

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 086 of 2017

BETWEEN : **STATE**

AND : **MONISH NISCHAL PRASAD**

Counsel : **Mr. Tuenuku T. for the State**
: **Ms. Singh J. for the Accused**

Hearing on : **21st of February 2020**
Sentence : **28th of February 2020**

SENTENCE

1. Mr. Monish Nischal Prasad, you were charged as follows;

Statement of Offence

ATTEMPTED MURDER: contrary to section 44 (1) and section 237 of the Crimes Act 2009.

Particulars of Offence

Monish Nischal Prasad, on the 10th of April 2017, at Ba Town, in the Western Division, attempted to murder Rishma Rohini Lata.

2. Before the commencement of the trial, Mr. Monish Nischal Prasad, the accused, having well understood the contents of the information and the consequences of such plea, pleaded guilty to the above count.

3. Thereafter, the State having filed the Summary of Facts, on the 18th of February 2020 the said Summary of Facts were read over and explained to you on 21st of February 2020. You having understood, agreed and accepted the said summary of facts to be true and correct and have taken full responsibility for your actions.
4. The Summary of Facts filed by the State discloses that:

The accused, Monish Nischal Prasad, 21 years old, unemployed of FSC, Ba is charged with one count of Attempted Murder contrary to Section 44 (1) and Section 237 of the Crimes Act, 2009. The accused on the 10th of April, 2017 had attempted to murder the victim Rishma Rohini Lata, 20 years old, student of Varadoli, Ba by striking and stabbing the victim several times with a kitchen knife.

The accused and the victim were in a relationship as boyfriend and girlfriend.

Incident

Approximately 3 weeks before the incident, the accused and the victim had an argument about the victim being on Facebook. The victim then ended the relationship with the accused. The accused however, did not like the fact that the victim ended their relationship as boyfriend and girlfriend and was very angry about this.

The accused continued to contact the victim by sending messages on her phone. This continued on 8th April 2017 where the accused sent the victim a message on her phone telling the victim that Monday (10th April 2017) will be her last day. (TAB A is the screenshots of the phone messages between the accused and the victim).

On the 10th of April 2017, the accused sharpened and prepared a kitchen knife and kept it in his bag. The kitchen knife was a 7 inch stainless steel

blade with a black handle. The accused then took his bag which contained the kitchen knife and waited for the victim at Ba bus stand.

When the victim arrived at the bus stand at 6.45 am on 10th April 2017, the accused came to the victim and placed his left hand on her shoulders. The victim told the accused to remove his hands from her shoulders but he refused. The accused then told the victim to go with him to Courts Home Centre. At this point in time, the victim tried to get away from the accused but the accused did not let her go. The victim was with her friends namely Rashika and Elvis. When they saw that the accused was holding the victim, Elvis went towards two Police Officers who were standing near Ba Market.

It was at this point in time that the accused told the victim that Police Officers were coming and whether he will kill the victim or not, he will be going to Prison. The accused then took out the kitchen knife and stabbed the victim 3 times on her stomach. The victim fell down to the ground yelling for help. The accused then attacked the victim's neck with the same knife and struck the victim's neck 2 times. The accused then continued to strike the victim's left side of her face with a knife and the victim tried to save herself by raising her right hand when the accused struck the victim's right hand at three places with that same kitchen knife. Fortunately, two itaukei men and two Police Officers ran to the victim's rescue and stopped the accused from striking the victim with the knife.

The victim was immediately taken to Ba Hospital and was immediately taken to the emergency room. The victim had injuries on her face, shoulder, neck, multiple lacerations and deep wounds on her body. According to the medical report of the victim (TAB B), from the multiple lacerations and the nature of the injuries, it was evident that there was an intention to kill. The victim had deep stab wounds which were actively bleeding on her shoulder and her back. The victim was later transferred to Lautoka Hospital.

The accused was arrested by the Police Officers who had stopped him and was immediately taken to Ba Police Station for his safety as bystanders

were trying to assault him. The accused was caution interviewed on the same day and fully admitted to the offence. When the accused was accused at question 82 why he struck the victim several times with a knife on her neck, head and stomach, the accused replied "so that she does not survive". Moreover, at question 85, the accused admitted that he wanted to kill the victim, (TAB C is the caution interview of the accused).

The accused at question 13 of his charge statement (TAB D) said that if the victim is not his then she cannot be of anyone else. The Police Officers also took photographs of the crime scene and the kitchen knife was uplifted from the scene. (TAB E are the photographs of the crime scene).

5. I find that the above summary of facts support all elements of the charge in the Information, and find the charge proved on the Summary of Facts agreed by you. Accordingly, I find you guilty on your own plea and I convict you of the count of Attempted Murder contrary to section 44 (1) and 237 of the Crimes Act 2009, as charged.
6. 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."

7. Therefore the prescribed punishment for the offence of attempted Murder too, would be the mandatory imprisonment for life.
8. 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.

9. 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.
10. 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 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.

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.”

11. 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.”

12. 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 mitigatory

circumstances. Therefore, I decide to set a minimum term of imprisonment to be served by the accused, before consideration of his pardon.

13. 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.”

14. The act was preplanned and the culpability was high. As for the Victim impact Statement level of harm occurred was high. 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.
15. The accused was only 21 years at the time of the incident. He bears a clean character up to then. The learned counsel for the accused seeks a lenient sentence.
16. 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.
17. In the result, the accused Mr. Monish Nischal Prasad is sentenced to imprisonment for life, subject to him being eligible for consideration of pardon after serving 15 years of imprisonment.
18. A permanent Domestic Violence Restraining Order (DVRO) under sections 27 and 29 of the Domestic Violence Act is issued in addition, for the protection of the victim, Ms. Rishma Rohini Lata.

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



Chamath S. Morais

JUDGE

**Solicitors : *Office of the Director of Public Prosecutions for the State.
Legal Aid Commission, Lautoka for the Accused.***