

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 47 of 2010

STATE

V

NIKASIO TUPOU

**Counsel** : Ms. Juleen Fatiaki with Ms. Sujata Lodhia for the State  
Mr. A. K. Singh for the Accused

**Dates of Trial** : 6, 8-9 & 12 November 2018

**Summing Up** : 13 November 2018

**Judgment** : 16 November 2018

**Sentence** : 23 November 2018

## SENTENCE

[1] Nikasio Tupou you were charged with the following offence:

### *Statement of Offence*

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

### *Particulars of Offence*

**NIKASIO TUPOU** on the 4<sup>th</sup> day of February 2010, at Samabula, in the Central Division, murdered Esita Kele.

- [2] You pleaded not guilty to the above mentioned charge and the ensuing trial was held over 4 days.
- [3] The prosecution, in support of their case, led the evidence of Assistant Superintendent of Police (ASP), Eroni Ratavola, Inspector Sakeasi Busele, a Medical Officer, Dr. James J.V. Kalougivaki and witness Elia Manoa. The prosecution also tendered the following production items as prosecution exhibits:
- Prosecution Exhibit **PE1A** - The caution interview statement of the accused (in the Itaukei language).
- Prosecution Exhibit **PE1B** - The English translation of the caution interview statement of the accused.
- Prosecution Exhibit **PE2** - Kitchen Knife.
- Prosecution Exhibit **PE3** - Cane Knife.
- Prosecution Exhibit **PE4** - Post Mortem Examination Report of the deceased.
- [4] You gave evidence on your own behalf. You also called witness Livai Naqera Junior. You also tendered to Court your Medical Examination Report, dated 5 February 2010, as Defence Exhibit **DE1**.
- [5] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision the three Assessors found you guilty of the charge of Murder.
- [6] Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors and found you guilty and convicted you of the charge of Murder.
- [7] In terms of the "Agreed Facts" filed you have admitted that at the time of the incident you resided with your de-facto partner Esita Kele (the deceased) at your family home at 25 Mali Place, Samabula. You have admitted that the deceased was pregnant at the time, with your child.
- [8] You have also admitted that you stabbed the deceased's stomach twice with a kitchen knife and the said knife penetrated her stomach. Thereafter, you have admitted that the deceased fled from you and whilst in pursuit of her you grabbed your cane knife and

struck her with it a number of times. The deceased fled outside of the house and collapsed in the compound, a few meters away from your house.

- [9] Furthermore, you have admitted to the incident which took place in your caution interview statement. I have held that the caution interview statement was made voluntarily by you and that there were no general grounds of unfairness in the recording of the said statement. I have also held that the contents of the statement were true and accurate and that Court can rely and accept the statement as a true version of the incident which took place.
- [10] The post mortem examination of the deceased was conducted by Dr. Ramaswamy Ponnu Swamy Goundar, who is now said to be retired and overseas. As such, based on the injuries recorded by Dr. Goundar in his post mortem report; Dr. James J.V. Kalougivaki, testified in Court and explained in detail the external and internal injuries recorded on the body of the deceased. Dr. Kalougivaki was of the opinion that the cause of death was due to severe multiple slash wounds or cut wounds to the head and neck of the deceased.
- [11] Thus it has been proved that, on 4 February 2010, at Samabula, in the Central Division, you murdered Esita Kele.
- [12] Murder is a most serious crime.
- [13] In terms of the provisions of Section 237 of the Crimes Act No. 44 of 2009 ("Crimes Act") the penalty for the offence of Murder is a mandatory sentence of imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered.
- [14] In *State v Masicola* [2015] FJHC 411; HAC081.2014S (5 June 2015); His Lordship Justice Temo held:

*"The offence of "murder" (count no. 1) is often said to be at the top of the criminal calendar. To preserve human life is a fundamental objective in preserving and maintaining the wellbeing of our society. Our lawmakers had prescribed a mandatory penalty of life imprisonment for those found guilty of murder. The court is empowered "to set a minimum term to be served before a pardon may be considered" (Section 237 of the Crimes Decree 2009). A pardon may only be granted by His Excellency the President*

*of the Republic of Fiji (Section 119 of the 2013 Fiji Constitution). Minimum terms for murder had been set between 26 to 11 years imprisonment, depending on the mitigating and aggravating factors: Waisale Waqanivalu v The State, Criminal Appeal No. CAV 005 of 2007, Supreme Court, Fiji; The State v Navau Lebobu, Criminal Case No. HAC 016 of 2002, High Court, Suva; State v Anesh Ram, Criminal Case No. HAC 124 of 2008, High Court, Suva and State v Tukana, Criminal Case No. HAC 021 of 2009, High Court, Lautoka.”*

- [15] The penalty stipulated in Section 237 of the Crimes Act is a stand-alone penalty provision which is specific to sentencing upon a conviction for Murder. As such, His Lordship Justice Calanchini (President, Court of Appeal) has held that the general provisions that apply to sentencing under the Sentencing and Penalties Act No. 42 of 2009 (“Sentencing and Penalties Act”), have no application.
- [16] In the case of Aziz v The State [2015] FJCA 91; AAU112.2011 (13 July 2015); His Lordship Justice Calanchini held as follows:

*“...Under section 237 of the Crimes Decree (Crimes Act) the penalty for murder is expressly stated to be a mandatory sentence of imprisonment for life with a judicial discretion to set a minimum term to be served before a pardon may be considered. This is a particular sentencing enactment that applies specifically to an offender convicted of murder. Pardon is part of the prerogative of mercy exercised by the President on the recommendation of the Mercy Commission under section 119 of the Constitution. The pardon may be free or conditional (section 119 (3) (a)). The effect of a free pardon is to clear the person from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction, but not to remove the conviction (8 (2) Halsburys 827).*

*Although section 18 of the Sentencing Decree (Sentencing and Penalties Act) is a general enactment which ordinarily would apply to a life sentence imposed for murder, the particular enactment in section 237 of the Crimes Decree must be operative and in such case the maxim of interpretation “*generalia specialibus non derogant*” (general things do not derogate from special things) should be applied. The provisions of section 18 of the Sentencing Decree will have general application to all sentences, including where life imprisonment is prescribed as a maximum sentence unless a specific sentencing provision excludes its application. In my judgment a sentencing court is not expected to select either a non-parole term or a minimum term when sentencing for murder under section 237 of the Crimes Decrees. As a result any person convicted of murder should be sentenced in*

*compliance with section 237 of the Crimes Decree. For the same reason the discretion given to the High Court under section 19(2) of the Sentencing Decree, being an enactment of general application, does not apply to the specific sentencing provision for murder under section 237 of the Crimes Decree."*

- [17] Furthermore, some very useful guidance on sentencing in cases of Murder have been provided by His Lordship Justice Calanchini in *Balekivuya v The State* [2016] FJCA 16; AAU0081.2011 (26 February 2016).

*"[36] Section 237 (of the Crimes Act) provides for a mandatory sentence of life imprisonment for a person convicted of murder. It must be recalled that life imprisonment means imprisonment for life (Lord Parker CJ in R v Foy [1962] 2 All ER 246). The trial Judge when sentencing a person convicted of murder is required to exercise a discretion in two ways. The first is whether a minimum term should be set. The second is the length of the minimum term that should be served before a pardon may be considered. The use of the word "pardon" in the penalty provision is not the same as what is sometimes referred to as an "early release" provision. The word "pardon" is not defined in the Crimes Decree nor is it defined in the Sentencing Decree. The only reference to the word "pardon" that is relevant to sentencing is to be found in section 119 of the Constitution. Under section 119(3) the Prerogative of Mercy Commission (the Mercy Commission), on the petition of a convicted person, may recommend that the President exercise a power of mercy by, amongst others, granting a free or conditional pardon to a person convicted of an offence.*

*[37] In my judgment the effect of section 237 when read with section 119(3) of the Constitution is that a convicted murderer may not petition the Mercy Commission to recommend a pardon until that person has served the minimum term set by the trial Judge. The reference to minimum term in section 237 has nothing to do with early release. The Mercy Commission may or may not make the necessary recommendation to the President. Furthermore, the matters that the Mercy Commission takes into account in deciding whether to recommend a pardon may or may not be the same as the matters that are taken into account by the trial judge when he sets the minimum term.*

*[38] It should be noted that under section 119(3) of the Constitution any convicted person may petition at any time the Mercy Commission to recommend (a) a pardon, (b) postponement of punishment or (c) remission of punishment. However it would be reasonable to conclude that the Mercy*

*Commission would take into account the sentencing judgment and the actual sentence imposed during the course of its deliberations.*

*[39] Finally and importantly, it is abundantly clear from the observations made above that the discretion to set a minimum term under section 237 of the Decree is not the same as the mandatory requirement to set a non-parole term under section 18 of the Sentencing Decree.*

*[40] The non-parole period is determined after the trial judge has arrived at what is referred to as the head sentence. The head sentence is premised on the existence of a prescribed maximum (not mandatory) penalty from which a tariff is identified, a starting point determined, aggravating and mitigating factors considered, any early plea of guilty credited and finally, under section 24 of the Sentencing Decree, a deduction made for time spent in remand as time already served. **However the position is different when the head sentence is a mandatory sentence of life imprisonment. There is no basis for undertaking the approach described above when the head sentence is fixed by law.** Furthermore there is no basis for proceeding to determine a non-parole period for a person sentenced to the mandatory life sentence for murder since the specific sentence provision of section 237 of the Decree displaces the general sentencing arrangements set out in section 18 of the Sentencing Decree. In my judgment the reference to the court sentencing a person to imprisonment for life in section 18 of the Sentencing Decree is a reference to a life sentence that has been imposed as a maximum penalty, as distinct from a mandatory penalty. Examples of prescribed maximum penalties can be found for the offences of rape and aggravated robbery under the Decree.*

*[41] For all of the reasons stated above I have concluded that there is no requirement for a trial judge to consider the time spent in remand when he has imposed the mandatory head sentence of life imprisonment upon a conviction for murder under section 237 of the Decree. Further given that the minimum term, if one is set, does no more than entitle the convicted person to petition the Mercy Commission to recommend a pardon in my judgment there is no requirement for the trial judge to consider the time spent in remand when setting the minimum term under section 237 of the Decree. In my view section 24 of the Sentencing Decree has no application to the specific sentencing provisions in section 237 of the Decree.*

*[42] ..... As I observed earlier, there is no guidance as to what matters should be considered by the judge in deciding whether to set a minimum term. There are also no guidelines as to what matters should be considered when determining the length of the minimum term.*

*[43] He should however give reasons when exercising the discretion not to impose a minimum term. He should also give reasons when setting the length of the minimum term. Some guidance may be found in the decision of R v Jones [2005] EWCA Crim. 3115, [2006] 2 Cr. App. R (S) 19 for the purpose of deciding whether a minimum term ought to be set. The Court of Appeal observed at paragraph 10:*

*"A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life."*

*In determining what the length of the minimum term should be a trial judge should consider the personal circumstances of the convicted murderer and his previous history."*

.....

*"[48] ..... It is clear that the sentencing practices that were being applied prior to the coming into effect of the Crimes Decree, the Sentencing Decree and the Constitution no longer apply. Whatever matters a trial judge should consider when determining whether to set a minimum term and the length of that term under section 237, the process is not the same as arriving at a head sentence and a non-parole period. **In my judgment the decision whether to set a minimum term and its length are at the discretion of the trial judge on the facts of the case.**"[All emphasis is mine].*

[18] Considering all the facts and circumstances of this case, I deem that it is appropriate to fix a minimum term to be served by the accused before pardon may be considered. In determining the length of the minimum term I take the following factors into consideration:

- (1) The deceased was your de-facto partner and living with you in your house at Samabula. Therefore, the two of you were in a domestic relationship. By your actions you breached and violated the trust expected from you and the breach was gross.
- (2) The deceased was pregnant at the time with your child.
- (3) You stabbed and cut the deceased to death with the use of two knives – a kitchen knife and a cane knife. The deceased sustained several deep slash or cut wounds over her head and neck. She also sustained a stab

wound on her upper abdomen. The injuries over her head and neck were the most fatal or seriously fatal injuries.

- (4) As per the previous Convictions Report filed in this Court, there are several previous convictions recorded against you. However, all these previous convictions were between the periods 1985 to 1998. Therefore, I agree that you have been of good character since 1998.
- (5) As personal circumstances, you have submitted the following factors to Court:
  - (i) That you are 48 years old. Your date of birth is 22 November 1969. Thus you turned 49 yesterday.
  - (ii) You are said to be having three children, aged 23 years; 16 years and 9 years.
  - (iii) You are said to be self-employed doing a small scale business.
- (6) You have submitted to Court that the causing of the deceased's death was not pre-meditated or pre-planned and that you acted in the spur of the moment.
- (7) You are said to be genuinely remorseful of your actions and you have sought forgiveness from this Court. I have observed your demeanour during the course of the trial, and can confirm that you seem to be genuinely remorseful of your actions.
- (8) You submit that you fully cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (9) From the records I find that you were sentenced after the original trial on 16 December 2010. You appealed against the said conviction and sentence to the Court of Appeal. The Court of Appeal pronounced their judgment on 29 November 2016, ordering that the original conviction



for Murder be set aside and a re-trial to be held. Thus, you have served nearly six years imprisonment after the original trial.

(10) You have submitted that you have been in remand custody for nearly one and half years prior to and after your original conviction for Murder. However, I cannot take your period of remand into consideration in determining the minimum term to be served by you before pardon may be considered.

[19] The penalty for the offence of Murder is a mandatory sentence of imprisonment for life. Accordingly, I sentence you to a mandatory sentence of imprisonment for life. Taking into consideration all the facts and circumstances I have referred to above, including your personal circumstances and your previous history, I set a minimum term of 12 years to be served by you before pardon may be considered.

[20] In the result, I sentence you to a mandatory sentence of imprisonment for life. I set a minimum term of 12 years to be served by you before pardon may be considered.

[21] You have 30 days to appeal to the Court of Appeal if you so wish.



  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI

AT SUVA

Dated this 23<sup>rd</sup> Day of November 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitors for the Accused : Messrs A. K. Singh Law, Nausori.