IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 352 of 2018

BETWEEN	**:**	**STATE**
AND	**:**	**RAJIV KRISHAN PADYACHI**
Counsel	**:**	**Ms. Tivao S. with Ms. Swastika S. and Mr. Prasad Y. for the State** **Mr. O'Driscoll G. for the Accused**
Hearing on	:	18th of November 2019 – 22nd of November 2019
Summing up on	:	26th of November 2019
Judgment	:	29th November 2019
Sentence	:	11th December 2019

SENTENCE

Mr. Rajiv Krishan Padyachi, you stand convicted of the offence of Attempted Murder contrary to sections 44 (1) and 237 of the Crimes Act 2009, after a full trial.

You pleaded not guilty to the said charge when it was read over and explained to you and the ensuing trial lasted for 5 days. The complainant, Ms. Arpana Pratap, Special Constable Ropate Sivo, Police Constable Rova and Dr. Mitieli Viliasi gave evidence for the prosecution while you, Rajiv Krishan Padyachi gave evidence for the defence.

At the trial it was revealed how you were introduced to the complainant, how your relationship started and developed, how she lend a colossal sum of money to assist you, and subsequently, how she constantly pestered you to pay her money back. It is apparent that though you promised to pay her back and mislead her, you never had sufficient means to pay her back and never intended to comply with your undertaking. As for your version, you were irritated and made very uncomfortable by her presence and the association. Therefore, as a panacea, having meticulously planned and deviously executed, you attempted to kill her, masking it to be an accident. You would have succeeded in your evil attempt if not for the uninvited presence and the timely intervention of the police boxing team.

At the conclusion of the evidence and after the directions given in the summing up, the assessors unanimously found you guilty to the count of Attempted Murder.

Having reviewed the evidence, this Court by its judgment dated 29th of November 2019, conquering with the unanimous opinion of the assessors convicted you for the offence of 'Attempted Murder' contrary to sections 44 (1) and 237 of the Crimes Act 2009.

As for Section 237, the prescribed punishment for the offence of Murder is mandatory imprisonment for life. Section 44 (1) of the Crimes Act provides;

44 (1) "A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed."

Therefore the prescribed punishment for the offence of attempted Murder too, would be the mandatory imprisonment for life.

However, section 237 of the Crimes Act provides the court with a judicial discretion, to set a minimum term to be served before pardon may be considered.

This is a stand-alone penalty provision which is specific to sentencing upon a conviction for Murder, and in a like manner upon a conviction for Attempted Murder. As such, His Lordship W. D. Calanchini J. (President, Court of Appeal), held in the case of **Aziz v The State** [2015] FJCA 91 (13 July 2015) 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.

His Lordship Calanchini J. determines in **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) that;

> *"Section 237 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.*
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> *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.

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.

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.

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.

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."

These apt determinations and the observations made in the above stated case of 'Murder', are equally valid and applicable in to a case of an 'Attempted Murder' due to the operation of the section 44 (1) of the Crimes Act. I would quote His Lordship Calanchini J. further, from **Balekivuya v State** (supra) where His Lordship determines;

"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."

Accordingly, firstly, I will consider whether to set a minimum period or not. None of the parties invite the court to not to set a minimum term. Furthermore, it has been the practice of our court and the exception of not setting a minimum term should be exercised only in extremely serious cases, which bear hardly any mitigatiory circumstances. Therefore, I decide to set a minimum term of imprisonment to be served by the accused, before consideration of his pardon.

In consideration of the appropriate term set to be served before consideration of pardon, I find some useful guidance in His Lordship Rajasinghe J.'s sentence in **State v Fuata** - Sentence [2019] FJHC 1038; HAC249.2019 (31 October 2019), where it states;

"In order to set a minimum term to be served for the offence of Murder, the court is required to consider the level of culpability, level of harm, aggravating factors and mitigating circumstances of the crime."

The act was preplanned and the culpability was high. Level of harm occurred was moderate as for the Victim impact Statement. The relationship between the accused and the complainant falls within the ambit of the Domestic Violence Act of 2009. Breach of trust committed by the accused is an aggravating factor.

The accused was only 28 years at the time of the incident. He bears a clean character up to then. Submitted character certificates substantiates the same. The learned counsel submits that the accused is remorseful. The accused has paid 50% of the money borrowed. He has been in remand for a period of about 5 weeks' altogether.

In consideration of all the material before me, inclusive of what I have mentioned above, I set the term to be served by you before being considered for pardon at 15 years.

In the result, the accused Mr. Rajiv Krishan Padyachi is sentenced to imprisonment for life, subject to him being eligible for consideration of pardon after serving 15 years of imprisonment.

You are given thirty (30) days to appeal to the Court of Appeal, if you so desire.

Chamath S. Morais
JUDGE

HIGH COURT OF FIJI
SUVA

Solicitors : Office of the Director of Public Prosecutions for the State.
O'Driscoll & Co., Suva for the Accused.