

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

**CRIMINAL APPEAL NO. AAU 066 OF 2019**  
**[Lautoka Criminal Case No. HAC 63B of 2015]**

**BETWEEN** : **SHALENDRA KRISHNA SAMI**  
*Appellant*

**AND** : **THE STATE**  
*Respondent*

**Coram** : **Mataitoga, P**  
**Qetaki, RJA**  
**Dobson, JA**

**Counsel** : **Ms. L. Manulevu for the Appellants**  
: **Ms. S. Shameem for the Respondent**

**Date of Hearing** : **02 July 2025**

**Date of Judgment** : **25 July 2025**

**JUDGMENT**

**Mataitoga, P**

[1] I concur with reasons and conclusions of this judgment.

**Qetaki, RJA**

**(A). Background**

[2] The Appellant is challenging his conviction on one count of murder contrary to section 237 of the Crimes Act, 2009 committed on 16 April 2015 at Lautoka in the Western

Division. He was sentenced on 26 March 2019 to life imprisonment with 12 years minimum serving period.

[3] The Appellant in person lodged a timely appeal against conviction filed on 22 May 2019 and was later amended by Legal Aid Commission on 28 February 2022. Leave hearing before a single Judge was held on 13 July 2022 on the single ground that:

*“The learned trial Judge erred in law and in fact by not directing the assessors on the defence of provocation which is available on the evidence.”*

[4] The leave to appeal against conviction was refused on 14 July 2022.

[5] On 19 August 2022 the Appellant in person filed renewal application for leave to appeal and belated application for leave to appeal on new grounds. On 10 March 2023 the Appellant filed another notice of renewal application and he also filed additional ground of appeal on the same day.

[6] The Appellant’s initial application for legal assistance was refused which explains why there has been delay in the filing of renewal applications. On 24 April 2025, the President of the Court had requested Legal Aid Commission to assist the Appellant in drafting his grounds of appeal.

[7] The evidence is as follows:

- i. The deceased and the accused are brothers. They lived in the same house with the deceased’s wife and their two children, and their parents.
- ii. There have been continuous disputes between the accused and his deceased brother, with frequent fighting erupting.
- iii. The relationship between the deceased and the accused had been strained throughout. The family members are aware of the tension between the two, especially the deceased’s wife.
- iv. On 16 April 2015 there was a fight between the accused and the deceased brother, when only the two of them were in their home. The accused received injuries in one of his fingers as a result of their fight.

- v. Later the deceased brought a kitchen knife and the accused started to struggle with the deceased. During the struggle the accused pushed the deceased's hand so hard and the knife struck the deceased's neck.
- vi. Having seen the knife strike the deceased's neck, the accused pushed the knife further into his neck.
- vii. After the deceased fell onto the floor, the accused once again stabbed the deceased on his back.
- viii. The Medical evidence revealed that accused caused two independently fatal wounds on the deceased resulting in instant death.
- ix. Later the accused called their mother who was at a neighbour's house and the accused confessed to their mother that he killed his brother.
- x. The incident was reported to the police as a case of suicide. Later upon investigation the accused was arrested and charged for murder. The accused in his caution interview admitted to the offence.

**(B). Grounds of Appeal (Renewal Notice of Appeal dated 25 June, 2025)**

[8] The grounds of appeal are set out below:

Ground 1: *The learned trial Judge erred in law and in facts by not directing the assessors on the defence of provocation, which is available on the evidence.*

Ground 2: *That the learned trial Judge erred in law and in fact in convicting the Appellant of murder when the evidence in totality does not support the conviction.*

**(C). The Law**

[9] In terms of section 21 (1) (b) of the Court of Appeal Act, the Appellant could appeal against his conviction only with the leave of the court. For a timely appeal, the test for leave to appeal against conviction and sentence is “*reasonable prospect of success*” - see **Caucu v State** [2018] FJCA 171; AAU0029 of 2016

(04 October 2018) and the line of similar authorities, on *arguable grounds*: **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU 10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV10 of 2013 (20 November 2013).

**(D). High Court Judgment (per Rangajeeva Wimalasena, Acting Judge)**

[10] The learned trial Judge stated that the:

- (i) Prosecution relied on 2<sup>nd</sup> limb of section 237 of the Crimes Act 2009, and conducted its case to align with the argument that the accused was reckless as to causing death of the deceased by his conduct. He found that the prosecution relied mainly on caution interview of accused and presented the evidence of the other witnesses to bolster the prosecution case. (Para.6)
- (ii) The accused took up the position that he acted in self-defence. Counsel for the accused contended that some of the answers in the caution interview were fabricated. Trial Judge had directed the assessors on accepting the admissions contained in the caution interview and on the concept of self-defence. (Paras.7 and 8)
- (iii) Trial Judge was informed prior to the commencement of the trial that the accused does not wish to challenge the caution interview statement. On that basis the interviewing officer tendered the caution interview statement as evidence. This was challenged by the counsel for the accused (during the cross-examination of interviewing officer), and it was suggested that the answers to questions 33, 36 and 70 of the interview questions were fabricated by the police. (Para 9)
- (iv) Considered the evidence given by the interviewing officer, D/Sgt 1898 Arvind Singh who denied allegations of fabrication, particularly responses to questions 33, 36 and 70. Trial Judge is satisfied that the caution interview statement is not fabricated, particularly the answers to the questions 33, 36 and 70. Further he is satisfied that the contents of the statement are true and accurate. He decided that the court can safely rely on the statement as true narration of the incident, and he accepted the contents of the accused's caution interview. (Para.10)

[11] The learned trial Judge discussed the contents of the caution interview statement which is reflected in the evidence-see paragraph [7] above.

[12] The learned Judge considered the evidence of Savitri (mother), Dr James V. Kalougivaki, Rajeshni Devi (deceased's wife) and Pushpa Wati (neighbour) - Paragraph 12 - 15. Their evidence is reflected in paragraph [7] above.

[13] The learned trial Judge was of the view that the prosecution witnesses gave reliable evidence. Their evidence was not challenged or discredited. Para. 16.

[14] The learned trial Judge stated that the accused gave evidence that he acted in self defence, and expressed the view that the accused's evidence was inconsistent and evasive. He was not inclined to accept accused's evidence as "it lacks credibility and reliability". The learned trial Judge had considered the defence of self defence under section 42 of the Crimes Act 2009 and whether it could be relied upon by the defence, and referred to the case **Aziz v State** [2015] FJCA 91; AAU 112.2011 (13 July 2015), where the defence was discussed, and it was observed that:

*"The defence of self defence is now, as a result of the words "if and only if", available as a statutory defence. The defence will exonerate an accused person in the event that the prosecution fails to establish beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as they were perceived by the accused. This is the only basis upon which the use of force in self defence will negate criminal responsibility for an offence".*  
(Paragraphs 17 to 19 of Judgment.)

[15] In considering the totality of the evidence, the learned trial Judge in paragraph 20 stated that the prosecution had established that there was no reason for the accused to perceive that it was necessary for him to push the knife further into the neck of the deceased and to stab him again when the deceased fell down. He stated that *"It is clearly an act of retaliation out of proportion"*.

[16] The learned trial Judge concluded by saying, paragraph 21:

*"..... I am satisfied that the prosecution proved beyond reasonable doubt that the conduct of the Accused was not a reasonable response to the circumstances"*

*as they were perceived by the Accused.....I decide that the Accused cannot resort to the defence of self-defence in the circumstances of this case. I am satisfied that the prosecution proved beyond reasonable doubt that the Accused did not act in self defence. Upon the direction given at the summing up, the assessors rightly excluded that the defence of self defence is not available to the Accused.”*

**(E). Ruling (per Prematilaka, RJA dated 14 July 2022)**

[17] Only one ground of appeal was before a single Judge when considering the Appellant’s leave application for extension of time:

*“Ground 1: The learned trial Judge erred in law and in facts by not directing the assessors on the defence of provocation which is available on the evidence.”*

[18] The learned single Judge stated in terms of section 242(1) of the Crimes Act 2009, a plea of sudden provocation could bring murder down to manslaughter where the death of the deceased has been caused by the accused in the heat of passion caused by such provocation before there is time for the passion to cool.

[19] The learned single Judge stated that the law requires the Judge to ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case. For the plea of sudden provocation to succeed there must be a credible narrative, on the evidence of provocative words or deeds of the deceased (*the source of provocation can be one incident or several; To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case; However cumulative provocation is in principle relevant and admissible*), of a resulting sudden loss of self-control by the accused, of an attack on the deceased proportionate to the provocative words or deeds and an evidential link between the provocation offered and the assault inflicted. Although there is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial, the defence cannot require the issue to be left to the jury unless a credible narrative of events suggesting the presence of these elements has been produced: **Masicola v. State** [2021] FJCA 176; AAU073.2015 (29 April 2021). Paragraph 8 of Ruling.

[20] In other words there must be an evidential basis for running the defence of provocation. The Appellant had unsuccessfully run his case on self-defence. According to medical evidence, it would need significant force to cause an injury of the nature of the stab wound in left front of the neck of the deceased. This injury was necessarily fatal and could have been caused with the knife produced at the trial. The second injury too on its own had been necessarily fatal and could have been caused with the same knife with significant force when the deceased was stabbed when he was lying face down.

[21] Paragraph [11] of the Ruling seems conclusive, which states:

*“The narrative given by the appellant in his caution interview led in evidence uncontested by him shows the appellant had a fight with the deceased when only he and the deceased were at home. The appellant had received injuries in one of his fingers as a result of the fight. The deceased had brought a kitchen knife and the appellant had started struggling with him. During the struggle the appellant had pushed the deceased’s hand so hard that the knife struck the deceased’s neck. Having seen the knife struck the deceased’s neck, he had pushed the knife further into his neck. After the deceased fell on the floor, once again the appellant had stabbed the deceased on his back.”*

[22] It is no surprise that the defence of self defence did not succeed. The learned single Judge is convinced that there was no evidential basis/credible narrative for the trial Judge to have put defence of provocation to the assessors or for him to have considered it himself in the judgment. This also explains why the Appellant’s counsel had not asked for redirection on provocation either. He concluded that in the circumstances, he does not see a reasonable prospect of success on the ground of appeal.

## **(F). Appellant’s Case**

### **Ground 1:**

[23] The Appellant accepts that the defence of provocation was not raised by the Appellant at trial, and the learned trial Judge had not directed the assessors to consider the defence in their deliberation. It is generally if not universally accepted that there is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial: as discussed in the case **Tapoge v State** at paragraphs

[16] to [19], which cited other other cases that adopted the same principle: **Praneel Kumar v Reginam**, FCA Criminal Appeal No25 of 1972; **Maha Narayan v Reginam**, FCACriminal Appeal No.1 of 1972.

[24] The scope of that duty in relation to provocation was explained by Lord Devlin in **Lee Chun Chuen v R** (1963) AC 220 as follows:

*“Provocation in law consists mainly of three elements- the act of provocation, the loss of control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.”*

[25] In **Isoa Codrokadroka v The State**, Unreported Criminal Appeal No. CAV of 2013, (20 November 2013), the Supreme Court endorsed the judicial approach to provocation that was formulated by this Court. The Court of Appeal summarised at paragraph 38 the judicial approach that should be taken in relation to provocation as follows:

1. *The Judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.*
2. *There should be a credible narrative on the evidence of provocation words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*
3. *There should be credible narrative of a resulting loss of self-control by the accused.*
4. *There should be a credible narrative of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.*
5. *The source of the provocation can be one incident or several. To what extent a history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However, cumulative provocation is in principle relevant and admissible.*
6. *There must be an evidential link between the provocation offered and the assault inflicted.”*

[26] The Appellant submits that in this case, there is evidence that warrants a direction on provocation for the assessors to consider. The evidence is as follows:

- (i) *The fights, arguments and taunting: The Appellant's evidence is that the deceased attacked him with a spear (pages 489 to 491 Court records). There is the evidence of PW3 who testified that she sometimes hear them fighting and she never went to check (paragraph 39 of summing up) and page 392 of the Court Records where PW3 confirmed that she usually hear the fights between the two brothers going on in their house. This is also confirmed by paragraph 40 of the summing up. It is apparent from the evidence of PW3 that the Appellant and the deceased were usually fighting. PW2 had testified that the deceased and the Appellant did not fight with each other when she is at home and this also confirmed in page 362 of the Court Records but it does not negate the fact that the two brothers usually argue or fight. Therefore, there is evidence to suggest that this is not the first fight.*
- (ii) *The wife of the deceased, PW4, had testified that the deceased and the Appellant were not in good terms. She further stated that they used to fight verbally and never talked to each other properly (paragraph 41 of the summing up). She also testified that the deceased used to tell the Appellant to find a job and the deceased was upset as the Appellant was not working. Moreover, she admitted that the deceased used to taunt the Appellant at home (paragraph 43 of summing up). See also pages 396 and 397 of Court Record.*
- (iii) *PW4 in her evidence in chief, at page 396 of Court Record stated the following:*

***Q:** Let's talk about from the start of the year, January. How was your husband's relationship with Mr Bobby's relationship with his brother Johnny?*

***A:** They never use to share anything, my Lord and they never talk to each other. Since the time I moved in I witnessed these two*

*brothers were fighting, they never stayed like happily. Never talked to each other properly.*

*At pages 396 and 397 of Court Records, PW4 stated the father in law would usually stop them if he was at home:*

*Q: And when there was like you said when the two usually fought, what about your in laws, what did they say?*

*A: When my father used to be at home, if they start fighting, he'll come in between them and he'll try to stop the fight and they calm down when he comes in between them.*

*PW4 also confirmed in cross-examination that they used to taunt Shalendra because he is a family member and he never supports. When the deceased taunts Shalendra it never stops him from eating (See page 409 of Court Record).*

[27] The Appellant submits that from the above evidence, it can be concluded that the fight on 16 April 2015 between the deceased and the Appellant was not a one off argument. What caused the argument is in the Record of interview.

[28] Record of Interview–Handwritten Copy (pages 566 to 576 of the Court Record). Typed Version (pages 577 o 582 of the Court Record): The Appellant submits the following Summary of the Record of Interview from questions 1 to 32:

- (i) The Appellant was interviewed under caution on 17 April 2015 by PW7.
- (ii) As per the Appellant's Record of interview, at 8am on 16 April 2015, he received a call from Munna telling him to come and pick a bucket of nitaly from Saweni Beach. He went to get the nitaly, he returned to the house and washed it in the washtub, packed it in plastic and took it to the house of Segran so that they can put it in the freezer.
- (iii) When he returned from Segrans house, the deceased had asked him why did he take the nitaly to Segran's house.

- (iv) The Appellant explained that he has placed it in the freezer and later he will take it to his cousin brother Latchman in Ba on Friday.
- (v) When the deceased heard this, he got angry and he started to swear at the Appellant. The deceased told the Appellant to fuck off from the house and for the Appellant to go and stay with his cousin brother in Ba.
- (vi) An argument started. Their mother came, heard the exchange, told the deceased to stop fighting, and told the Appellant to go inside so he went inside his room. The Appellant heard his mother arguing with the deceased then he did not hear them.
- (vii) The Appellant came out to check and saw his mother was not at home. He then went to his room to pack his bag to go to Ba.
- (viii) While he was packing, the deceased came with a spear and pushed his room door open and started to hit the Appellant on his back. He told the Appellant to go and commit suicide. The Appellant fell down on his bed.
- (ix) The deceased told the Appellant he should commit suicide, Appellant asked why to which the deceased struck him with the spear and he blocked it with his hand and his right hand got injured.
- (x) With his injury, the deceased asked the Appellant if he will commit suicide or not, if not he was going to kill him. The Appellant pushed his bedroom door closed for he was afraid. The deceased came back with a knife.

**Q 33:** Then what happened?

**A:** I got hold of his hand and we both struggle with each other. In this struggle I pushed his hand so hard that the knife struck his neck upon seeing that I pushed the knife further inside his neck.

**Q 34:** Then what happened?

**A:** After pushing the knife further inside the neck, I pulled the knife out and Bobby fell down and the knife got loose from his hand and he also fell down.

**Q 35.** Then what happened?

**A:** When he fell down I picked the knife and struck at his back behind the shoulder.

[29] The Appellant submits that:

- (a) The prosecution relied heavily on the Appellant's admissions in the caution Interview to fill the gaps in evidence. This was a Caution Interview that the Appellant had instructed was fabricated in part. The reason behind the argument, what transpired on that day, the knife, and the injuries were all in the Record of Interview.
- (b) It is apparent from the evidence that the Appellant was subjected to provocation from the deceased over the years from the evidence of PW3 and PW4 for the deceased and the Appellant were usually fighting. It can be said that the provocation the Appellant was subjected to was the constant taunting and the arguments from the deceased.
- (c) If the Record of Interview is to be taken as truthful then it is apparent that the argument on 16 April 2015 was initiated by the deceased. The deceased had chased the Appellant from the house which seems to be a common occurrence as per PW4's evidence (pages 407 to 408 of the Court Record). The Appellant went to pack his bags then the deceased had followed him to his room and was hitting him repeatedly with a spear that had 5 to 6 rods. He was telling the Appellant to go and commit suicide and if he does not want to then he will kill him. The deceased came with a knife and after they struggled with the knife, the Appellant pushed the deceased hand so hard that the knife struck his neck so he pushed it in some more. Then he struck him once more on his back.

- (d) On 16 April 2015, the deceased started the argument, he was the one that had hit the Appellant with the spear repeatedly, and he was the one that threatened him to commit suicide and was the one that brought the knife. How the events had escalated from just cleaning nitalies to the demise of the deceased were the doings of the deceased himself. Even the mother could not calm him down after talking to him. The deceased even argued with his mother.
- (e) Whether the accused had lost his self control and reacted before the heat of passion could cool off, was something for the assessors to decide.
- (f) Lastly, whether the retaliation is proportionate to the act of provocation was a matter for the assessors to decide, in light of the evidence. The matter to be decided is whether, in consideration of the 3 main elements to provocation as discussed in the above authority, there is evidential basis for the learned trial Judge to have directed the assessors on provocation.

[30] In **Naicker v State** [2018] FJSC 24; CAV0019.2018 (1 November 2018), Lord Justice Keith stated (paragraph 40):

*“.....But the mere fact that the defence in a particular case does not want an alternative defence to be raised does not mean that it should not be: see Marsoof JA’s compelling judgment in Praveen Ram v The State [2012] FJSC 12 in which the relevant authorities on the topic were reviewed. It all depends on whether such a defence arises on the evidence - or to be more precise, whether there is “a credible narrative” of events suggesting the presence of such a defence: see decision of the Privy Council in Lee Chun Chuen....” (Underlining for emphasis).*

[31] In **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017), his Lordship Justice Prematilaka at [22] had cited the principle in **Von Starck v The Queen** [2000] 1 WLR 1270, Lord Clyde in the Privy Council.

[32] In light of the above authorities, the Appellant submits that,

(i) It can be noted that it is prudent for the trial Judge to direct on the defence of provocation even if the Appellant failed to raise it during the High Court trial. It is submitted that there was a credible narrative given by the Record of the interview, PW2 and PW3 towards the constant fighting between the Appellant and the deceased, which suggests the availability of the defence of provocation. The Appellant did not have time to cool down for the deceased kept coming back to provoke him and assault him.

(ii) If the learned Judge had directed his mind on the issue of provocation, he would have found that the Appellant was not guilty of murder, and would have found him guilty of manslaughter which was clear from the evidence even though it was not submitted by the defence. Further, the Appellant submits that this ground be allowed and the conviction of murder be quashed and the Appellant be convicted of manslaughter.

## **Ground 2**

[33] There are two main issues in relation to this ground. Firstly, the defence of self-defence was not fully considered by the learned trial Judge. Secondly, the Record of Interview was not taken in its entirety. At pages 491 and 500 of Court Records, the Appellant had stated that he was trying to defend himself.

[34] The Appellant submits that it was the deceased that had come after him with a spear and it was the deceased that had hit him with a spear. It was also the deceased that brought the knife and had attacked the Appellant with it. The learned trial Judge had discussed the issue of self-defence in paragraphs 59, 65, 66 and 69 of the summing up and paragraphs 7-21 of the judgment, where he concluded the Appellant did not act in self-defence.

[35] On the second issue the Appellant submits that when the learned trial Judge had accepted his Caution Interview to be truthful, the focus was more on the acts of stabbing rather than on the whole interview. The prosecution relied on the 2<sup>nd</sup> limb of

section 237(c) and conducted its case to align with the argument that the accused was reckless as to causing the death of the deceased by his conduct. The prosecution relied heavily on the caution Interview of the Accused and they presented evidence of the other witnesses to bolster the prosecution case.

[36] The Appellant submits that, if the learned trial Judge considered the Caution Interview in its entirety, then there are a few things that the learned Judge failed to consider, as follows:

- i. Evidence of PW2: She stated she was not at home when the brothers argued (page 367 Copy Record) but in caution interview Q.20 and 21 answers contradicted that she was at home and had initially stopped the fight. She was not honest when she stated she had gone to a neighbour's house to watch a movie.
- ii. The Spear: the spear was mentioned a few times in evidence by the Appellant but it was never produced. It was mentioned in examination of Dr Vuki, in terms of the possibility of the spear causing injury. (Page 358 Court Records). Broken spear (pages 454 to 458, but none shown to pathologist).
- iii. Actions of the deceased: Caused the argument, etc. Judgment almost silent on acts of the deceased during the episode. Only focused on Appellant's actions. Deceased perpetrated everything, to which Appellant had reacted.
- iv. The struggle: Injuries sustained not consistent with wounds suffered after a struggle. (Pages 359 to 360). The wounds would be different if there was a struggle than the ones that were observed on the deceased.

[37] The Caution interview was not taken in its entirety and the above discussed issues were never emphasised by the learned trial Judge. If he had also focused on the parts of the Caution Interview outlining the role of the deceased then he would have reached a different conclusion after trial.

**(G). Respondent's Case**

- [38] **Ground 1:** The State submits that the single Judge was correct on this issue. See the Single Judge's Ruling at paragraph 7-12. The State submits that there was no evidential basis nor a credible narrative for the learned trial Judge to put the defence of provocation to the assessors or for him to consider it himself. (See paragraphs 7-19 of Respondents Full Court Submissions).
- [39] The Respondent submits that, after trial the Appellant's counsel had again informed the Court that the Appellant had acted in self-defence. Counsel for the Appellant had also asked for directions on manslaughter to be considered in the summing up. The State's response been that if the only defence is self-defence, there is no question of manslaughter (Page 321 of Court Records).
- [40] The State submits that given the evidence led at the trial, there was no evidential basis for the learned trial Judge to direct either himself or the assessors on the defence of provocation. The Appellant's version of the incident differed throughout the trial. Initially, he had instructed his counsel that there would be no challenge to the Caution Interview, but later he alleged fabrication on the part of the police. Although his mother and a police officer confirmed that the Appellant told them he had killed the deceased, he informed Court that they were lying. He was initially raising self-defence but when he gave evidence, he raised denial i.e. he denied killing the deceased at all.
- [41] Leading from the above, the State also submits that there was no credible narrative provided that warranted a direction on provocation. The Respondent submits that, even if there was a direction on provocation, such a defence would have failed as it failed to meet the criteria set out in **Masicola v State** (supra).
- [42] **Ground 2:** This ground was not argued before the single judge. It alleges that the learned trial Judge did not properly consider the issue of self defence considering the admissions in the caution interview. The learned trial Judge dealt with the issue of self defence in light of the caution interview in paragraphs 59 to 68 of summing up and also at paragraph 7 to 21 of judgment.

[43] Appellant's evidence differed throughout the trial as summarised at paragraph [40] above. Given the totality of evidence, the State submitted that the only reasonable conclusion was that the Appellant had recklessly killed his brother. The ground has no merit.

#### **(H). Analysis**

[44] The two grounds of appeal urged by the Appellant are closely related and interconnected. The analysis on one ground potentially also impacts the other ground as the substance of the appeal is focused on the basis upon which the learned trial Judge decided upon the conviction of the Appellant in the High Court on the charge of murder. Generally, it is the Appellant's contention that the learned trial Judge was mistaken in law and fact in not directing the assessors on the defence of provocation, when there is available evidence; that the learned trial Judge was mistaken in convicting the Appellant of murder when the totality of evidence did not support the conviction. The latter is based on the submission that the learned trial Judge did not adequately assess and evaluate the evidence on self defence, and that the learned trial Judge did not accept the Record of Interview of the Appellant in its entirety. The appeal, if successful will have the effect of the conviction on murder being quashed, to be replaced by a conviction on the lesser offence of manslaughter or acquittal.

#### **Ground 1**

[45] The Appellant contends that the learned trial Judge was mistaken in not directing the assessors on the defence of provocation which is available on the evidence.

#### ***Legal Principles***

[46] It is not disputed that provocation was not raised as a defence at trial, but that should not be an impediment for this court to consider this ground on the basis of legal principles that apply in situations such as this. The courts have always recognised that there is a general duty on the courts to consider a defence even if it was not expressly relied upon by the accused at trial: **Masicola v State** (supra); **Naicker v State** (supra), **Ram v State** (supra). However, the courts are governed by certain conditions, which

assist the court in determining whether in the circumstances, the learned trial Judge should direct the assessors on the defence of provocation.

[47] The scope of the duty was explained by Lord Devlin in 1963, in **Lee Chun Chuen v R** (supra) and has been endorsed and applied in this jurisdiction by both this Court and the Supreme Court .

[48] The Supreme Court, in the case **Ram v State** [2012] FJSC 12; CAV0001.2001 (9 May 2012), when considering whether or not directions on possible alternative verdicts should be included in the summing up, in paragraphs 34 and 36, stated:

“34. ....However, the fact that a defending counsel did not raise any alternative defence, or as in the instant case, oppose any direction being made on such an alternative verdict, does not relieve the judge from the duty of directing the jury or the assessors to consider the alternative, if there is sufficient evidence placed before the jury or assessors which would justify a direction that they should consider it. As Lord Bingham observed in **Coutts** [2006] 1 WLR 2154 {HL} at paragraph 23, the public interest in the administration of justice demands that where there is sufficient evidence to suggest any obvious alternate verdict, the trial Judge should consider it his paramount duty to include the same in his summing-up, subject to any appropriate caution or warning, irrespective of the wishes of trial counsel.”

“36. A trial judge has to grapple with the question as to whether in a given case, a direction on one or more alternative defences should be included, may find solace in the following observation of Lord Steyn in **Regina v Acott** [1997] UKHL 5; [1997] 1 ALL ER 706 ; [1997] 1 WLR 306 {HL} at page 313-

“What is sufficient evidence in this particular context is not a question of law. Where the line is to be drawn depends on a judgment involving logic and common sense, the assessment of matters of degree and an intense focus on the circumstances of a particular case. It is unwise to generalise on such matters: it is a subject best left to the good sense of trial judges. For the same reason it is not useful to compare the facts of decided cases on provocation with one another. “(Emphasis added).

[49] The case **Codrokadroka v State** a decision of this Court delivered on 25 March 2008, proposed a judicial approach to provocation when raised as a defence, which was endorsed by the Supreme Court in **Codrokadroka v State** (supra), at paragraph [17] of judgment delivered on 20 November 2013, as accurately reflecting the approach that should be taken by the trial Judge to the issue of provocation. The Court of Appeal, in relation to sections 203 and 204 of the Penal Code dealing with provocation had engaged in an exhaustive analysis and came out with the approach that should be taken as follows:

- (i) The Judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.
- (ii) There should be “a *credible narrative*” on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.
- (iii) There should be “*credible narrative*” of a resulting loss of “*self-control*” by the accused.
- (iv) There should be a “*credible narrative*” of an attack on the deceased by the accused which is “*proportionate*” to the provocative words or deeds.
- (v) The source of the provocation can be one incident or several. To what extent a history of abuse and provocation is relevant to explain a “*sudden loss of self-control*” depends on the facts of each case. However, cumulative provocation is in principle relevant and admissible.
- (vi) There must be an evidential link between the provocation offered and the assault afflicted.

[50] In **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017), this Court applied both the Court of Appeal and Supreme Court decisions in **Codrokadroka** to section 242 of the Crimes Act 2009, as follows:

“15. Provocation is not a complete defence to an unlawful killing. It is a partial defence. Killing with provocation reduces culpability from murder to manslaughter. This lesser culpability is the effect of section 242 of the Crimes Act 2009.

16. There is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at a trial. The scope of that duty in relation to provocation was explained by Lord Devlin in **Lee Chun Chuen v R** (1963) AC 220 as follows:

Provocation in law consists mainly of three elements - **the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation.** The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.”

(Underlining /highlighting for emphasis)

### ***Applying the judicial approach***

[51] In light of the above cases, the learned trial Judge needed to evaluate and assess the available evidence against the above conditions, to assess whether the defence of provocation be put to the assessors, and especially whether there is *credible narrative* (a) of provocative words and deeds of deceased to accused; (b) loss of self-control by the accused and (c) attack on deceased by accused which is proportionate. There must also be an evidential link between the provocation offered and the assault inflicted.

[52] The totality of the evidence adduced at the trial is distilled and set out in paragraph [7] above. For the prosecution, the sources of evidence/ witnesses are the Police Officers including the Investigation Officer, the deceased’s mother, the deceased’s wife and the Doctor (expert witness). The Appellant was caution interviewed and the Caution Interview Statement was admitted in evidence with the Appellant’s concurrence initially. He later objected on the ground that certain contents of the Caution Interview Statement was fabricated by police, however, the learned Judge accepted the statement as evidence.

- [53] The Appellant had produced evidence which, in his submission, if considered by the learned trial Judge, would warrant a direction on provocation for the assessors to consider. The evidence is set out in detail in paragraph [26] of this judgment. The main areas to which that evidence relate are (a) the fight, arguments and taunting, (b) the bad blood between the brothers (deceased and Appellant), (c) the strain in relationship between the deceased and the Appellant. The Appellant submits that these elements of the evidence demonstrate that the fight on 16 April 2015 leading to the death of the deceased was not a one-off argument, and the cause of the argument is in the Record of Interview.
- [54] The Record of Interviews is summarised in paragraph [28] of this judgment. Its contents substantially support the story and picture that the Appellant wanted to project, that is that he was subjected to provocation in the form of fighting, constant taunting and arguments from the deceased over the years. The Appellant submits that the deceased initiated the argument on 16 April 2015, he hit the Appellant with a spear repeatedly, followed him to his room while he was packing his bag, told him to go and commit suicide and if he doesn't deceased will kill him, brought a knife and they struggled leading to the killing - See the Appellant's case, paragraph [29] (c) and (d) of this judgment.
- [55] In carefully assessing the evidence of the prosecution, including the Caution Interview Statement, and having also considered the allegations that the police fabricated the contents of the caution interview, I am not persuaded that there is a *credible narrative* of words and deeds from the deceased to the accused that would provoke the accused to commit the offence he was charged with. Yes, words were spoken which were in condemnation of the accused, there was threat but was the deceased capable of carrying out the threat? Accused alleged that he was hit by a spear repeatedly, but no spear was brought in evidence as an exhibit. The only injury sustained by the accused was to his finger. When the deceased brought the knife out, a struggle ensued, on the accused's own evidence, he had pushed the deceased's hand so hard that the knife hit the deceased's neck. He did not stop there. He pushed the knife further killing his brother instantly. He then stabbed his brother's back with the same knife.
- [56] Under the circumstances, the accused knew what he was doing and he knew the end result of what he did. I find that there is no *credible narrative* of the accused losing

self-control. If the Appellant is believed, then he attributed the commencement of the argument to the deceased on 16 of April 2015, and it was the deceased that had hit the Appellant with the spear repeatedly, and threatened the Appellant to commit suicide, and the deceased was the one that brought the knife. The deceased could not calm down even when the mother talked to him to calm him down. Due to the deceased's acts, the Appellant reacted. Was there evidence of the Appellant losing self-control?

[57] There is no evidence that Appellant lost self-control. The Appellant pleaded self-defence at trial and later denied killing the deceased. There is no expert witness to provide/express an opinion on the Appellant's condition and state of mind due to acts and deeds of the deceased towards him. The Appellant had not lost his self-control. The Appellant's acts were conscious acts, and reckless, but were not the acts of an individual who has lost self-control.

[58] Further, there was no credible narrative of an attack on the deceased by the Appellant which was proportionate. The Appellant had pleaded self defence at the trial, but the learned trial Judge had rejected that, finding him guilty of murder. Although the deceased had used a spear to attack the Appellant, the Appellant only suffered injury to his finger. The deceased had brought a knife, which caused a struggle between the two. The threat that Appellant will be killed by the deceased in the event the Appellant did not commit suicide, was a threat that, on the evidence, was not clarified, that is, whether the deceased was capable of carrying out the threat in the circumstances of the case, considering the totality of the evidence.

[59] The Appellant's assault on the deceased with the knife was pressed to the deceased's neck by the Appellant with much power and force. The only conclusion is that the attack on the deceased by the Appellant was reckless and not proportionate. I am not persuaded there is *credible narrative* that the Appellant's assault on the deceased was proportionate under the circumstances. The manner in which he described how he pressed the knife hard towards the deceased neck speaks volumes of the Appellant's purpose and recklessness. He did not stop but kept pressing. That was a fatal act. Not only that, the Appellant then stabbed the deceased's back with the same knife, which wounded the deceased a second time, and according to the medical report and evidence of the pathologist, was fatal on its own.

[60] I am also not satisfied on the totality of the evidence that there is any evidential link between the alleged provocation offered by the deceased and the assault inflicted by the Appellant on the deceased's neck and later on the deceased's back, which was disproportionate. I am not persuaded, in the circumstances, that the deceased's acts and deeds towards the Appellant and the alleged frequent fighting and taunting can be regarded as constituting either historic or cumulative provocation. There is no evidence available to warrant a direction on provocation to the assessors. This ground has no prospect of success. It has no merit

## **Ground 2**

[61] This ground was not before the learned single Judge at leave stage. The Appellant contends that the learned trial Judge was mistaken in convicting the Appellant of murder when the evidence in totality does not support that conviction. The ground is argued on two fronts, firstly, that the learned trial Judge, despite the evidence on fights, arguments and taunting had not taken them into account when considering the defence of self defence. Secondly, the Appellant's concerns that the learned trial Judge did not take the Appellant's Caution Interview in its entirety.

### ***Murder***

[62] The elements of the offence of murder contrary to section 237 of the Crimes Act 2009, are as follows: A person commits an indictable offence if-

- (a) The person engages in conduct, and
- (b) The conduct causes the death of another person, and
- (c) The first mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.

[63] The first element relates to the identity of the person who committed the offence, which is not in dispute. The defence agrees that it was the accused who was involved in this case and no one else. This is taken to be proved beyond reasonable doubt. The second element of the offence relates to the conduct of the accused. The prosecution has to prove beyond reasonable doubt that the accused acted wilfully and not

accidentally. To prove beyond reasonable doubt that the accused's conduct was deliberate and not accidental. The act of the accused need not be the sole or principal cause of death but the act should substantially contribute to the death of the deceased, as it is sufficient to proving the third element that 'the conduct caused the death of the deceased'.

[64] The third element requires that the intention of the accused to cause death be proven beyond reasonable doubt. It concerns the state of mind of the accused. The prosecution has to prove beyond reasonable doubt either that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution has to prove only one of the two limbs of this element. The state of mind, by its nature, is difficult to prove. No witness can look into the accused's mind and describe what it was at the time of the incident. However, one can deduce the state of mind from the facts and circumstances of the case that has been proven beyond reasonable doubt.

[65] It does not end there. For in order to conclude that the accused intended to cause the death of the deceased, the assessors should be sure that the accused meant to bring about the death or that he was aware that death will occur in the ordinary cause of events as a result of his conduct. The assessors should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.

[66] The assessors found that the accused was reckless as to causing the death of the deceased. This means that the Appellant was aware of a substantial risk that death will occur due to his conduct; and having regard to the circumstances known to him, it was unjustifiable for him to take that risk, and the accused did foresee or realise that death was the likely result of his conduct and yet he decided to go ahead and engage in the conduct regardless of that consequence.

[67] Lastly, the accused must foresee that death was a probable consequence or the likely result of his conduct and after realising that death was a probable consequence or likely result of his conduct if he decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then he was reckless as to causing the

death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.

[68] In convicting the Appellant for murder as charged, the learned trial Judge had concluded, from the evidence adduced at the trial, that the Appellant engaged in conduct, meaning, did an act which was wilful and not an accidental (stabbing) which, caused the loss of blood of the deceased causing his death; or was reckless as to causing the death of the deceased by his conduct. The accused was reckless as to causing the death of the deceased by his conduct.

### *Manslaughter*

[69] In paragraphs 23 to 25, the learned trial Judge summed up the alternative or lesser offence of manslaughter, which if the prosecution could not prove the accused intended to cause the death of the deceased or was reckless as to causing the death of the deceased the assessors must consider the lesser offence of manslaughter.

[70] In the offence of manslaughter only the last two elements differ from the elements of murder. In manslaughter, the Appellant intends that his conduct will cause serious harm or the Appellant is reckless as to a risk that the conduct will cause serious harm to the deceased.

[71] The learned trial Judge reminded the assessors in summing up that:

- (a) If they are satisfied that the prosecution has proved the elements of the offence of murder beyond reasonable doubt then they must find the accused guilty of murder - Paragraph 22.
- (b) If the accused intended to cause serious harm to the deceased or the accused was reckless as to causing serious harm and that the conduct caused death of the deceased, then they should find the accused guilty of manslaughter - Paragraph 25.

### ***Caution Interview***

[72] The learned trial Judge in his judgment had covered the issues (Analysis of evidence of self-defence and caution interview Statement) raised: see paragraphs [10] to [16] above. He found as follows: The prosecution relied mainly on caution interview of the accused and presented the evidence of the other witnesses to bolster the prosecution case-Paragraph 6; The accused had taken up the position that he acted in self defence. The Appellant contended that some answers in the caution interview were fabricated. The learned Judge had directed the assessors on accepting the admissions contained in the caution interview and on the concept of self-defence - Paragraphs 7 and 8. Prior to the trial, the learned Judge was informed that the accused does not wish to challenge the caution interview. On that basis the interviewing officer tendered the caution interview statement as evidence. This was challenged by counsel for accused during cross-examination of interviewing officer.

[73] Counsel suggested that the answers to questions 33, 36 to 70 were fabricated by the police -paragraph 7; Interviewing Officer denied the allegation of fabrication of answers to questions 33, 36 and 70 -Paragraph 10. Facts in the caution interview statement - Paragraphs 11 to 13; Medical experts' opinion on the cause of death - paragraph 12; Deceased's widow, and neighbour confirm that brothers have had regular fights - Paragraph 15; The learned trial Judge inclined not to accept the accused's evidence as it lacks credibility and reliability.

[74] The learned trial Judge believed the prosecution witnesses - they gave reliable evidence. Their evidence was not challenged. Evidence by the prosecution was accepted by the learned trial Judge-Paragraph 16.

### ***Self Defence***

[75] Learned trial Judge considered the defence of self-defence under section 42 of the Crimes Act 2009 and whether it could be relied upon by way of defence. Section 42 provides:

“(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the defence of self defence.

*(2) A person carries out conduct in self defence if and only if he or she believes the conduct is necessary-*

*(a) to defend himself or herself or another person; or*

*(b) to prevent or terminate the unlawful imprisonment of himself or herself; or*

*(c) to protect property from unlawful appropriation, destruction, damage or interference; or*

*(d) to prevent criminal trespass to any land or premises; or*

*(e) to remove from any land or premises any person who is committing criminal trespass,*

*and the conduct is a reasonable response in the circumstances as he or she perceives them.*” (Underlining for emphasis)

[76] The defence of self defence was discussed in **Aziz v State** (supra). The relevant observation is quoted at paragraph [14] above.

[77] The learned trial Judge’s findings on the evidence accepted the evidence of the prosecution witnesses. He was satisfied beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as they were perceived by the accused. Accused cannot resort to the defence of self-defence in the circumstances of this case. It is proven beyond reasonable doubt that the accused did not act in self defence. With the direction given, the assessors rightly excluded the defence of self-defence as not available to the accused - Paragraphs 20 and 21.

[78] The learned trial Judge was satisfied beyond reasonable doubt that the prosecution had proven its case. The assessor’s opinion is justified and the learned Judge agrees with them - Paragraph 22.

### ***Defence of Provocation & Self-Defence***

[79] Referring to the defences of provocation and self-defence, the learned single Judge stated that there must be an evidential basis for running the defence of provocation.

The Appellant had unsuccessfully run his case on self-defence. That according to medical evidence, it would need significant force to cause an injury of the nature of the stab wound in left front of the neck of the deceased. This injury was necessarily fatal and could have been caused with the knife produced at the trial. The second injury too on its own had been necessarily fatal and could have been caused with the same knife with significant force when the deceased was stabbed when he was lying face down.

[80] In his Ruling at Paragraph 11 the learned single Judge summarised the Appellant's caution interview led in evidence which the Appellant did not contest, as quoted at paragraph [21] above.

[81] That summary seems to support the medical opinion that the injuries sustained by the deceased were both fatal on their own without the other. Further, that the injuries sustained by the deceased appear to be caused by stabbing with a knife, rather than caused by beating with a spear. The Doctor also cast doubt on the theory that the injuries sustained were caused during a struggle between the brothers. It could be inferred from the facts and circumstances of the case that the injuries sustained were stab wounds inflicted on the deceased by the Appellant. Ground 2 has no prospect of success. It has no merit.

### **(I). Conclusion**

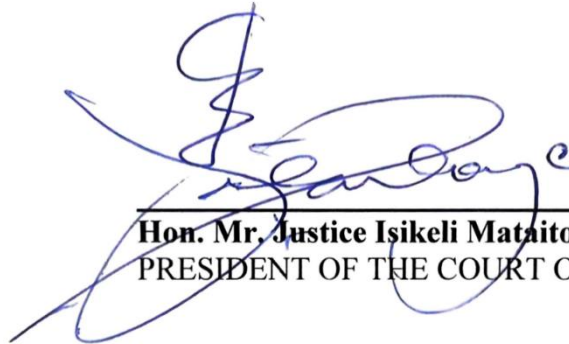
[82] From the above discussion it is concluded that the learned trial Judge was not mistaken in not directing the assessors on the defence of provocation, the Appellant having failed to establish that evidence is available for such direction to be given. Further, the learned trial Judge was not mistaken in convicting the Appellant of murder, as the conviction is supported by the totality of evidence.

### **Dobson, JA**

[83] I agree with the conclusions in the judgment of Qetaki RJA.


**Orders of the Court**

1. *Appeal against conviction is dismissed.*
2. *Conviction is affirmed.*




---

**Hon. Mr. Justice Isikeli Maitoga**  
PRESIDENT OF THE COURT OF APPEAL



---

**Hon. Mr. Justice Alipate Qetaki**  
RESIDENT JUSTICE OF APPEAL



---

**Hon. Mr. Justice Robert Dobson**  
JUSTICE OF APPEAL

**Solicitors**

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent