

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0092 of 2022

[Suva High Court No. HAM 401 OF 2019]

BETWEEN : **TEVITA KUNAWAVE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**

Counsel : **Ratidara I, for the Appellant**

: **Latu L, for the Respondent**

Date of Hearing : **18 July, 2025**

Date of Ruling : **10 September, 2025**

RULING

[1] The appellant, Tevita Kunawave was charge with one count of Murder, contrary to section 237 of the Crimes Act 2009. He was tried at the Suva High Court and the trial was on 3rd, 5th, 9th, 23rd, and 24th of November 2020.

[2] The Statement and Particulars of the offence were as follows:

Statement of Offence

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

Particulars of Offence

TEVITA KUNAWAVE on 27th day of October 2019 at 55 Mawaraka Place, Sukanaivalu Road, Nabua murdered **SULIANA TALEMAITOGA KUNAWAVE** by throwing a cement block which landed on her head resulting in her death.

- [3] The trial was held with assistance of Assessors. At the end of the trial the three assessors returned a unanimous guilty opinion against the appellant.
- [4] The trial judge in his judgement dated 26 November 2020, accepted the unanimous opinion of the assessors that the appellant was guilty of murder as charge. The trial judge opined that the guilty opinion was available on the evidence and that he was satisfied beyond reasonable doubt that the appellant was guilty of murder and convict him accordingly.
- [5] The appellant was sentenced to life imprisonment with a 14 years non-parole imprisonment period on 27 November 2020.

Appeal

- [6] On 30 September 2022, the appellant filed a Notice and Grounds of appeal against conviction and sentence. The Notice of appeal is substantially out of time – 1 year 9 months late.
- [7] There has been no application by the appellant for enlargement of time to file appeal. It was not raised by the appellant’s counsel at the time when he filed the appellant’s submission in 18 January 2024. The State also did not raise this matter when on 4 June 2024 it filed its response submission.
- [8] Section 26(1) of the Court of Appeal Act 2009 states:
- “26. – (1) Where a person convicted desires to appeal under this Part to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice to appeal or notice of his application for leave of appeal in such manner as may be directed by rules of Court within [30] days of the date of conviction [or decision]. Except in the case of a*

conviction involving sentence of death, the time, within notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Appeal.”

[9] I considered whether the exception to section 26(1) Court of Appeal Act 2009 applies in this case. I decided that it does not apply since the *sentence of death in no longer part of Fijian law*. In this case on conviction of murder the sentence is now mandated by law is life imprisonment. The discretion created by this provision of statute law does not apply to save the appellant’s late submission of his grounds of appeal involving issues of law and facts.

Grounds of Appeal

[10] On 18 October 2023, counsel for the Appellant submitted the following 3 grounds of **appeal against conviction**:

- i) the trial judge erred in fact and law when he found the appellant guilty of murder, as the totality of the evidence did not support such a finding;
- ii) the trial judge erred in law and fact when he directed the assessors that they could find the appellant guilty of murder based on recklessness when, in this case the prosecution was solely relying on doctrine of transferred intent to try and prove the charge against the appellant;
- iii) the trial judge erred in in law and fact when he failed to analyze the evidence of the case or give reasons for finding the appellant guilty in his judgement dated 26 November 2020.

Against Sentence

- i) the sentence was harsh and excessive

The Law

[11] Section 21(1)(a) and (b):

“21. – (1) A person convicted on a trial held before the [High Court] may appeal under this Part to the Court of Appeal –
(a) against his [or her] conviction on any ground of appeal which involves a question of law alone;

(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his [or her] conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) ...”

[12] From the above provisions of section 21(1)(a) of the Court of Appeal Act 2009, leave is not required for appeal to the full court, on issues involving questions of law only. However, leave is required where the grounds of appeal for questions involving issue of law and fact: Section 21(1)(b) Court of Appeal Act 2009.

Assessment of Grounds of appeal

Grounds 1 and 3

[13] Grounds 1 and 3 cannot now be considered without leave of the court for an enlargement of time to appeal. They involve issues of law and facts and require leave of the court. The appeal must be file with 30 days of the date of the judgement which is 26 November 2020.

[14] In this case the grounds of appeal against conviction were file on 30 September 2022. This was late by 1 year and 8 months, a substantial delay and unless those grounds have reasonable prospects of success on appeal, it must be refused leave to preserve the sanctity of observing court procedures and processes.

[15] The submission by Counsel for the appellant on grounds 1 and 3 have been reviewed against the test in **Caucu v State [2018] FJCA 171; Sadrugu v State [2029] FJCA 87 and Naisua v State [2013] FJSC 14.**

[16] I have reviewed the grounds 1 and 3 and I conclude that there is no reasonable prospect of success for those to go to the full court. Leave to appeal on those grounds are refused.

Issues of law – ground 2

[17] For the assessors to apply the requirements of the doctrine of transferred malice to the facts in this case; they first need to be correctly advised by the trial judge in the summing up, to be able to apply. In this case the first element of the doctrine was outlined but the second element were not.

[18] The doctrine of transferred malice (intent) operates for the application of mens rea. It is the *intention of the defendant that is in question for the purposes of transferred malice and NOT the guilty action*. It allows to transfer the mens rea, intended for victim to the actual victim. Common law provides us the reference if the defendant strikes out at A and ends up striking B. In such a case the intention to strike can be transferred: R v Latimer (1886) 17 QBD 359

[19] Once the mens rea is established for transfer malice, *the next issue to consider will be 'what level of force was intended' or was the defendant being reckless as to the use that force at the time of the harm?* This is an objective part of the test and often difficult to answer. In R v G and another [2003] UKHL 50, [2004] 1 AC 1034, helps in this regard which states that an individual acts recklessly with respect to (first part of the test) a circumstance when he is aware of a risk that it exists or will exist (second part of the test) knowing the risk goes on to take the risk that resulted in the harm to the victim. Limitations to transferred malice are that it cannot transfer the malice to an offence with a different mens rea or in other words the coincidence of actus rea and mens rea. Action was unlawful and intention was at the time of that action. The intention before or after does not matter.

[20] When explaining recklessness, judges may tell the assessors that the appellant must have been aware that his or her conduct would probably cause the relevant consequence, but decided to go ahead anyway. It is not necessary to prove that the

appellant acted recklessly in relation to the actual victim, as long as the appellant had acted recklessly in relation to the risk of his behaviour causing injury to some person: R v Bacash [1981] VR 923).

[21] In this regard the trial judges summing up to the assessors at paragraphs 16, 17, 18, and 32 are relevant for consideration. A further difficulty of the trial judge was in explaining what recklessness meant in a situation like in this case, where the appellant has been drinking alcohol for almost 30 hours without any break. In this regard paragraphs 22, 23, 24, and 25 are relevant for further consideration. Another issue that should have been covered clearly in the summing and was not, given the heavily intoxicated state of the appellant, whether he was aware that his conduct would probably give rise to the consequences of this case. In this context the word “probable” simply means likely to happen: R v Crabbe (1985) 156 CLR 464.

[22] In Fiji, the doctrine of transferred malice is recognized as part of the common law in the Court of Appeal decision of Krishna Kiran Naidu v R [1984] FLR 81. This was a case involving consideration of a murder charge under the old definition in the repealed Penal Code of ‘malice aforethought.’ In this case there was no directions given to the assessors on what is required under section 237 (c) Crimes Act 2009. Underpinning this is the related issue whether the doctrine of transferred malice is still part of the Fijian criminal law after the passage of the Crime Act 2009.

[23] In light of the above review of the evidence and the applicable law, there is an arguable case for the application of doctrine of transferred intent to be considered by the full court and whether on the evidence in this case the murder charge is proven beyond reasonable doubt or an alternative lesser offence was appropriate on the facts. These are issues of law for the full court to consider in light of the fuller court records and transcript that will be available to them.

ORDERS:

1. The appellants leave application for leave to appeal for grounds 1 and 3 is refused;

2. Leave is not needed for ground 2 which raises issues of law, it may proceed to the full court for hearing




A handwritten signature in blue ink, appearing to read "Isikeli U. Maitoga", is written over a horizontal line. The signature is stylized and extends above and below the line.

Hon. Justice Isikeli U. Maitoga

PRESIDENT

FIJI COURT OF APPEAL