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

CRIMINAL APPEAL NO. AAU 71 of 2022
[In the High Court at Lautoka Criminal Case No. HAC 030 of 2018]

BETWEEN	:	**RAVIN NATH**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. J. Nasa for the Respondent**
Date of Hearing	:	**07 March 2024**
Date of Ruling	:	**08 March 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Lautoka for having committed attempted murder of his wife Nanise Ralulu Tinai contrary to section 44(1) and 237 of the Crimes Act 2009. The particulars of the offence are that:

Statement of Offence

ATTEMPTED MURDER: *Contrary to section 44 and 237 of the Crimes Act 2009.*

Particulars of Offence

RAVIN NATH , *on the 26th January, 2018, at Lautoka in the Western Division attempted to murder NANISE RALULU TINAI.*

[2] After the assessors unanimously expressed an opinion of guilty, the trial judge convicted the appellant and sentenced him on 13 January 2021 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.

[3] 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)].

[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 law when he failed to canvass the defense case in an objective, fair and balanced manner. Thereby overlooking the defence of provocation pursuant to section 44 (6) of the Criminal Procedure Act.*

Additional Grounds of Appeal

(a) THAT the Learned Trial Judge erred in law thus failed to take into consideration and to direct the assessors on the facts which did not disclose the offence of Attempted Murder beyond reasonable doubt.

(b) THAT the Learned Trial Judge erred in law thus failed to analyse the evidence of provocation that there was no intention to kill but Act to Intent to Cause Grievous Harm due to provocation.

(c) THAT the Learned Trial Judge thus failed to define intention and knowledge of fault element in the section 44 (3) of the Criminal Act 2009 states "subject to section 7 for the offence of attempting to commit an offence intention and knowledge are fault elements in relation to each physical element of the offence attempted.

(d) THAT the Learned Trial Judge failed and/or neglected to fairly put the defence of the petitioner to the assessors which resulted in substantial miscarriage of justice.

(e) THAT the Learned Trial Judge erred in law thus failed to give proper and adequate direction to the assessor regarding the expert evidence and the medical findings which does not support the information of Attempted Murder but does support the offence of Act with Intent to Grievous Harm (see Etonia Vosa v State Criminal Appeal No. AAU 0084 of 2015 in the High Court Criminal Case of HAC 040 of 2015).

Sentence:

(f) THAT the sentence is excessively harsh in regards to the whole circumstances of the case.

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

> *'[4] ……. According to the evidence presented by the prosecution and the admitted facts, the prosecution alleges that the accused had struck the complainant on her legs, hands, and the shoulder with a cane knife causing her injuries as stated in the medical report. The accused did not deny the incident and assaulting her with a cane knife, but he claimed that he had no intention to kill her as the complainant provoked him. Due to the provocation, he lost his sense and did not know what he had done. The accused claims that he had a blackout and could only recall that he swung the cane knife at the complainant. Accordingly, the accused is relying on the defence of provocation.'*

[7] The prosecution led the evidence of 05 witnesses and the appellant have evidence on his behalf.

Grounds of appeal 01, (b) and (d)

[8] All three grounds of appeal is based on 'provocation' which is rather misconceived. The victim had admitted that an argument developed between the appellant and the complainant over a phone call and she had then spit on him before the appellant struck multiple blows on her with his cane knife. According to the appellant, while the complainant and he were in the kitchen, an argument developed over her plan to visit Navua to attend her grandmother's birthday with their son. The complainant had spitted on him twice, but he wiped it out and went out to sharpen the cane knife to cut the chicken. When he came back, he saw the complainant on her phone. She had spitted on him again and pushed him away. He stood up and tried to see the phone of the complainant, but she hid it. He then tried to cut the chicken. At the time he started to cut the chicken, the complainant spitted on him again. The appellant had said that he did not know what happened to him. According to him, he had a blackout, and he just swung the knife three to four times at the complainant. After a while, he realised what he had done.

[9] Thus, the appellant had not specifically pleaded 'provocation' as a defense but seems to have insinuated it by his narrative. However, the trial judge had directed the assessors that the appellant was relying on the defence of provocation but also advised them as follows:

> *'26. The defence of provocation is not available for the offence of attempted murder. Therefore, I must advise you that you should not consider the defence of provocation raised by the accused to find him not guilty of this offence of attempted murder. If you find the accused was provoked by the complainant and lost his sense and cool, you are still not allowed to find that the accused had no intention to kill or had no knowledge that his action would cause the death of the complainant.'*

[10] The trial judge had correctly directed himself in the judgment that the defence of provocation is not available for attempted murder (vide **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019). Section 242(1) of the Crimes Act also supports this proposition as provocation as a partial defence is available only when a person unlawfully ***kills*** another which will bring his culpability down to manslaughter and

not when only an attempt is made. According to ***Samy,*** provocation could only apply to a case of murder, not attempted murder but it will go to mitigation and the length of the sentence.

[11] Section 2(1) of the Criminal Code (Tasmania) provided:

> *"An attempt to commit a crime is an act or omission done or made with intent to commit that crime, and forming part of a series of events which if it were not interrupted would constitute the actual commission of the crime."*

Section 160(1) provided:

> *"Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation."*

Section 157(1) stated the circumstances in which, subject to s 160, culpable homicide was murder.

Held, in **STEVEN JOHN McGHEE v THE QUEEN** (1995) 130 ALR 142 13 July 1995 by Brennan, Dawson, Toohey and Gaudron JJ, Deane J dissenting in the High Court of Australia, that a plea of provocation could not be raised under s 160(1) to a charge of attempted murder.

Ground (a)

[12] The basis of this ground appears to be that the verdict is either unreasonable or cannot be supported by evidence. Considering the totality of the summing-up and the judgment, I cannot see any ground for this argument to succeed.

[13] The question the appellate court should ask itself is whether there was evidence before the court on which a reasonably minded jury (in Fiji assessors) could have convicted the appellant in that having considered the evidence against the appellant as a whole, whether the court can or cannot say whether the verdict was unreasonable in that whether there was clearly evidence on which the verdict could be based [see **Sahib v**

State [1992] FJCA 24; AAU0018u.87s (27 November 1992)]. In terms of section 23 (1) of the Court of Appeal Act, the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed but the proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred [**Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[14] 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'***

[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).

[19] I have considered the matters raised by the appellant under this ground of appeal but do not find them to be in anyway adequate to render the verdicts unreasonable or unsupported by evidence.

Ground (c)

[20] Intention and knowledge are the two fault elements in relation to physical element of the offence of attempted murder whereas intention to cause death, or being reckless as to causing the death of the other person are the two fault elements for the offence of murder.

[21] The trial judge at paragraphs 14, 15 and 27 had amply analyzed for the assessors the fault elements of attempted murder. The Supreme Court of Canada in **The Queen v. Ancio** 1984] 1 SCR 225 (1984-04-02) held that:

> *'The mens rea for attempted murder is the specific intent to kill and a mental state falling short of that level, while it might lead to conviction for other offences, cannot lead to a conviction for an attempt. The completed offence of murder involves killing and any intention to complete that offence must include the intention to kill. An attempt to murder should have no lesser intent. Nothing illogical arises from the fact that in certain circumstances a lesser intent will suffice for a conviction for murder…..*
>
> *The crime of attempt developed as, and remains, an offence separate and distinct from murder. While the Crown must still prove both mens rea and actus reus, the mens rea is the more important element. The intent to commit the desired offence is a basic element of the offence of attempt, and indeed, may be the sole criminal element in the offence given that an attempt may be complete without completion of the offence intended.'*

[22] The appellant had struck the victim on her left leg with the cane knife. She had moved away, but he struck again on her right leg with the cane knife. She had sat down and saw the appellant aiming at her face with the cane knife. She tried to cover her face with her right hand. He struck again on her right hand, causing a cut below her wrist. He again struck which she tried to cover with her left hand. That strike landed on her left hand, severing two of her fingers. While she was still sitting down, the appellant had walked to the door and waited for a while. He was breathing in and out heavily.

He suddenly turned back and came to her and again struck her on her shoulder with the cane knife. Doctor Mckaig had described the nature of the injuries and the treatment he had given to the complainant. The injuries sustained by the complainant were severe, and she was in a hypovolemic shock due to the blood loss. A person could die due to such hypovolemic shock unless he or she is treated immediately. According to Doctor Mckaig, a very sharp object used with enormous force would have caused these injuries.

[23] Given the above evidence, the assessors and the trial judge was justified in concluding that the appellant had intended to cause death of the complainant or he knew that his action would cause the death of the complainant and he did not intend just to do grievous bodily harm of the complainant as argued by the appellant.

Ground (d)

[24] The trial judge had directed the assessors on medical evidence adequately at paragraph 19 of the summing-up. He had also directed them as follows:

> *27. You have to determine whether the accused had an intention to kill the complainant or knew that his action would cause the death of the complainant. You have to determine then whether the accused had struck the complainant, with that intention or the knowledge, on her legs, hands and the shoulder with the cane knife, causing the injuries as stated in the medical report. If you are satisfied that the prosecution has proven it beyond a reasonable doubt, then you must find the accused guilty of the offence. If you are not satisfied or doubt it, you must then find the accused not guilty.*

[25] Thus, as already said before the manner of the attack, the ferocity of the attack, the areas of the complainants' body where the attack was directed at by the appellant suggest unmistakably that he simply did not only act with intent to cause grievous harm but either intended to cause death of the complainant or he knew that his action would cause the death of the complainant.

Ground (f) - Sentence

[26] 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.

[27] 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 including provocation 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

[28] 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.*

[29] 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.'

[30] 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.

[31] 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.

[32] 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.

[33] 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

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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