failed to carefully and properly assess the evidence of attempted murder as none of the Prosecution witnesses saw the accused commit the act.*

***Ground 2***

*THAT the Learned Trial Judge erred in admitting as evidence the alleged confession statements of the accused when he was caution interviewed.*

***Ground 3***

*THAT the Learned Trial Judge erred in admitting the complainant's evidence with the other four prosecution witnesses as the complainant although received stab wounds admits he did not see the assailant did the act.*

***Ground 4***

*THAT the Learned Trial Judge erred in law and in fact in allowing the prosecution to a defective charge for failing to particularise how the accused had attempted to murder the victim.*

***Ground 5***

*THAT the Learned Trial Judge erred in law and in fact in clearly make out the accused intent* as *he was after Iliapi and not Lemeki as the accused and Iliapi had an argument prior to the alleged incident.*

***Ground 6***

*THAT the Learned Trial Judge erred in law and in fact in failing to clearly make out the accused intent as he was after Iliapi and not Lemeki as the accused had a disability of one eyed.*

***Ground 7***

*THAT the Learned Trial Judge erred in in law in failing to clearly explain the weight and value of the confessional statements of the accused together with his right of silence exercised during trial.*

***Ground 8***

*THAT the Learned Trial Judge erred in law and in fact in making out the accused had engaged in an act or acts which were more than preparatory to commit an attempt of murder on the complainant.*

***Sentence***

***Ground 1***

*THAT the sentence is manifestly harsh and excessive.*

*(a) That given the five cases quoted in the Sentence of the Learned Trial Judge none was from circumstantial evidence;*
*(b) That the accused being remanded in custody for 1 year and 11 months should be deducted from the 8 years imprisonment.*

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

> *2. The facts are that offender and the victim are friends. Though the victim is from another island, they came to know each other in the village and used to drink grog together. On the night of 22 July 2020, the two of them drank grog with others and later, drank homebrew brought by the offender. While drinking homebrew, a fight broke out. The victim left the drinking party at this point and went home to sleep. Home was some distance away and when he got home, went straight to sleep.*

3. *He was awakened sometime around 3 o'clock in the morning when he felt pain on his back, neck and the top of his head. He sustained multiple stab wounds to these parts of his body. The wound to his head was not so serious but those on his back penetrated deep enough to injure his lungs. He passed out after jumping out of the house following the attack, in an attempt to save himself. He regained consciousness at the Health Centre. He was in a critical condition. Both doctors testified that the wounds were life threatening and could have resulted in death had he been presented late.*

4. *He did not see his assailant but circumstantial evidence placed the offender at the scene immediately before and in the vicinity immediately after the attack on the victim, with blood on his chest and the front of his body and on both his hands. The knife he was wielding was bloodstained. He told his grandfather Saula, "Kuku, death is here."*

5. *When interviewed by the Police and shown the knife taken from him shortly after the incident, the offender had admitted the knife was his saying he had brought it with him from home. This was evidence of pre-meditation and planning. The number of stab wounds, the gravity of the injuries and the words uttered by the accused not long after stabbing the victim point to an irrefutable inference of intent to murder.*

***01st and 03rd grounds of appeal***

[7] The identity of the appellant as the assailant had been established by his own confession in the form of the cautioned interview and charge statement coupled with the circumstantial evidence which are succinctly set out at paragraphs 44-52 of the judgment. I do not find any concern as to the identity of the appellant as the perpetrator of the attack on the victim.

***02nd and 07th grounds of appeal***

[8] The appellant argues that the trial judge should have considered the voluntariness of his cautioned interview although the defense did not contest its admissibility. He also argues that the trial judge had apparently failed to consider the weight and value of the cautioned statement as she delivered the judgment just two days after the conclusion of the trial.

[9] Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to Judges and Magistrates and at a trial before assessors a *voir dire* may be conducted prior to swearing in of the assessors but after the accused has pleaded to the information. **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) had earlier laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

> *'[24] Whenever the court it advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.*
>
> *[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.*

[10] In this case the appellant was represented by counsel and he had not indicated to the trial judge that he was challenging the confessional statements. Therefore, there was no need to have a voir dire to decide the voluntariness of the cautioned interview or charge statement. Nor was there any complaint of general unfairness in recording the cautioned interview or charge statement (see **Ganga Ram & Shiu Charan v R**, Criminal Appeal No. AAU0046 of 1983 (13 July 1984) as the appellant remained silent throughout the trial. **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) **Tuilagi v State** [2018] FJSC 3; CAV0013.2017 (26 April 2018) have no application to the facts of the appellant's case.

[11] There was no material before the trial judge to doubt the weight and value of the cautioned statement and the charge statement. The mere fact that the trial judge had

delivered the judgment in two days is no basis at all to doubt the soundness of the judgment.

***04th ground of appeal***

[12] The fact that the appellant had been charged by the police for committing an act with intent to cause grievous harm contrary to section 255(a) of the Crimes Act is not a bar for the DPP to file an information on attempted murder. It does not make the information for attempted murder 'defective'. This ground has no merit at all.

***05th and 06th grounds of appeal***

[13] The gist of the appellant's argument is that he with one eye did not intend to attack the victim, Lemeki but Iliapi and therefore, cannot be held liable for the attempted murder of Lemeki. The trial judge had dealt with this proposition at paragraphs 53-58 of the judgment and correctly ruled it out citing **Naidu v Reginam** [1984] FJLawRp 23; [1984] 30 FLR 81 (27 July 1984) which *inter alia* held:

> *'"Accident" could not be raised by way of defence where a deliberate and unlawful act resulted in the death of a person other than the one to whom it had been directed. See e.g. R. v. Mitchell (1983) 2 All E.R. 428 at p.431.*
>
> *The position is no different if the assailant was unaware of the presence of the unintended victim.*
>
> *The appellant's act in this case was a "willed" act. The intent was to inflict grievous bodily harm. Nothing about these sequence was accidental.'*

[14] In **R v Mitchell** [1983] 2 WLR 938, the defendant, having become involved in an argument whilst queuing in a post office, pushed an elderly man, causing him to fall accidentally on the deceased, an elderly woman, who subsequently died in hospital from her injuries. The defendant was convicted of unlawful act manslaughter. He unsuccessfully appealed on the ground that his unlawful act had not been directed at the victim. Staughton J held that although there was no direct contact between the defendant and the victim, she was injured as a direct and immediate result of his act. Thereafter her death occurred. The only question was one of causation and the jury

had concluded that the victim's death was caused by the defendant's act. The actions of the elderly man in falling on the victim were entirely foreseeable and did not break the chain of causation between the defendant's assault and the victim's death. In addition, the court saw no reason of policy for holding that an act calculated to harm A cannot be manslaughter if it in fact kills B.

[15] In **R v Goodfellow** (1986) 83 Cr App R 23, the defendant had deliberately fire bombed his own council house in the hope that he would be rehoused by the council. His wife and children, who had been in the house, were killed in the ensuing blaze. He appealed against his conviction for manslaughter on the ground that his unlawful act (criminal damage) had not been directed at the victims as required by *Dalby*. The Court of Appeal held that *Dalby* (**R v Dalby** [1982] 1 WLR 425**)** should not be construed as requiring proof of an intention on the part of the defendant to harm the victims. It was to be viewed as an authority on causation, in that the prosecution had to establish that there had been no fresh intervening cause between the defendant's act and the death.

***08th ground of appeal***

[16] The trial judge was correct to hold at paragraph 59 that the appellant's acts were not merely preparatory but intentional. At the least they were clearly reckless.

***09th ground of appeal (sentence)***

[17] The appellant submits that the trial judge should have deducted the pre-trial remand period from the minimum serving time of 08 years. However, in fixing the minimum period the trial judge had already considered the pre-trial remind period.

[18] The life imprisonment being mandatory, the main plank of the appellant's grievance appears to be on the minimum serving period of 08 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 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.

[19] Although the trial judge had not given specific reasons for the decision to set a minimum serving period, some reasons could be deduced from the sentencing order and the trial judge has given specific reasons for fixing the length of the period at 08 years some of which are aggravating and migratory factors involved in the offending.

***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***

[20] 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.*

[21] 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.'*

[22] 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.*

[23] 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.*

[24] 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.

[25] Given the facts of the case, it appears to me that the starting point for the appellant could have been taken as 25 years as his case falls into the third category and then after adjusting for many aggravating factors and mitigating factors, the minimum serving period of 08 years is a very generous period.

***Orders of the Court:***

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

COURT OF APPEAL FIJI

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

**Solicitors:**

Bukayaro Esq for the Appellant
Office of the Director of Public Prosecution for the Respondent