IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV0001 of 2020
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0078/13; HAC 45 of 2013]

BETWEEN: **NILESH CHAND**

Petitioner

AND: **THE STATE**

Respondent

Coram: The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
The Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

Counsel: Mr Iqbal Khan for the Petitioner
Mr L.J. Burney for the Respondent

Date of Hearing: 13 October 2022

Date of Judgment: 27 October 2022

JUDGMENT

Gates J

[1] This petition seeks special leave to appeal from the judgment of the Court of Appeal which had refused the Petitioner's application for enlargement of time to appeal against his

conviction on two counts of murder. He also seeks to overturn the decision which had dismissed his application to appeal against part of his sentence that had fixed a minimum term to serve in prison before being eligible to be considered for parole of 25 years.

[2] The sole ground against conviction is that his plea of guilty in the High Court *"was equivocal and involuntary and that he was pressured into pleading guilty to the offence of murder."*

The Facts

[3] The Petitioner was living with his wife and three children at Matasawalevu, Dreketi. It was a farming community. He was aged 30, and had been married for 10 years. He was employed by the China Railway Company. He was educated up to Class 8.

[4] He had lived at his house with his father and mother. His brother-in-law's daughter Subashni also stayed with him. She was schooling nearby and was in Form 7. She had stayed there for 5 years since her own home was too far away from the school.

[5] The Petitioner had a Hilux van. He told the police in his caution interview that at around 6pm on Friday 5th July 2013 he went to a nearby shop. He said he took one knife with him. He placed it under the mat near the driver's seat. He was asked why he had kept the knife and he said it was to assault Abishek, the son of the shop owner. He said he had an issue with Abishek. Abishek always wanted to speak to Subashni. According to Abishek, his friend Samuel, who was attending the same school as Subashni had told him Subashni "*was a good girl*." Samuel was a 17 year old, Form 5 student. Abishek was a 21 year old student at the Fiji National University.

[6] Abishek and Samuel were both at Wailevu, Abishek's home when Nilesh arrived in his twin cab and picked them up. Nilesh was with one Tua, an iTaukei man who was a diver. He told the police he brought the diver along as his guard. If there were to be a fight, "*he will be with me for my safety*." He told Tua, today we will assault him, assault Abishek."

All four of them drove off to Labasa, purchased a carton of beer and eventually came to Korosomo, Seaqaqa to drink it.

[7] Earlier the Petitioner had arranged through another to obtain Subashni's phone. He called Abishek using Subashni's phone. Abishek said "*look Subashni gave me a miss call*."

[8] Nilesh called four or five times. Each time Abishek showed him that Subashni was calling him. Nilesh said he then knew that Abishek had been calling Subashni. He said at that point he was "*full of anger."* Nilesh made up his mind, so he told the police, to end Abishek's life.

[9] They had reached Long Bay, Korosomo. He parked the van. They started drinking. Nilesh questioned Abishek why he was calling Subashni. The Petitioner then hit Abishek with the bottle he was holding full in the face. He pushed Abishek, who fell down.

[10] The Petitioner went and opened the driver's side door and pulled out the knife. He said "*I came and Abishek was lying down and (I) sat on his chest with my knee. I pressed Abishek both hand and with neck and I slit his neck*." He said he lifted Abishek's neck with his left hand and holding the knife in his right, from right to left he slit Abishek's neck.

[11] It was dark, so he checked with his finger to see if the neck was slit. Abishek's body had gone slack and there was no movement.

[12] Nilesh stood up. Samuel was crying and cowering in fear. Tua had been punching him. Samuel was lying down saying "*save me, I won't be a messenger anymore*." Nilesh gave Tua the knife and told him to kill Samuel. Tua would not do it. He told Tua to hold Samuel's leg. When this was done, Nilesh struck Samuel with the knife. He struck him three or four times, and again on the back of the neck.

[13] Straight afterwards, Nilesh told Tua to throw away the knife. Nilesh wiped away the blood from his hands, face, and clothes, so he told the police. He took off his shirt to wipe away

the blood. He told Tua to remove their phones and wallet. He said he did this *"so that I do not get caught*."

[14] He telephoned an uncle and arranged to go to his house. He parked the van in the dark he said, so no one could see him washing the van. He washed the blood off the van. Both Nilesh and Tua took a shower, and changed clothes. The blooded clothes were put in a plastic bag which his uncle supplied to him. The mobile phones were also put in a plastic bag. The stained clothes were thrown in an old well behind the house. He told his uncle to give a false story about his visit if anyone asked. They threw away the phones and wallet just before the Savusavu road junction. He told his uncle to burn the remaining clothing items. He said he did this to erase all the evidence.

[15] In the course of the interview he indicated to the police all of the places relevant to the account he had given of events on that night. As a result, almost all of the items were recovered, including the knife used to commit the murders.

[16] Towards the end of a lengthy interview, the Petitioner denied that he had had a sexual relationship with his niece. He admitted he had texted her and said he loved her. He said he knew of the relationship between Subashni and Abishek. The High Court judge concluded that this had been platonic. Finally in Q and A 198 the Petitioner said "*Yes, I murdered Abishek and Samuel at Korosomo*."

[17] On 6th July 2013 the relatives of the two boys reported that they were missing. After a search their bodies were discovered on 7th July. On 8th July post mortems, were carried out, on the two bodies, by then in a state of decomposition. The account by the Petitioner of the infliction of knife wounds was borne out in the pathologist's report.

[18] Professor Goundar, the Pathologist, found that for Abishek the cause of death was:
"*-excessive loss of blood due to cut injury to the neck*
– Anterior Severed Trachea and severed oesophagus."

And in the case of Samuel:

"*excessive loss of blood, cut injuries to the neck, severed spinal cord, severed trachea and severed oesophagus.*

Multiple cut injuries to the body, assault cut injuries."

The High Court

[19] The matter came up before the High Court on 6th and 8th August 2013, sentence being delivered on 9th August 2013. The Petitioner was represented by Mr Sen of Counsel. The Petitioner had pleaded guilty to the two counts of murder [Section 237(a)(b) and (c) Crimes Act]. He agreed the facts as given and was accordingly found guilty and convicted.

[20] The learned Judge noted that this was a plea of guilty at the earliest opportunity and that the Petitioner had made a full and frank admission about his crimes.

[21] The sentence for murder was fixed by law, and that was one of mandatory life imprisonment. The judge accordingly sentenced the Petitioner to two terms of life imprisonment, the terms to be served concurrently. The judge went on to consider the exercise of a discretion to set a minimum term to be served before pardon can be considered. Defence counsel addressed the court on this issue in detail and also filed written submissions.

[22] The judge considered his early plea, his co-operation with the authorities, his clear record and his remorse. But he could not overlook *"the sheer horror of these frenzied, unprovoked and unjustified intentional murders of two very young men."* His Lordship imposed a minimum term of 25 years.

The Single Judge

[23] His same solicitors filed a Notice of Appeal against sentence on 21st August 2013. A year later, on 22nd August 2014 the solicitors filed their submissions. On 30th March 2016 a

Notice of Appeal was filed with the Court of Appeal by his then 3rd Solicitor, Messrs. Iqbal Khan and Associates, his present lawyers in this appeal.

[24] His leave to appeal was heard by the single judge Goundar J. The Petitioner claimed, in a filed affidavit, that his private lawyer in the High Court Mr Amrit Sen, had been engaged for him by his father. He said one of the conditions for the payment of counsel's fees was to plead guilty. The father had done this to save the family from the embarrassment of a trial. Goundar J observed that neither Mr Sen or the (Petitioner's) father had filed an affidavit to support these contentions.

[25] Goundar J refused leave to appeal against conviction, and found that there was no arguable error in the sentencing discretion of the learned judge to arrive at the minimum term of 25 years.

Court of Appeal

[26] On 21st August 2013 the Petitioner's counsel in the High Court filed a timely application for leave to appeal. This was against sentence only. Written submissions on sentence were filed by both sides. On 2nd January 2015 a letter was filed by the Medium Corrections Centre. In this document it appeared he wanted to appeal against conviction as well. His 2nd solicitors filed proposed amended grounds and late submissions, which sought enlargement of time in the appeal against conviction. The 3rd solicitors came in on 24th March 2016, the present solicitors Messrs. Iqbal Khan & Associates. They sought renewal of the grounds, the one against conviction, and six new grounds of appeal against sentence.

[27] Mr Iqbal Khan for the Petitioner informed the full Court of the Court of Appeal that he would not be pursuing the additional grounds of appeal against sentence filed after the single judge ruling.

[28] A single ground against sentence remained therefore:

> *"That the learned Judge erred in law in failing to correctly apply judicial discretion to set a minimum non-parole term to be served by the Appellant before he could apply for a pardon."*

[29] The court found there had been no sentencing error within the parameters set in **Naisua – v- The State** CAV0010 of 2013; 20 November 2013 [2013] FJSC 14, and refused leave to appeal against sentence.

[30] The ground against conviction was:

> *"That the plea of the appellant was equivocal and involuntary and he was pressured into pleading guilty to the offence of murder."*

[31] This ground was filed separately and was filed late. The court had to follow established principles for deciding whether to enlarge time for that late appeal to be heard. After a careful analysis the Court refused such enlargement.

Grounds before this Court

[32] The two grounds before the Court of Appeal are repeated in the petition brought before this Court. However the Petitioner alleges the pressure to plead guilty had come from his former counsel.

[33] On 10th August 2015 the Petitioner swore an affidavit. In it he had made various allegations against his counsel in the High Court. One of them was that his counsel and his father, who were on very friendly terms, wanted him to plead guilty to avoid it becoming known that he and his teenage niece had been having an affair. But in the affidavit [at para.31 (t)] the Petitioner said:

> *"After the incident everyone in our village started talking about my affair with my niece and that I had killed Abishek because of that."*

[34] So at the time of his entering a guilty plea the cat was already out of the bag. Everyone in that rural community already knew what had happened and why. The affair was well-known, and pleading guilty was not going to assist in its concealment. The disrepute to the family had already occurred, and could not have forced a person facing a double murder charge to forgo a defence if he thought he had one. In any event, the fact of the affair came out upon his plea of guilty. He did not have to plead guilty in order to avoid it coming out.

[35] His affidavit says nothing about what questions he had for his lawyer. Mr Sen had made himself available. He did not interfere with the progress of the caution interview conducted by the Police. But he called into the room where it was taking place no less than four times. There was at least one of those occasions when he spoke in private with Mr Sen, which the Petitioner accepts.

[36] The Petitioner believes he could have challenged the prosecution case. Considering the evidence, available in the disclosures upon which Mr Sen would have based his advice, that appears to be a naïve belief. The Petitioner stated that the least that could have been done by his lawyer for him would have been an approach to the Director of Public Prosecutions to seek a reduction of the charges so that he could plead to those. The circumstances of the brutal attack and the lack of foundation for a plea based on provocation, the premeditation, the planning, the execution of the plan, taking along the knife and the "*the tough guy*," and the prior obtaining of the niece's sim card to make the calls to Abishek, and the immediate efforts at erasure of evidence afterwards, make sudden provocation an unlikely finding.

[37] On the summary of facts presented to the High Court, and which the Petitioner had accepted, there was nothing to alert the Judge that there might be some equivocation over the plea. There is nothing evident on the face of the record of proceedings to indicate that the Petitioner might not be pleading guilty.

[38] In the Court of Appeal, Prematilaka JA set out defence counsel's duty [at para.26] which we indorse:

> *"The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide* ***R v. Hall*** *[1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.) In* ***R. v. Turner*** *(1970) 54 Cr. App. R. 352, C.A. [1970] 2 Q.B. 321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in* ***Herbert*** *(1991) 94 Cr. App. R. 233 said that defence counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also* ***Cain*** *[1976] QB 496)."*

[39] In the instant case, reviewing Mr Sen's advice, Prematilaka JA observed [para.27]:

> *"Therefore, in the light of the above judicial pronouncements, I cannot see anything wrong in Mr. Sen's advising the appellant that on the facts of the case he stood little chance of success in challenging the prosecution to prove the case of murder and the decision to plead guilty would have been considered the wise option. Further, the defence counsel would in probability have informed the appellant that a plea of guilty would be viewed favourable by the trial judge in fixing the minimum serving period. It is only logical for the defence counsel and the appellant to have thought of getting a lesser minimum serving period upon tendering an early plea of guilty. It would be grossly unfair by the defence counsel to draw an inference of having pressured the appellant in the absence of any material, for he had no opportunity of responding to that allegation in the appeal before this court."*

[40] The Petitioner tendered his plea of guilty on 6th August 2013. He was not formally convicted by the judge till the 8th August, and he was sentenced on 9th August. The Petitioner had ample time to re-consider his position on the plea he had tendered, and on the Summary of Facts he had agreed to. He could still have applied to withdraw that plea before sentence was passed. It would have been clear to him that the charge continued to be murder, not manslaughter, and that no representation had been made to reduce the

murder charges. On the record of the proceedings there was no equivocation or doubt as to the plea to these two very serious charges. The judge was right to accept the plea as both informed and voluntary: **R v. McNally** [1954] 1 WLR 933; 38 Cr. App. R.90, **S. (An Infant) v. Recorder of Manchester** [1970] 2 WLR 21; [1971] AC 481. The Court of Appeal therefore rejected the allegation that he had pleaded guilty because Mr. Sen had informed him that upon making the guilty plea the count of murder would be reduced to manslaughter.

[41] In making petition to this court Mr Khan relied on the Petitioner's affidavit sworn on 10th August 2015. This had been prepared by the 2nd firm of solicitors in his matter – Messrs. Kohli and Singh. In the affidavit serious allegations were being levelled at counsel in the High Court, Mr Sen. The Court of Appeal noted that there appeared to have been no previous guidance given in Fiji on the procedures to be adopted in such applications. Reference was made to guidance given for England and Wales by the Lord Chief Justice. That procedure was set out in **Regina v. Doherty and McGregor** [1997] EWCA Crim. 556; [1997] 2 Cr. App. R. 218. Fiji's Court of Appeal considered the procedure to be one that could safely be adopted in Fiji. With that opinion, I agree.

[42] The English procedures were as follows:

> *"1. Allegations against former counsel may receive substantial publicity whether accepted or rejected by the court. Counsel should not settle or sign grounds of appeal unless he is satisfied that they are reasonable, have some real prospect of success and are such that he is prepared to argue before the court (Guide to proceedings in the Court of Appeal Criminal Division para 2.4). When such allegations are properly made however, in accordance with the Code of Conduct counsel newly instructed must promote and protect fearlessly by all proper and lawful means his lay client's best interests without regard to others, including fellow members of the legal profession.*
>
> *2. When counsel newly instructed is satisfied that such allegations are made, and a waiver of privilege is necessary, he should advise the lay client fully about the consequences of waiver and should obtain a waiver of privilege in writing signed by the lay client relating to communications with, instructions given to and advice given by former counsel. The allegations should be set out in the Grounds of Application for Leave to Appeal. Both*

waiver and grounds should be lodged without delay; the grounds may be perfected if necessary in due course.

3. On receipt of the waiver and grounds, the Registrar of Criminal Appeals will send both to former counsel with an invitation on behalf of the court to respond to the allegations made.

4. If former counsel wishes to respond and considers the time for doing so insufficient, he should ask the Registrar for further time. The court will be anxious to have full information and to give counsel adequate time to respond.

5. The response should be sent to the Registrar. On receipt, he will send it to counsel newly instructed who may reply to it. The grounds and the responses will go before the single judge.

6. The Registrar may have received grounds of appeal direct from the applicant, and obtained a waiver of privilege before fresh counsel is assigned. In those circumstances, when assigning counsel, the Registrar will provide copies of the waiver, the grounds of appeal and any response from former counsel.

7. This guidance covers the formal procedures to be followed. It is perfectly proper for counsel newly instructed to speak to former counsel as a matter of courtesy before grounds are lodged to inform him of the position."

[43] In the oral hearing before us, Mr Khan conceded he had not written to Mr Sen for his comments on his conduct of the case in the High Court, and specifically to seek his comments on the allegations made against him in arriving at the Petitioner's plea. He said he had come across Mr Sen in Labasa and mentioned the allegations. Mr Sen said they were untrue. This was an insufficient way of dealing with the matter. The approach to Mr Sen should have been in writing to allow him to make a considered reply in writing. Whilst the guidance from the English court might not have come to the notice of Mr Khan prior to the decision of the Court of Appeal on the 28th November 2019, it would have been known prior to the hearing of the Supreme Court in 2022. Yet, as a matter of procedure and courtesy no professional approach was made to former counsel for his comments. The decision of the single judge had already referred to the absence of affidavits from Mr Sen and the Petitioner's father. This should have alerted Mr Khan as to the need for some confirmatory evidence in support of the bare allegations in his client's affidavit.

[44] The Court in **Doherty and McGregor** (supra) had stated [at 221D]:

> *"The purpose of the "courtesy" referred to in the guidance is to inform trial counsel of the allegations which are to be made. It is not to be treated as an opportunity to cross-examine or interrogate him, whether before the grounds of appeal and necessary documents have been lodged with the registrar, or after counsel has responded. Where there is a factual dispute between client and former counsel both the appellant and counsel may be required to give evidence so that, unless agreed, issues of fact may be resolved. The opportunity for cross-examination arises at that stage."*

[45] It is very easy when all else fails to blame the lawyer. This phenomenon is beginning to appear in Fiji, though it may be more frequent in other jurisdictions. In **R v. Achogbuo** [2014] EWCA Crim. 567; [2014] WLR [D] 137 Lord Thomas LCJ observed at para.16:

> *"As in this case, many such cases proceed without any inquiry being made of solicitors and counsel who acted at trial"*

and at para.17:

> *"The frequency of this kind of appeal makes it clear to us that counsel and solicitors would be failing in their duty to this court if they did not make enquiries which would provide an objective and independent basis, other than complaints made by the convicted criminal, as to what had happened."*

[46] In this case both the 2nd and the 3rd solicitors failed to approach trial counsel for his comments. The Court of Appeal concluded *"it would be naive to expect this court to act upon totally unsubstantiated and belated affidavit of the appellant alone."* That conclusion was correct and inevitable. It was impermissible to proceed on the word of the defendant alone: **Archbold** "*Criminal Pleadings Evidence and Practice*," 2018 Edition p.1272.

Ground against sentence

[47] In refusing leave to appeal to the Court of Appeal on sentence, the single judge had said:

> "*[8] In my judgment, <u>there is no arguable error in the sentencing discretion of the learned Judge to arrive at a minimum term of 25 years</u>. The murders were dreadful and a minimum term of 25 years was justified on the facts of this case. For these reasons, leave to appeal against sentence should be refused*. (emphasis added).

[48] The Full Court in finding there had been no sentencing error, added [at para.69]:

> *"Given that the appellant had acted in a premeditated and totally unprovoked and senseless manner showing scant disregard for the preservation of human life driven only by jealousy, he deserves deterrence in the form of a very substantial minimum period of incarceration. A survey of previous sentences over a long period of time shows that the courts have imposed minimum serving periods ranging from around 10 years to 25 years with exceptions at the lowest and highest ends, depending on the facts and the gravity of circumstances of each and every case in addition to the mandatory life sentence for murder. I cannot see anything wrong with the 25 years imprisonment as the minimum period the appellant must serve before pardon may be considered in the face of the horrific acts of the appellant that speak for themselves. They shock the conscience of any human being. He is clearly a danger to the society and must be kept in imprisonment for at least 25 years.*

[49] These observations were unassailable.

<u>Determination</u>

[50] The late allegations on equivocal plea are unsupported and unrealistic. There was never any prospect of a reduction of the charges to manslaughter. Provocation, as a defence, could gain no traction in view of the Petitioner's premeditation, pre-planning, and orderly and immediate steps taken to erase the incriminating evidence.

[51] The Court of Appeal was correct in rejecting the application to enlarge time for appeal against conviction. The non-parole part of the sentence was proportionate to the circumstances of the two brutal murders. The petition against sentence must also fail.

Marsoof J

[52] I have read the judgment of Gates J in draft and agree with his reasoning and conclusions and the orders proposed by him.

Keith J

[53] I agree with the judgment of Gates J. There is nothing that I can usefully add.

Orders:

1) *Special leave refused.*
2) *Conviction and sentence affirmed.*

Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

Hon. Mr Justice Saleem Marsoof
Judge of the Supreme Court

Hon. Mr Justice Brian Keith
Judge of the Supreme Court