

3IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 001 OF 2022
High Court No. HAC 310 of 2019

BETWEEN : **THE STATE**
Appellant

AND : **LUKE NASETAVA**
Respondent

Counsel : Mr L. Burney for Appellant
Respondent in person

CRIMINAL APPEAL NO. AAU 009 OF 2022
High Court No. HAC 310 of 2019

BETWEEN : **LUKE NASETAVA**
Appellant

AND : **THE STATE**
Respondent

Coram : Mataitoga, RJA

Counsel : Appellant in person
Mr L. Burney for Respondent

Date of Hearing : 22 March, 2024

Date of Ruling : 17 April 2024

RULING

1. The appellant was tried at the High Court in Suva, without assessors, from 17, 18,19 and 22 of November 2022. The following information was read over and explained to the appellant, in the presence of his counsels:

“Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Act 2009.

Particulars of Offence

LUKE NASETAVA, on the 31st day of August 2019 at Suva in the Central Division murdered AMELIA MAFI.”

2. Following the trial the appellant was acquitted of the murder charge, and found guilty of Manslaughter by the trial judge. He was sentenced to 9 years of imprisonment with a non-parole period of 8 years effective from 14 January 2022.

Appeal and Cross Appeal

3. The State, as appellant filed a Notice of Appeal for an Application for Leave to Appeal against Acquittal on 14 January 2022 in AAU 001 of 2022. On 18 February 2022 appellant filed an application for Leave to Appeal against sentence in AAU 009/ of 2022. This was timely appeal by the State.
4. By handwritten letter dated 25 January 2022, Luke Nasctava, the appellant in AAU 009 of 2022, submitted his Application for Appeal against Sentence, which was filed in court registry on 10 February 2022. The Appellant’s submission against sentence was filed 21 November 2023. This was timely application i.e. AAU 09 of 2022.

Applicable Law and Principles

5. Section 21(1)(a) and (b) of the Court of Appeal Act are the relevant provisions here. The following is clear:
 - i. *Section 21(1)(a) does not require leave of the court, and there are two grounds claims that they raise issues of law only. It will be assessed to establish whether it in fact raises an issue of law only.*

ii. *Section 21(1)(b) requires that the appellants obtain leave of the court to appeal if the grounds they urge on the court involves issues of law and fact*

6. Where leave to appeal is required, the test for leave to be granted, the court must be satisfied that the grounds submitted by the appellant has **'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 **Waqasaga v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019).]
7. Since this case involves both parties submitting separate Notices for Leave to appeal against conviction and sentence respectively, I will first deal with appeal by the State – the appellant in AAU 01 of 2022 before considering the sentence appeal of the appellant [Luke Nasetava] in AAU 009 of 2022.

Grounds of Appeal [State] Appellant in AAU 001 of 2022
Against Conviction

8. The appellant submitted 4 grounds of appeal. They are:
- (i) The trial judge erred in law and in fact in failing to direct his mind to the question whether there was evidence from which the judge might conclude that the respondent was or may have been provoked.
 - (ii) The trial judge erred in law and fact that marital infidelity may constitute a wrongful act or insult within the meaning of section 242(2) of the Crime Act 2009
 - (iii) The trial judge erred in law in treating the consumption of alcohol as material to the objective assessment of the power of self-control of an ordinary person
 - (iv) The trial judge erred in law in acquitting the respondent on charge of murder was unreasonable and cannot be supported having regard to the evidence.
9. I will first assess grounds 2 and 3 before assessing grounds 1 and 4, against the threshold of **'reasonable prospect of success'** requirement discussed in paragraph 8 above.

10. Ground 2 on whether marital infidelity constitute wrongful acts or insult envisaged in section 242 (2) of the Crime Act 2009.
11. In my view that marital infidelity does not constitute wrongful act or insult in the circumstances of this case. In Fiji, the test is the ordinary man test, that is, whether the accused caused the death of the deceased in the heat of passion caused by sudden provocation having reacted to a wrongful act or insult of the deceased which was of such nature to be likely to deprive the ordinary the power of self-control. The facts in this case are such that the appellant came prepared to cause serious injury to his wife now deceased.
12. In Lesu v State [2003] FJCA 1 (AAU 003/2002) the Court of Appeal stated the following:

“The fact that the deceased lived in defacto relationship with Kolora and had a child by him was known to the appellant. The appellant had accepted the situation. He went to the house where the deceased in the early hour hours of the morning when most people are in bed, sleeping. He was armed. There is no rational explanation why the appellant took the knife him, unless he intended to use it on the deceased, in thin the way he did. The deceased did not punch the appellant until he was struck the first blow with the knife, a perfectly natural and predictable response. Mr O’Driscoll, Counsel for the appellant, submitted that finding his wife with the appellant in bed when he had earlier arranged to spend the night with her constituted “such wrongful act or insult” as to constitute provocation. We cannot agree. We do not think in the circumstances of this case that the alleged provocation was such as would deprive a reasonable man of the power of self-control such as to induce him to commit the kind of violence which the appellant inflicted on the deceased. There was a large element of premeditation in what the appellant did.”

13. In Masicola v State [2023] FJSC 27 (CAV 011/2021) the husband travelled from his residence to another suburb in Suva to kill her wife who was having sex with another man. He walked for several kilometers from Veikoba to Kaleli settlement in Nasinu with knife to kill his wife. The court did not accept the slow-burning provocation argument discussed by the court in Codrokadroka v State [2015] FJSC 15.
14. The evidence in this case suggests that the respondent has obviously worked himself up about suspicions of the deceased marital infidelity. The respondent had been drinking alcohol heavily in the hours before he set off on the long journey from Lautoka

to Suva which ended in the killing of his wife. PW7 evidence pointed to the fact that the deceased feeling threatened after her telephone conversation with the offender on the morning of 31 August 2019. All these suggest premeditation.

15. This ground of appeal involves a question of law regarding the meaning of 'wrongful act or insult' in the definition of what may constitute provocation under section 242 (2) Crimes Act 2009. It is for the full court to determine.
16. Leave is not necessary for this ground granted. It should go to the full court to decide on the issue of law raised therein.
17. Ground 3 raise an issue of law and its application to the facts of this case. It requires leave under section 21 (1)(b) of the Court of Appeal Act. The consumption of alcohol by the respondent [Luke Nasetava] while in a taxi on the way to Suva, traveling to confront his wife about her infidelity, was observed by the trial judge as having the effect of making him loose control [reference: last sentence of paragraph 21 of Judgement.]
18. As noted earlier in Fiji the test is: what wrongful act or insult that would deprive an ordinary person [like the respondent] of self-control and to induce him to commit the assault for which the murder charge is based. In this case, the respondent even before he arrived at his deceased wife's workplace where he committed the wrongful act, that killed her, was already under the influence of alcohol. His consumption of alcohol to be taken as part of the trial judge's objective assessment of the deprivation of the power of self-control of the respondent, was an error of law due the fact that the lack of self-control was self-induced through consumption of alcohol.
19. Leave is granted for appeal on this ground.
20. Ground 1 - On the basis of the evidence in this case, was the trial judge in a position to find acts or omissions that come within the **wrongful act or insult** sufficient engage the partial defense of provocation. At paragraph 25 of the judgement the trial judge considered the suggestion from the deceased wife for respondent [Luke Nasetava] to find another woman while she finds another man as the wrongful act and insult within

section 242 (2) of the Crime Act. It is even suggested by the trial judge that this encourages adultery.

21. PW7's evidence stated that the deceased was having an extra-marital affair and the respondent also in his statement after he was charged admitted that the deceased told him that she was having an affair with another man. Any suggestion that the deceased lied about her extra-marital affairs to the respondent is baseless on the evidence adduced in court. This evidence may not support the claim of provocation: R. v Yasso [2002] 6 VR 239.
22. The deceased loudly telling the respondent to "*Fuck Off Outside*", is not denied. The context in which this insult took place was when the deceased was confronted by the respondent at her workplace in plain sight of her workmates, in a high state of inebriation due to consumption of alcohol.
23. The evidence referred to above is insufficient for finding of provocation, as was allowed in this case. Leave is granted for appeal to the full court.
24. Ground 4 - With regard to this ground, the following the following are relevant: the trial judge had found the murder charge against the respondent proven by the prosecution beyond reasonable doubt: refer to first 4 point on finding of fact at paragraph 28 of the judgement. Those 4 additional finding of the court cover the essential elements of the murder charge.
25. As a matter of law, was the trial judge correct to acquit the respondent of the murder charge? I think not, for the following reasons:
 - (i) The trial judge had found that the elements of the offence of murder as charged was proven beyond reasonable doubt by the prosecution {Refer to Paragraph 28 of Judgement}
 - (ii) Provocation is a partial defense not a complete defense that may reduce the charged from murder to manslaughter. Acquittal is not open to the trial judge in that circumstance.

- (iii) The appellant can only be acquitted if the evidence offered is inadequate, weak, contradictory, or fails to inspire confidence, which leads to doubt in the appellant's role in the commission of the crime. This lack of evidence beyond reasonable doubt, may permit the court toward an acquittal. That is not the case here.

26. Leave to Appeal is granted for this ground of appeal.

Appeal against Sentence – AAU 009 of 2022

27. In this appeal, the appellant is Luke Nasetava and the State is the respondent.
28. The grounds of appeal against sentence by the appellant was initially only 1 ground. It was amended by an Amendment Notice & Submission filed on 5 October 2023, the grounds of appeal is now 3. The initial Notice of Appeal was dated 22 January 2022. The sentence ruling appealed against was delivered on 14 January 2022. This appeal against sentence is timely.
29. The guidelines to be followed when a sentence is challenged on appeal, was set out by the Court of Appeal in **Kim Nam Bae v State** [1999] FJCA 21 (AAU No: 0015/18) and endorsed by the Supreme Court in **Naisua v State** [2013] FJSC 14 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.
30. The appellant Luke Nasetava have submitted the following grounds of appeal against sentence:
- (i) The trial judge erred in his sentencing discretion when he failed to act upon a correct principle on tariff for manslaughter resulting in a harsh and excessive sentence;
 - (ii) The trial judge erred in law in allowing extraneous or irrelevant matters to guide or affect him in sentencing to regard such matters as aggravating circumstances to enhance the sentence;

- (iii) There was lack of consideration of the provisions of the Sentencing & Penalties Act when determining sentence.

31. The respondent [the State] in this matter have filed cross-appeal against conviction based on the sole ground that: The sentencing judge erred in the exercise of his sentencing discretion by failing to have any, or sufficient regard to the domestic violence context of the offending and the respondents self-induced intoxication and use of a weapon as serious aggravating factors resulting in an unduly lenient sentence in all the circumstances of the Appellant's offending.

Assessment of the grounds

32. Having considered the sentence ruling and all the grounds advanced by the appellant I have concluded that none has any merit. As regards, ground 1 the judge choosing the starting point of 6 years is not an error of law, though it is bit on the low side given the circumstances of this case.
33. The applicable principle in assessing evidence on appeal, is to consider the totality of the sentence, not the mechanistic way in which it was derived. In this case 9 years imprisonment with 8 years non-parole period is not harsh or excessive.
34. Ground 2 of the appellants ground claim that there was no evidence that the judge could rely on as part of the aggravating factors in composing the sentence. The appellant is wrong on this claim. There was evidence before the judge and he may rely on it in making the sentence. The Victim Impact Report from pages 3 to 8 set out clearly evidence regarding the impact of the death of Amelia MAFI on the aunt Asenaca Tikoikorovou, who raised her up as her own child. This ground has no merit.
35. Ground 3 alleges that there was no consideration given to the rehabilitation aspect of sentencing provided for in section 4 of the Sentencing & Penalties Act [S&PA. In support of this claim, he submits that he travelled to Suva to try and solve their marital problem.
36. At the trial, PW7 gave evidence that established that after a telephone the appellant had with the deceased wife on that fateful morning, the deceased was noticeably frightened and disturbed. If the visit from the appellant was to seek to solve the problem that state

of high anxiety would not have been present in the deceased. The appellant himself turned up at the workplace of deceased wife highly intoxicated.

37. Section 4 (1) S&PA is not relevant in this case. Section 4(2)(3) of the S&PA set out factors that inform the sentencing that may be passed.
38. All the grounds of appeal against sentence have no merit and are dismissed.


Ground of appeal against by the State – insufficient consideration of factors of the domestic violence aspects of this case in section 4(3) S&PA

39. The appellant (State) point to the fact that judge gave inappropriate weight the following aggravating factors:
- The domestic violence context
 - Self-induce intoxication
 - Use of knife
40. There is sufficient basis for this matter of sentence as regards the factors raised by the cross appeal of the state to go to the full court.
41. Leave is granted to the cross-appeal grounds of the respondent [State]

ORDERS

1. Leave is granted to appeal against conviction [acquittal of Murder Charge] in AAU 001 of 2022.
2. Leave is refused for the appeal ground submitted by the appellant in AAU 009 of 2022.
3. Leave is granted to appeal on the cross-appeal ground against sentence, by the respondent (State) in AAU 009 of 2022.




Isikeli U Maitoga
Resident Justice of Appeal