

IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV0011 OF 2021

Court of Appeal No. AAU 0073 of 2015

BETWEEN : **JOELI MASICOLA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Honourable Mr. Justice William Calanchini,**
Judge of the Supreme Court

: **The Honourable Mr. Justice Terence Arnold**
Judge of the Supreme Court

: **The Honourable Mr. Justice Isikeli Mataitoga**
Judge of the Supreme Court

Counsel : **Mr. S. Waqainabete for the Petitioner**

: **Ms. S. Shameem for the Respondent**

Date of Hearing : **09 August 2023**

Date of Judgment : **30 August 2023**

JUDGMENT

Calanchini, J

[1] I have read in draft form the judgment of Arnold, J and agree with his reasoning and his conclusions.

Arnold, J

[2] On 13 February 2015, the Petitioner, Joeli Masicola, pleaded guilty to three counts – one of murder, one of attempted murder and one of grievous bodily harm. He was sentenced on 15 June 2015 to mandatory life imprisonment on the first two counts and 4 years' imprisonment on the third, to be served concurrently. The Court determined that a period of 19 years was to be served on the murder conviction before a pardon could be considered.¹

[3] Mr Masicola filed an appeal against conviction and was granted leave to appeal to the Court of Appeal by a single Judge. The only issue raised was whether the partial defence of provocation was available on the facts and should have been raised by the Judge, presumably with defence counsel and/or Mr Masicola. The Court of Appeal dismissed his appeal.²

[4] Mr Masicola now seeks leave to appeal to this Court. As his application was filed approximately three months out of time, he also seeks an enlargement of time. The sole intended ground of appeal is that the Court of Appeal erred concluding that the partial defence of provocation was not open on the basis of the summary of facts put before the High Court, on the basis of which Mr Masicola admitted the three counts.

¹ Section 237 of the Crimes Act 2009.

² *Masicola v State* [2021] FJCA 176; AAU073.2015 (29 April 2021).

Factual background

- [5] Mr Masicola initially entered pleas of “*Not Guilty*” to the charges, but later, on 17 November 2014, advised the Court that he wished to enter “*Guilty*” pleas and wanted to consult his counsel. Mr Masicola pleaded guilty to all three counts on 13 February 2015 at a hearing where he was represented by counsel. The matter was adjourned, and the prosecution was instructed to prepare (among other things) a summary of facts. When the matter was called again on 27 February, the Judge instructed defence counsel to “*consult his client carefully on the charges he has pleaded guilty to*” and adjourned the matter again.
- [6] Ultimately, on 17 April 2015 when the matter was called again, the summary of facts was provided to the Court. The defence acknowledged receipt of the summary. Mr Masicola agreed with the summary in relation to each of the three counts he faced. In light of that, the Judge convicted Mr Masicola on the three counts. Sentencing took place on 5 June 2015.

The summary of facts

- [7] The summary of facts is obviously critical to the question whether provocation should have been put in issue. Given its importance, I set it out in full:

*"The defendant is **Joeli Masicola** (33 years old in 2014) and he was residing at Sakoca Settlement, Nasinu in 2014. He is legally married to Tavenisa Lewavavai (aged 28 years in 2014) and they have been legally married for about 4 years but they do not have any children.*

In December 2013 Tavenisa did not stay with her husband anymore and separated from him. She then went to stay with her aunty namely Karalaini Loaloa (aged 40) at Kilikali Settlement along Ratu Dovi Road, Nadera in Nasinu.

Tavenisa became involved in a relationship with a man named Jone Nabaisila (aged 38 years) and they both stayed with her aunty at Kilikali Settlement, Nadera in Nasinu.

On 21st February 2014 at about 1am, the defendant was at Kilikali Settlement, Nadera in Nasinu asking for a cane knife. The defendant had approached a resident there but was informed that they did not have one.

The defendant then went to another settlement namely Veirasi Settlement, Nadera which is 1 – 2 kilometers away. It was about 2am now on the 21st of February 2014. At Veirasi Settlement, the defendant managed to obtain a cane knife from a house there and then left the area without saying anything to anyone.

Between 2am to 3am on that same day, the defendant returned to Kilikali Settlement and entered the house belonging to Karalaini Loaloo who was sleeping at the time. Tavenisa Lewavavai and Jone Nabaisila were also asleep inside the house at the time in the sitting room.

When the defendant entered the house, he struck Tavenisa Lewavavai first with the cane knife. She was still lying down when she was struck. The defendant struck Tavenisa with the cane knife on the right side of her face, the back of her left shoulder and the right hand amputating or severing her small right finger (or "pinky" finger).

The defendant then turned his attention to Jone Nabaisila who was also lying down. The defendant struck Jone Nabaisila several times namely on the left side of his head, left arm, left hand, abdomen, back and left leg.

Karalaini Loaloo (the aunty) woke up to the voice of her niece Tavenisa saying "Joeli don't". The aunty stood up enquiring what happened and this was when the defendant swung the cane knife at her. When the knife was swung at her by the defendant, Karalaini Loaloo lifted her right hand to defend herself and the knife landed on her right hand. Her right pinky finger was severed or amputated as a result of the cane knife landing on her hand and she also received a cut as well to her right ring finger.

The defendant then ran away from the house thereafter.

Tavenisa Lewavavai, Jone Nabaisila and Karalaini Loaloo were all bleeding as a result of the attack by the defendant. Particularly for Jone Nabaisila, his intestines were protruding because of the cut he received to his abdomen and he was moaning in pain.

The police were called a few minutes later and secured the scene. Tavenisa Lewavavai and Karalaini Loaloo had to go to Colonial War Memorial (CWM) hospital because of their injuries. For Jone Nabaisila, it was noticed as if he was "giving his last breath" or struggling to breathe. He did not say a word. He too was taken to the hospital minutes after the attack but passed away later on the same day at about 3am. The cause of death for Jone Nabaisila in the view of the pathologist Dr. James Kalougivaki was excessive blood loss due to multiple slashed (cut) injuries to the deceased. The post mortem was conducted on 22nd February 2014.

Tavenisa Lewavavai was medically examined on the same day at around 4am at the Colonial War Memorial Hospital by Dr. Timoci Qereqeretabua. The doctor found that there was a deep laceration across the right side of her face from the ear to the mouth; an incisional wound on her left shoulder; and a partial amputation of her right small finger. The injuries were consistent with the use of a sharp knife.

Karalaini Loaloe was medically examined on the same day too at around 4.30am at the Colonial War Memorial Hospital by Dr. Timoci Qereqeretabua as well. The doctor found that she had a partial amputation of her right little finger and laceration of her right ring finger. The injuries were consistent with the use of a sharp knife.

At about 4am on that same day after having attacked Tavenisa Lewavavai, Jone Nabaisila and Karalaini Loaloe with a cane knife at Kilikali Settlement, the defendant returned to Veirasi Settlement and informed one of the residents that he is going to the Police Station and that the cane knife he had used is in a cassava patch at Kilikali Settlement.

Later, the defendant then surrendered himself voluntarily to Police at the Valelevu Police Station on the same day 21st February 2014 at about 4am. He informed the police officer who was on duty at the time namely Mikaele Ratuvoa that his wife was having a de-facto relationship and he "stabbed them". He was immediately placed under arrest. He also informed the police that he had thrown the cane knife he used near the road side at Kilikali Settlement.

At the scene, a search was made by police and the cane knife with a brown handle was found on the same day on 21st February 2014 at around 5am at Kilikali Settlement in a drain. It was later identified on 22nd February 2014 to police by Tui Safata (a resident at Veirasi Settlement, Nadera) that it had gone missing earlier because the defendant had taken it.

*After surrendering to police, the defendant **Joeli Masicola** was interviewed under caution at the Valelevu Police Station commencing on the same day on 21st February 2014 in the Itaukei language. He was allowed to speak to his pastor in the beginning of the interview. He understood his rights and admitted that he is married to Tavenisa Lewavavai for more than 3 years and they do not have any children. He said that he is not suffering from any sickness. He said that his wife had gone to stay with her aunty at Kilikali Settlement 2 weeks before the 20th of February 2014. He said that he gave his wife permission to stay at Kilikali. He admitted calling his wife on 20th February 2014 at around 11pm on his phone. His wife answered and asked him what he wanted and the defendant replied, asking her when she will return home. He said that his wife then told him not to disturb her as it is midnight and she turned off the phone. He called her again but a "male person" picked up the phone and told him not to disturb them and not to call*

again. He requested the male person to give the phone to his wife and when the defendant's wife answered, his wife told him not to call them as they are having sex. The defendant told police that he heard his wife moaning and having sex and when this was happening the phone was on for a while and then it went off. The defendant told police that he called a third time and asked his wife whether it was true and the wife replied saying "what else" and the phone was turned off. He tried calling her again but there was no answer. The defendant told police that he made up his mind to see them and find out the truth and if he finds them sleeping together he will kill them both. So he walked from Sakoca to Kilikali Settlement and that was about 12 midnight. He reached Kilikali and went to the house where his wife was. He said that he climbed up the window of the house on a used fridge and when he drew the curtain he saw the man sleeping between his wife and Karalaini. The man was wearing shorts but no shirt and his wife was wearing her clothes. When he saw them he wanted to look for a knife. He went to a house at Veirasi, Qarase Road and he took a knife from a house there. He told police that the knife had a small blade and wooden handle. When police showed him a knife during the interview, he agreed that it was the same one. He admitted trying to get a knife from Kilikali Settlement but he couldn't and so he went to Veirasi Settlement. He returned to Kilikali where his wife was with a knife, he saw that they were still sleeping. He managed to open the door to the house and when he entered, started striking his wife first with the knife who he said was closest to the door. He doesn't know which part of her body he struck with the knife because he said that he was really angry. He struck his wife twice and then he struck the man 4 times. He also does not know where he struck the man. Whilst he was striking them he was saying that they now know the consequence of having extra marital affairs. He also admitted striking "Kara" with the knife. He then left the house and ran to the road where he threw the knife into a drain. During the scene reconstruction, he showed police the route he took to Kilikali, the window he looked through, the house where he got the knife from, how he struck his wife, the place where he threw the knife and the route he took to the Valelevu Police Station. He admitted that when he reached the police station he told them that his wife was having an affair with another man and he had struck them with a knife. He said that he did it because he was "heartbroken". He said that his wife has had extra marital affairs with other men 3 times. In his interview, he also sought forgiveness for what he had done..."

Provocation

- [8] Provocation has been the subject of many appellate court decisions, in Fiji and elsewhere. The limitations inherent in the law and its overall complexity have led to calls for the abolition of the defence and, in its place, giving judges the discretion to make allowance

for circumstances in the nature of provocation through the sentencing process.³ Nevertheless, Fiji, in common with many other jurisdictions, retains the defence.

[9] Under s 242(1) of the Crimes Act 2009, murder is reduced to manslaughter where the killer “*does the act which causes death in the heat of passion caused by sudden provocation ... before there is time for the passion to cool*”. Relevantly, “*provocation*” is defined in s 242(2) as:

“The term “provocation” means ... any wrongful act or insult of such as nature as to be likely when—

(a) done to an ordinary person;

...

to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

[10] In *Codrokadroka v The State*,⁴ the Supreme Court approved the following principles from the judgment of the Court of Appeal⁵ as accurately reflecting the approach that a trial judge should take to the issue of provocation:

- “1 The judge should ask himself/herself whether provocation should be left to the assessors **on the most favourable view** of the defence case.*
- 2 There should be “a credible narrative” on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*
- 3 There should be “a credible narrative” of a resulting loss of self-control by the accused.*
- 4 There should be “a credible narrative” of an attack on the deceased by the accused which is **proportionate** to the provocative words or deeds.*

³ See, for example, New Zealand Law Commission *The Partial Defence of Provocation* Report 98 September 2007. New Zealand has now abolished the defence.

⁴ *Codrokadroka v The State* [2015] FJSC 15; CAV07.2013 (20 November 2013) at para [17].

⁵ *Codrokadroka v The State* [2008] FJCA 122, AAU0034.2006 (25 March 2008) at paragraph [38].

- 5 *The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a **sudden** loss of self-control depends on the facts of each case. However cumulative provocation is in principle relevant and admissible.*
- 6 *There must be an evidential link between the provocation offered and the assault inflicted.”*

[11] The authorities establish that a trial judge has the responsibility to raise provocation where there is the necessary “credible narrative” on the facts even if an accused is represented by counsel and does not wish to raise the defence. The authorities recognise that this can, in some circumstances, place the judge in a difficult position.⁶

The Petitioner’s Submissions

[12] Mr Waqainabete for Mr Masicola drew the Court’s attention to three portions of the material before the Court:

- (a) First, he noted the description in the summary of facts about what happened when Mr Masicola telephoned his wife and learnt that she was having sexual intercourse with another man, in particular the effect on Mr Masicola.
- (b) Second, Mr Waqainabete pointed to Mr Masicola’s police interview. In that interview, Mr Masicola described the impact of learning that his wife was having sexual intercourse with another man, namely that he was “heartbroken”.
- (c) Finally, counsel emphasised the references in both the summary of facts and in the plea in mitigation to his wife’s previous history of infidelity. Before this incident, she had, during their relatively short marriage, had affairs with three other men. On each occasion, she left her husband and went to live with the man concerned for a time.

⁶ See, for example, the discussion in *Ram v The State* [2012] FJSC 12; CA V0001.2011 (9 May 2012).

[13] Mr Waqainabete argued that these facts, taken in totality, amounted to cumulative provocation, which had built up over the years that Mr Masicola was involved in an unfaithful marriage.

Analysis

[14] I agree with the Court of Appeal that the summary of facts does not raise a credible evidential basis for the partial defence of provocation. I now explain why.

[15] First, as is reflected in the summary, in his interview, Mr Masicola said that, after the three telephone calls to his wife's phone during which his wife said she was having sex with someone, he "*had to go and see them to know the truth*". He went on to say that, if he found them sleeping together, he would kill them both. So, the decision to kill was not a spontaneous or sudden reaction to a provoking action but rather a decision made that was conditional on finding out what was going on.

[16] Second, Mr Masicola had to walk from the village where he lived, Sakoca, to the village where his wife was staying with her aunt, Kilikali. When he arrived at the aunt's hut, he looked in a window and saw his wife, a man and the aunt asleep on a bed, the man sleeping between this wife and her aunt. They were clothed and no sexual activity was occurring, so to that extent, he saw nothing to make him immediately lose the power of self-control.

[17] Third, having seen them, Mr Masicola went to look for a knife. He could not find one in Kilikali and so went to another village, Veiraisi, where he obtained one. While looking for a knife, Mr Masicola spoke to several people. The period from when he left his home at Sakoca to when he located a knife was somewhere between one and two hours, so that Mr Masicola had the opportunity to cool off.

[18] Fourth, when Mr Masicola returned to the aunt's hut at Kilikali with the knife, all three occupants were still asleep. Mr Masicola had to get into the hut by climbing on an old refrigerator, prising open a louvered window and unlatching the door. Once in the hut, Mr Masicola first attacked his wife with the knife, then the deceased, then the aunt. When

he was asked where on the body he had struck his wife, Mr Masicola replied that he did not know “*because he was really angry and kept on striking*”. At some point he said to the victims “*Now you know the consequences of having marital affairs*”. This indicates that Mr Masicola was angry and that his motivation was to get revenge by punishing those involved.

[19] Finally, while I accept that the law allows for the possibility of cumulative provocation – actions that buildup over a prolonged period that ultimately cause a person to “snap” – the evidence does not support that narrative in the present case. Mr Masicola’s wife had a history of going away with other men. But in this case, it did not cause Mr Masicola to suffer a sudden loss of self-control. Rather, what occurred was a pre-planned attack, which took several hours to implement.

Disposition

[20] Mr Masicola seeks an enlargement of time to seek leave to appeal. The State opposes this. However, I consider it is appropriate to exercise the discretion to extend time given Mr Masicola’s circumstances and the relatively short period of delay.

[21] Mr Masicola seeks leave to appeal to this Court on the basis of s7 (2) (c) of the Supreme Court Act 1998. Under that subsection, the Court may grant leave if a “substantial and grave injustice may otherwise occur”. Like the Court of Appeal, I am satisfied that the summary of facts did not raise a credible narrative of provocation and that the appeal has no prospect of success. Accordingly, I would decline to grant leave to appeal.

[22] I conclude by reiterating the important point made by this Court in **Matalulu v Director of Public Prosecutions**.⁷ The Court said:

“The Supreme Court of Fiji is not a court in which the decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distracts this court from its role as the final appellate body by burdening it with appeals that do not raise

⁷ *Matalulu v Director of Public Prosecutions* [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003).

matters of general importance or principles or, in the criminal jurisdiction, 'substantial and grave injustice'.

This case illustrates the concern expressed in that extract.

Mataitoga, J

[23] I support the judgment of Arnold, J.

[24] **Orders of the Court**

1. *The Petitioner's application for an enlargement of time is granted.*
2. *The Petitioner's application for leave to appeal is dismissed.*



W. Calanchini
.....
The Honourable Mr. Justice William Calanchini
Judge of the Supreme Court

Terence Arnold
.....
The Honourable Mr. Justice Terence Arnold
Judge of the Supreme Court

Isikeli Mataitoga
.....
The Honourable Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court