

IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO: AAU0130/2014
[High Court Case No: HAC012/ 2014Ltk]

BETWEEN : TALAT MAHAMOOD *Appellant*

AND : THE STATE *Respondent*

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr. M. Yunus for Appellant
Mr. L. J. Burney & Mr. E. Samisoni for Respondent

Date of Hearing : 18 February 2016

Date of Ruling : 1 March 2016

RULING

- [1] This is an application for leave to appeal against conviction and sentence. The appellant was charged with one count of murder contrary to section 237 of the Crimes Decree 2009 in the High Court at Lautoka. He pleaded guilty to the charge, and on 24 September 2014, he was sentenced to life imprisonment with a non-parole period of 15 years. On 22 October 2014, the appellant gave a timely notice of appeal, but that notice was not forwarded to the Court of Appeal Registry by the Department of Corrections until 6 November 2014. The appellant is not at fault and for that reason I grant him an extension of time to seek leave to appeal.
- [2] The grounds of appeal are:
1. The learned Trial Judge erred in law and in fact when he did not consider the defence of provocation.
 2. The learned Trial Judge erred in law by imposing a non-parole term to be served before parole could be considered.
- [3] The facts of the case were that the deceased and the appellant were related and were neighbours. On the day in question, the appellant went to the deceased's home to complain about her daughter's bad character. The deceased and the appellant were in the living room when an argument developed between them. The appellant slapped the

deceased twice in the face and grabbed her mouth causing her dentures to come out. The deceased was cleaning vegetables using a small kitchen knife when the appellant attacked her. She used the kitchen knife to fend off the attack on her. The appellant snatched the knife from the deceased and stabbed her in the neck, stomach and hands several times. When the knife's blade broke and got stuck in the deceased's neck, the appellant grabbed hold of another kitchen knife and stabbed the deceased again in the stomach several times. He then dragged her motionless body to the kitchen and left it there. He returned to the living room and cleaned the blood stains with a mop and re-arranged everything to make it look like nothing had happened.

- [4] While the appellant was in the living room, the deceased's 20-year old son arrived and saw the appellant sitting on the sofa. The son got suspicious when the appellant tried to prevent him from entering the house. The son forced himself inside and went to the kitchen and saw his mother dead. By this time, the appellant had fled the scene. He was later arrested and charged with murder.
- [5] At the leave hearing, Mr. Yunus informed the court that the appellant had withdrawn his instructions and wanted to represent himself. When the appellant was asked to confirm his decision to withdraw instructions from his counsel, the appellant expressed his frustration that Mr. Yunus after receiving the initial instructions had not been in contact with him. Otherwise, the appellant did not have any other complaint against his counsel. When this was relayed to the court, the importance of legal representation was explained to the appellant. The case was adjourned for five minutes to allow the appellant to discuss his options with Mr. Yunus. When the court resumed, Mr. Yunus informed the court that the appellant opted to be represented by counsel. Mr. Yunus also informed the court that the appellant instructed him to abandon his appeal against conviction.
- [6] The appellant was represented by counsel when he pleaded guilty to murder in the High Court. There is no suggestion that the appellant did not receive competent legal representation in the court below. The appellant's contention that he was not guilty of murder but guilty of manslaughter on the ground of provocation is devoid of any merit. The facts admitted by him show that he was the initial aggressor. The appellant was the first to assault the deceased. The deceased was justified to fend off the attack using the

knife she was holding when she was attacked in her own home. Her retaliation was not out of proportion to the attack on her by the appellant. She did nothing wrong to deprive an ordinary person of the appellant's age and gender the power of self-control and to induce him to commit violence before there was time for cooling of the passion so aroused (see, *Pravin Ram v The State* unreported CAV001 of 2011; 9 May 2012). On the facts of this case, there was no evidential basis for a plea of provocation. In my judgment, there is no arguable ground to suggest that the appellant's guilty plea to murder was equivocal. In these circumstances, the appellant's decision to abandon his appeal against conviction is justified.

- [7] The appellant has no right of appeal against the sentence of life imprisonment. Life imprisonment for murder is a fixed sentence under section 237 of the Crimes Decree 2009. There is no discretion but to impose life imprisonment for murder. But there is a discretion to fix a minimum term before pardon could be considered for murder. In this case, the learned High Court judge instead of imposing a minimum term imposed a non-parole period of 15 years pursuant to section 18(1) of the Sentencing and Penalties Decree 2009. In *Abdul Aziz v The State* unreported Cr App No. AAU112 of 2011; 13 July 2015 the court observed that the parole regime "does not apply to the specific sentencing provision for murder under section 237 of the Crimes Decree". Although the alleged error is a technical error and does not affect the length of the non-parole period, the ground is arguable based on the decision in *Aziz*.

[8] **Result**

Leave to appeal against conviction refused.

Leave to appeal against sentence granted.



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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State