IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV0037 OF 2023
[Court of Appeal No: AAU0008 of 2017]

BETWEEN : **JOVILISI GODROVAI**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court
The Hon. Mr Justice William Young, Judge of the Supreme Court

Counsel: Ms L Ratidara for the Petitioner
Ms S Shameem for the Respondent

Date of Hearing: 7th April, 2025
Date of Judgment: 29th April, 2025

JUDGMENT

Arnold, J

Introduction

[1] This petition for leave to appeal against conviction raises the issue of diminished responsibility. The petitioner submits that the trial Judge should have raised the possibility of this defence, which reduces murder to manslaughter. Diminished

responsibility is addressed in some detail in another decision of this Court delivered in this session, *Khan v State*.[1] The decision in the present case can usefully be read in conjunction with Young J's judgment in that case.

[2] In addition, the petitioner seeks to appeal against the minimum sentence imposed upon him for murder in conjunction with the mandatory life sentence.

Background

[3] The petitioner, Jovilisi Godrovai, was charged with one count of murder and one count of aggravated robbery, committed between 19 and 20 May 2016. He was represented by the Legal Aid Commission. At first call on 9 June 2016, defence counsel asked that the petitioner be referred to St Giles Hospital for a psychiatric assessment. This was because the petitioner had been receiving treatment there.

[4] Dr Jay Lincoln of St Giles provided the Court with a detailed report dated 4 July 2016 (the 2016 report). The 2016 report stated that the evaluation had been carried out on 17 June 2016 and was based on an interview with the petitioner lasting one and a quarter hours. Dr Lincoln concluded that the petitioner was fit to plead and that he was aware of his actions at the time of the alleged offending. I will go into the 2016 report in more detail later in this judgment.

[5] On 5 August 2016, the petitioner entered pleas of "not guilty" to both counts. Then, on 16 August 2016, having discussed the matter with his lawyer, the petitioner entered pleas of "guilty" to both charges, confirming that he did so of his own free will and without any pressure from the prosecution. A draft summary of facts was then prepared, which was considered by both prosecution and defence counsel. On 23 September 2016, the summary of facts was read to the petitioner, and he admitted it. Attached to the summary were some photographs of a reconstruction carried out by police with the petitioner, the post-mortem report and the petitioner's caution interview.

[1] *Khan v State* Criminal Petition No CAV 0001 of 2024.

[6] In relation to the murder charge, the petitioner was sentenced to life imprisonment, with a minimum period of 20 years before he could be considered for a pardon. In relation to the aggravated robbery, he was sentenced to 12 years, seven months with a non-parole period of 11 years. Both sentences were to be served concurrently.

The offending

[7] According to the summary of facts accepted by the petitioner, the petitioner was walking with a friend late one evening when he saw an unlighted house. He forced entry by removing some wooden shutters and louvred windows. While looking around inside, the petitioner came across a 69 year old woman asleep in bed. The petitioner pressed the woman's mouth and punched her legs, which caused the woman to wake up and begin shouting. The petitioner stuffed a piece of cloth into her mouth, tore up a bedsheet and tied a strip of it over her mouth. The petitioner then used a rope to tie the woman's hands and legs.

[8] Having done this, the petitioner searched the house and found some money and other items, which he took. Before he left the house, the petitioner went back into the bedroom to check on the woman. She had by that time died of asphyxia. The petitioner realised the woman was dead when he touched her neck. He then left the property with the items he had found and rejoined his friend. He was arrested several days later.

The 2016 report

[9] In the 2016 report, Dr Lincoln noted that St Giles did not have a psychiatric consultant at that time. Dr Lincoln recorded that he was a junior registrar psychiatrist with limited training in psychiatry, but he was performing the psychiatric evaluation because there was no one else to do it.

[10] The 2016 report noted that most of the information relied on had come from the petitioner, whom Dr Lincoln assessed to be a reliable source of information. Dr Lincoln also had access to some court documents, and he appears to have had access to an earlier report about the petitioner that he prepared in August 2015 for correctional authorities

(the 2015 report). Although the 2015 report was not in the Record, this Court obtained a copy of it at the petitioner's request. I will refer to it further later in these reasons.

[11] In the 2016 report, Dr Lincoln summarised the account that the petitioner had given him about the offending. One feature of the petitioner's account that does not appear in his caution interview or in the agreed summary of facts is that he said he attempted to revive the victim when he went back into her bedroom by giving her mouth to mouth resuscitation and chest compressions but was unsuccessful.

[12] Dr Lincoln then made a number of observations, to the effect that the petitioner was aware of his surroundings during the interview, responded well to some hypothetical situations put to him and "had insight into his social and legal circumstances at the moment". Dr Lincoln noted that the petitioner did not show odd or bizarre behaviour, denied suffering auditory hallucinations or grandiose delusions and did not display any obvious signs of mood disorder.

[13] In a section dealing with possible diagnoses, Dr Lincoln referred to "suspected undifferentiated schizophrenia – mentally stable at present (mental disorder)" and gave alternative possible diagnoses of "depression with psychosis" and "malingering". He also referred to "suspected antisocial personality disorder".

[14] Dr Lincoln then referred to s 28 of the Crimes Act 2009 and ss 104-109 of the Criminal Procedure Act 2009.

(a) Section 28(1) of the Crimes Act provides that that a person is not criminally responsible for an offence if, when it was committed, they suffered a mental impairment that had any one of three effects - either:

(a) they did not know the nature and quality of the conduct, or

(b) they did not know that their conduct was wrong, or

(c) they were unable to control their conduct.

"Mental impairment" is defined in s 28(8) to include "senility, intellectual disability, mental illness, brain damage and severe personality disorder". Where the accused establishes mental impairment on the balance of probabilities

(s 28(3)), the court must return a special verdict of "not guilty because of mental impairment" but only if satisfied that the offender is not criminally responsible for the offence only because of the mental impairment (s 28(5)).[2]

(b) Section 105 of the Criminal Procedure Act deals with the "defence of unsoundness of mind", referred to in the section as "insanity". Where a person is shown to be insane at the time an offence was committed so as not to be responsible for their actions, they can be found "not guilty by reason of insanity". It is not clear precisely what the relation is between this section and s 28, although it is likely simply an inadvertent linguistic mismatch. Other provisions in this part of the Criminal Procedure Act deal with fitness to plead and the consequences of unfitness.

[15] Having referred to these provisions, the 2016 report went on to summarise the petitioner's interactions with St Giles. They began in 2011 while he was serving concurrent terms of imprisonment for a variety of offences, including robbery with violence and escaping from lawful custody. He was brought to St Giles from prison following efforts at self-harming. He was diagnosed with severe depression, although the possibility of malingering and conversion disorder (ie, symptoms resulting from severe emotional stress) were also noted. The reports of these incidents in the 2016 report appear to summarise what is set out in more detail in the 2015 report.

[16] The 2016 report noted that there were features that pointed towards a diagnosis of schizophrenia and said that the petitioner had been placed on antipsychotic drugs since 2011, which seemed to be helping him. Despite this, the 2016 report said, the petitioner's self-harming and dislike of the prison environment were common as inmates often found it difficult to cope.

[17] Dr Lincoln expressed the opinion that "it was obvious that the accused was well aware of his actions at the time" and that he was "mentally capable of appreciating the acts he

[2] There is a detailed discussion of s 28 and its background in the judgments of Goddard J and Young J in *Lino v State* [2024] FJSC 43.

was performing as well as the consequences of his actions". He was mentally competent to stand trial.

The Petition

[18] The petitioner was represented by the Legal Aid Commission as a result of an order made by the President of the Court. Ms L M Ratidara appeared. We are grateful to her for her valuable assistance.

[19] There are two essential points raised in the petition. The first is that the Judge failed to consider the defence of diminished responsibility. It was submitted that he should have ordered an inquiry into the petitioner's state of mind, as provided for in s 104 of the Criminal Procedure Act. The second is that the minimum term of 20 years imposed upon him was excessive. These grounds were considered by the Court of Appeal and rejected.[3] I deal with each in turn below.

Diminished responsibility

[20] Dr Lincoln did not refer in his 2016 report to s 243 of the Crimes Act, which provides for the partial defence of diminished responsibility. The defence is partial because, unlike mental impairment under s 28, it applies only to reduce murder to manslaughter. Like the defence of mental impairment, the burden of establishing it rests with the accused.

[21] Section 243(1) provides:

> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair—
>
> (a) the person's capacity to understand what the person is doing; or
>
> (b) the person's capacity to control the person's actions; or

[3] *Godrovai v State* [2023] FJCA 46.

(c) the person's capacity to know that the person ought not to do the act or make the omission —

the person is guilty of manslaughter only.

[22] There are three features of this that require emphasis. First, the section refers to a "state of abnormality of the mind" arising from one of the four enumerated conditions. The conditions referred to are to be interpreted in their "broad popular sense", as Young J explains in *Khan*.[4] Second, although the three capacities referred to in s 28(1) and s 243(1) are formulated in different language, they are essentially identical in substance. Third, s 243(1) refers to the *substantial impairment* of one of the three capacities, whereas s 28(1) envisages the *complete failure* of one or more. This suggests that "[a] state of diminished responsibility is a lesser abnormality than that required for a finding of mental impairment".[5]

[23] As this Court has stated previously, the defence of diminished responsibility depends on there being a medical or psychiatric report addressing the state of an offender's mental health when the killing occurred.[6] In the present case there was such a report – the 2016 report. In it, Dr Lincoln stated that the petitioner was "mentally capable of appreciating the acts he was performing as well as the consequences of his actions." Clearly, he considered that the petitioner's capacities in the three respects mentioned in s 28 had not failed, despite the possible diagnosis of "suspected undifferentiated schizophrenia". The question of whether the petitioner was *substantially impaired* in relation to any of the three capacities for the purposes of s 243 was not explicitly addressed. Obviously, it is desirable that this issue be canvassed where mental impairment is raised in murder cases. But in any event, as it stands, the 2016 report does not assist the petitioner.

[24] Turning to the 2015 report, it indicates that the petitioner was first seen at St Giles in 2011. He was admitted on three occasions in 2014 with suicidal ideations and various

[4] *Khan*, above n 1, at paras [48]-[49] and [58].
[5] See Eric Colvin *Criminal Law in Fiji* (2nd ed, LexisNexis 2022) at [5.58]. See also *Lino v State*, above n 2, per Young J at para [65]: "The threshold criteria of a "substantial impairment" of one of the three mental capacities listed in section 243 provides a less stringent threshold than the criteria of mental impairment under section 28, as it recognises a reduced culpability arising from a range of disorders not amounting to insanity".
[6] *Darshani v State* [2018] FJSC 25 at [32].

perceptual disturbances, although there was a concern about the possibility of malingering. The description of his current mental state (ie, as at August 2015) was positive, although there was a diagnosis of schizophrenia, which appeared to be controlled by medication.

[25] The problem for the petitioner is that there is no credible narrative to support a submission that at the time of the offending in May 2016, the petitioner was substantially impaired in relation to any of the capacities identified in s 243. There is nothing in the account the petitioner gave in his caution interview (which is reflected in the agreed summary of facts) or in the account he gave to Dr Lincoln that suggests the petitioner was substantially impaired in a relevant respect at the time he conducted the robbery and killed the victim. In this respect, the petitioner's case is quite different from that in *Khan*, where there was a credible narrative (including expert opinion) supporting a diminished responsibility defence.

[26] The petitioner submits that the trial Judge should have called for a report under s 104 of the Criminal Procedure Act. But the Judge did, at the request of defence counsel, make an order that the petitioner be psychiatrically assessed, as is recorded in the Judge's notes and in the 2016 report itself. While the Judge's order did not refer specifically to s 104, it was presumably made under that provision.

[27] Section 104 relates to fitness to plead, not to mental state at the time of the offending. But the 2016 report dealt with both the petitioner's fitness to plead and his mental state on the evening of the offending. Given the 2016 report and the absence of a credible narrative to support a potential diminished responsibility defence, there was nothing to put the Judge on further inquiry about the possibility that the petitioner was in a state of diminished responsibility at the time of the offending.

[28] Consequently, this ground of appeal is without substance.

Sentence

[29] The petitioner submits that the 20 year minimum term imposed upon him in respect of his conviction for murder is harsh and excessive.

[30] In sentencing the petitioner, the trial Judge started with the aggravated robbery offending. The Judge noted that the maximum sentence for aggravated robbery was 20 years imprisonment, and the tariff was between 8 and 16 years imprisonment. Having considered the seriousness of the offending, including the level of harm caused to the victim, the Judge set the starting point at 13 years imprisonment. He then added 4 years to reflect the fact that the offending involved a home invasion of a property whose sole occupant was an elderly, vulnerable and defenceless woman. While the Judge gave no credit for good character given the petitioner's record of 21 previous convictions, he did deduct one year for the petitioner's personal circumstances (ie, relatively young age and family circumstances). The Judge then deducted three years for the early guilty plea. There was a further reduction of five months to reflect the petitioner's time on remand, leaving a sentence of 12 years, 7 months for the aggravated robbery. The Judge fixed a non-parole period of 11 years for this offending.

[31] In setting the minimum period to be served before the petitioner could apply for a pardon, the Judge noted that the murder "was not a pre-planned or premeditated act". He said that consideration, together with the various mitigating and aggravating factors identified in relation to the aggravated robbery offending, meant that the minimum sentence before a pardon could be considered should be 20 years. One difficulty with this "rolled up" approach is that it is not clear whether, and if so to what extent, any deduction was made to the minimum term to reflect the petitioner's guilty plea and time served.

[32] The Court of Appeal recently delivered a guideline judgment in relation to minimum terms in murder cases in *Vuniwai v State*.[7] The judgment states that it applies to all sentencing for the relevant offending that takes place after the date of the judgment, irrespective of when the offending took place. However, where sentencing was completed before the guideline judgment was issued, as in the present case, the guideline judgment will only apply where (i) an appeal against sentence was filed before the date of the guideline judgment and (ii) the application of the guideline judgment would result in a more favourable sentence for the appellant.[8]

[7] *Vuniwai v State* [2024] FJCA 100. We were not asked to consider the merits of this decision and have not done so. Rather, we have taken it as it stands for the purposes of this judgment.
[8] See *Vuniwai*, above n 7, at para [136] and the judgments cited therein.

[33] In the present case, the petitioner was sentenced in 2016 and filed an appeal (which was out of time) in 2017. A single Judge rejected his application for an extension of time and leave to appeal.[9] The petitioner renewed his application before the Full Court, but it was dismissed in a decision dated 24 February 2023.[10] The petitioner then petitioned this Court for leave to appeal, including against sentence. Obviously, the guideline judgment in *Vuniwai* played no part in the Court of Appeal's decision-making as it had not yet been argued, much less delivered. But the first of the two requirements set out in paragraph [32] has been met, ie, the petitioner did challenge his sentence before the guideline judgment was given.

[34] Turning to the second requirement, there are two respects in which it appears that the application of the guideline judgment could have affected the petitioner's sentence to his advantage. The Court in *Vuniwai* considered that a minimum term might be reduced to reflect (i) time served on remand and (ii) a guilty plea.

[35] The Court identified three categories of seriousness for the purpose of setting minimum sentences in relation to murder – Extremely High, High and Low. Most cases, including this one, fell within the High category. For cases within the High category of seriousness, the Court identified a minimum term range of 15 – 25 years, with a starting point of 20 years.[11] Adopting that 20 year starting point in the present case, the vulnerability of the victim because of her age and inability to defend herself was an aggravating factor, as was suffering inherent in the manner of her death. Mitigating factors were that there was no premeditation or planning involved and no intention to kill. These mitigating and aggravating factors were likely to cancel each other out.

[36] As well, however, the petitioner was entitled to have the court consider whether he should receive a deduction in the minimum term for his early guilty plea[12] and for the time he served on remand.[13] As I have said, the "rolled up" approach adopted by the trial Judge to fixing the minimum term makes it difficult to know whether this was done. For my part, I consider that there should be a deduction of two and a half years to reflect

[9] *Godrovai v State* [2020] FJCA 125.
[10] *Godrovai v State* [2023] FJCA 46.
[11] *Vuniwai*, above n 7, at para [91]-[92].
[12] *Vuniwai v State*, above n 7, at para [111]-[116].
[13] *Vuniwai v State*, above n 7, at para [117]-[119].

these factors. That would lower the minimum term to be served before a pardon could be considered to 17 years, six months.

[37] Standing back and looking at the matter overall, I am fortified in this outcome by the table of cases attached to the Court of Appeal's decision in *Vuniwai*. The Director of Public Prosecutions provided the Court with a table containing 50 murder cases considered by the Court of Appeal. In four of the cases, no minimum sentence was imposed. Ignoring those four cases and one outlier where there was a four year minimum term, the cases showed an average minimum sentence of 17 years, six months, the highest being 30 years and the lowest 11 years. The Legal Aid Commission provided a table of 28 cases. That showed an average minimum sentence of 19 years, the highest being 28 years and the lowest 12 years. These cases are not a scientific sample, but they do provide some sense of the approach being adopted by the Fijian courts and support a minimum sentence of less than 20 years in the present case.

[38] In the result, I would grant the petitioner leave to appeal against the 20 year minimum sentence imposed for murder, on the ground that a substantial and grave injustice may otherwise occur (s 7(2)(c) of the Supreme Court Act 1998). I would quash the minimum term of 20 years and replace it with a minimum term of 17 years, six months. In all other respects, the petitioner's sentence would remain the same.

Goddard, J

[39] I have read the judgment of Arnold J and am in complete agreement with the reasoning and outcome.

Young, J

[40] I also agree with the reasoning and outcome in Arnold J's judgment.

Orders:

1. ***The petitioner's application to appeal against his conviction for murder is dismissed.***

2. ***The petitioner's application to appeal against the minimum term of 20 years imprisonment imposed in relation to his murder conviction is granted.***

3. ***The minimum term of 20 years imprisonment is quashed and replaced by a minimum term of 17 years, six months imprisonment.***

The Hon Mr Justice Terence Arnold
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon Madam Justice Lowell Goddard
JUDGE OF THE SUPREME COURT

The Hon Mr Justice William Young
JUDGE OF THE SUPREME COURT