

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Criminal Case No. HAC 190 OF 2021

BETWEEN : **STATE**

AND : **NOELI JACK TAMANIKAISAWA**

Counsel : **Ms B Kantharia & Mr T Naimila for the State**
Mr T Varinava for the Accused

Hearing : 15, 16, 22, 23 & 24 July 2024

Judgment : 10 September 2024

Mitigation/Submissions : 1 October 2024

Sentence : 18 October 2024

SENTENCE

[1] Mr Tamanikaisawa, you appear today for sentence. You have been found guilty of murder and robbery.

Background

[2] On 26 September 2021 you murdered and robbed Mr Satya Pillay.

[3] Mr Pillay was going about his normal day. He was driving his taxi to make money to look after his family. You caught Mr Pillay's taxi that afternoon at Nausori town. Your intentions were bad. You intended to rob Mr Pillay. You directed him to drive out of Nausori town to a quiet and remote road. When you arrived, you persuaded Mr Pillay to get out of the taxi to help you place a bag of manure in the boot. When Mr Pillay's back was turned, you put your arms around his neck and strangled Mr Pillay until he was dead. It would have been a terrifying end to his life which, no doubt, Mr Pillay would have felt

helpless to stop. You then disposed of Mr Pillay's body in the nearby bush. You then stole what little he had on him; about \$15 in cash, his mobile phone and his groceries that he had purchased earlier that afternoon. Not content at that, you also took his taxi, although you didn't get far as it ran out of petrol.

- [4] You were arrested by the police a few days later. Although you admitted the offences when interviewed by the police, you defended the charges against you. You have been found guilty and you are here for sentencing.

Mitigating factors

- [5] You were a juvenile on 27 September 2021, at the time of the offending. You were 17 years old. Your 18th birthday was the next day, on 28 September 2021. You were studying at Fiji National University and you have no previous convictions.

Sentencing regime

- [6] The sentence for murder is mandatory, it is '*imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered*'.¹ What this means is that ordinarily the only question for the Court to consider is whether to set a minimum term and, if so, what that minimum term should be.
- [7] Here, however, you were only 17 years old at the time of the offence and, therefore, in law a juvenile. Pursuant to s 30(3) of the Juveniles Act 1973 a young person may not be sentenced for imprisonment for more than two years.² Section 31 concerns serious offending by the juvenile and reads:

(1) *Where a juvenile is found guilty of murder, of attempted murder or of manslaughter, or of wounding with intent to do grievous bodily harm, and the court is of the opinion that none of the other methods by which the case may legally be dealt with is suitable, the court may order the offender to be detained for such period as may*

¹ Section 237 of the Crimes Act 2009.

² A young person is defined under s 2 of the Juveniles Act as someone who has attained 14 years but not yet attained 18 years. Mr Tamanikaisawa was a young person at the time of the offence.

be specified in the order, and where such an order has been made, the juvenile shall notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and on such conditions as the Minister may direct.

- (2) *A juvenile detained pursuant to the directions of the Minister under the provisions of this section shall, while so detained, be deemed to be in lawful custody.*
- (3) *Any person detained may, at any time, be discharged by the Minister on licence which licence may be in such form and may contain such conditions as the Minister may direct, and may at any time be revoked or varied by the Minister.*
- (4) *Where a licence has been revoked under the provisions of subsection (3), the juvenile to whom the licence related shall return to such place as the Minister may direct, and, if he fails to do so, may be apprehended without warrant and taken to that place.*

[8] The application of this provision was considered by Shameem J in *State v NT* [2003] FJHC 339 (31 July 2003).³ Her Ladyship stated:

The legislature in Fiji, included murder in section 31(1) of the Juveniles Act. The result is that a judge may impose any term (including one for life imprisonment) having first concluded that there is no other suitable way of dealing with the case. The result is that where a juvenile commits murder, he may be sentenced to detention for life but need not be.

Such a discretion is in harmony with the various international instruments referred to by counsel for the offender in his well-researched and comprehensive submissions. The International Covenant of Civil and Political Rights, the United Nations Convention on the Rights of the Child, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) set down standards for children in conflict with the law. Although Fiji is signatory only to the Convention on

³ Another case where s 31 was considered is *State v Saukuru* [2021] FJHC 72 (5 February 2021), at 19 to 24.

the Rights of the Child, the other instruments are part of an influential body of international law. They have been adopted by the United Nations. The principles in them are consistent with the compassionate thread running through our Juveniles Act. In particular the Convention on the Rights of the Child urges the courts to impose imprisonment as a last resort and for the shortest possible time. This is consistent with the ethos behind section 30 of the Juveniles Act (which provides that children shall not be imprisoned for any offence, and that young persons shall not be imprisoned "unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution..."). Further, in sentencing persons under the age of 18, the welfare of the child is a primary consideration. I accept these principles and have applied them to this sentence.

...

Life Imprisonment

Section 31 of the Juveniles Act gives to the courts a discretion to impose a sentence appropriate to the offender and the offending. However, the courts must first be satisfied that no other legal alternative exists. There is no such alternative in this case, such as a hospital order. Both counsel agree that a custodial sentence is the only suitable option. Is this a case for life imprisonment?

There is no doubt at all that there are cases which must lead to life imprisonment, even where the offender is a juvenile. In this category would fall cases of planned killing, gratuitous violence, and the killing of the weak and especially vulnerable. Killing accompanied by sexual assault or mutilation of the victim would also fall into this category, deterrence, denunciation and the need to protect the public outweighing considerations of rehabilitation.

However this case does not fall into these categories.

Serious as this case is, and without in any way belittling the devastating loss of a life, I consider that this is not an appropriate case for life imprisonment. Although the injuries you caused were serious, you did not plan the murder, nor did you try to lie to the police about your conduct.⁴

- [9] I am satisfied that there are no other methods or alternatives (including those set out in s 32 of the Juveniles Act or those provided in the Sentencing and Penalties Act) that are suitable for your offending here. The only suitable option is a custodial sentence.⁵ I am not persuaded, however, that the circumstances of your offending fall within the nature of cases described by Shameem J above, as justifying a sentence of life imprisonment. It may be argued that you murdered a weak and vulnerable person but I read this description as applying to a child, or an elderly person or a disabled person. Mr Pillay was not elderly and there is no evidence he was suffering any disability. I do not downplay the seriousness of your criminal actions or the horrendous loss to Mr Pillay's family. However, the crimes you committed are not of the nature that Shameem J intended in her description in *State v NT*.
- [10] Accordingly, it is appropriate to fix a period of detention for you under s 31 of the Juveniles Act. The question is what period of detention is appropriate. The guideline tariff for the minimum term for murder as considered by the Court of Appeal in *Vuniwai v State* [2024] FJCA 100 (30 May 2024) is appropriate for this task.
- [11] Before considering the Court of Appeal's guideline in *Vuniwai*, it is necessary that I mention that you have also been found guilty of robbery. The maximum penalty for robbery is 15 years imprisonment. I will take this offending into account in determining a suitable period of detention for you.
- [12] The Court of Appeal set out five steps to be followed in setting a minimum term for murder.

⁴ In that case the offender, aged 14 years at the time of the murder, broke into the victim's home with a knife to steal and when discovered by the victim proceeded to stab the victim 3 times with a knife causing her death.

⁵ The methods identified under s 32 are not adequate for the seriousness of your offending.

- [13] The first step is to identify the seriousness of the murder and whether it falls into the category of extremely high, high or low. The State argues that the high category is appropriate, whilst your lawyer argues that it is the low category. I am satisfied that the proper category is high. Your case comes within item 2 under the High category which reads, '*A murder done for or in furtherance of payment, ransom or gain (such as a murder done in the course of contract killing or in furtherance of extortion, robbery or burglary or done in the expectation of property - moveable or immovable or intangible gain as a result of the death)*'.⁶ Here, the murder of Mr Pillay was done in furtherance of robbing Mr Pillay of his property.
- [14] The starting point for the high category is 20 years imprisonment with a range of 15 to 25 years imprisonment.
- [15] The second step is to weigh up the aggravating and mitigating factors.
- [16] The State refers to the degree of your planning of the robbery, the vulnerability of Mr Pillay who was 60 years old, the concealment of his body, the substantial loss caused to Mr Pillay's family, and the fact that Mr Pillay was providing a public service, namely the provision of taxi services.
- [17] Taxi drivers provide an invaluable service to the people of Fiji. Public transport goes nowhere near to satisfying the transport needs of the community. Taxi drivers provide an affordable and accessible service. In order for this service to function properly, taxi drivers must feel safe. They must be afforded protection.
- [18] Added to this aggravating factor is the terrible loss, both emotionally as well as financially, on Mr. Pillay's family. His widow and his son state in their Victim Impact Statements that Mr. Pillay was the main breadwinner in the family, as well as, understandably, an important source of emotional support and wisdom for the family. His death has left a gaping hole in their lives. As Mrs. Devi puts it, "*I have lost part of myself*". Mrs. Devi worries about the financial future of her and her children. Mr. Pillay's son speaks of the loss and shock of losing his father in the circumstances that happened. He

⁶ Paragraph [92] of *Vuniwai v State* (supra).

states that he is “*not too sure what to do because he was there to guide us along*”. Mr. Pillay’s son worries that he must now step into his father’s shoes and assume the responsibility of looking after the family. This terribly sad situation was brought about by your selfish criminal actions, your greed, your desire to rob another person of their property and in the process also take away their life.

[19] The main mitigating factors for you are that you are young and a first offender.

[20] The third step applies to a guilty plea. You defended the charges and, therefore, this step does not apply to you.

[21] The fourth step concerns time served on remand. The Court of Appeal accepted that the Court can make a deduction from the minimum term for time already served. The State advises that as of 30 September 2024 you have spent 1 year, 9 months and 25 days on remand. I make allowance for the additional 18 days up to today, 18 October. Therefore, the total period that you have been remanded is **1 year 10 months and 13 days**.

[22] The fifth step is proportionality. This requires having regard to all the factors, including the need to protect taxi drivers, the callousness of your actions, the significant impact of Mr Pillay’s death on his family, balanced against your young age, your previous good conduct and the need to leave the door open for your rehabilitation. An important consideration in this assessment is your age and the fact that you were only a juvenile when you committed the crimes.

[23] In my view, having regard to all the circumstance, a reasonable period of detention for you is 15 years. In arriving at this figure, I have considered comparable cases to your own from Annexure A to the *Vuniwai* decision. Case numbers 47 and 49 bear some similarity to the facts of your case. A minimum term of 15 years and 14 years were imposed in those cases – the offenders were aged 19 years at the time of the offences and both murders occurred in furtherance of another crime. I also make a deduction for the time served meaning that your period of detention is, in fact, 13 years, 1 month and 17 days.

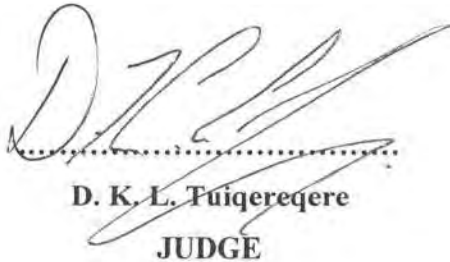
Orders

[24] Mr Tamanikaisawa, would you please stand.

[25] My orders are as follows:

- i. You are sentenced to a period of detention under s 31 of the Juveniles Act of 13 years, 1 month and 17 days. The place and the circumstances of your detention are to be decided by the Minister for Social Welfare. The Court Registry and the Prison Authorities should bring this immediately to the attention of the Minister. Until a decision is made by the Minister you are to be detained at the prison.
- ii. You have 30 days to appeal to the Court of Appeal.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State

Office of the Legal Aid Commission for the Accused