IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 122 OF 2011
(High Court No. HAC 23 of 2011)

BETWEEN : **ROHIT KHAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Bandara JA
Wengappuli JA

Counsel : **Mr. S. Waqainabete for the Appellant**
Ms. P. Madanavosa for the Respondent

Date of Hearing : **3 February 2017**

Date of Judgment : **23 February 2017**

JUDGMENT

Calanchini P

[1] I agree that the appeal should be dismissed.

Bandara JA

[2] The Appellant was charged with one count of Murder contrary to section 237 of the Crimes Decree No. 44 of 2009 and one count of act with intent to cause grievous harm contrary to section 255 (a) of the Crimes Decree No. 44 of 2009.

[3] At the trial, on 16th November 2011, after the evidence of four witnesses had been led by the prosecution the Appellant had withdrawn his former plea of not guilty, and had pleaded guilty to the aforesaid two charges against him.

[4] Avory J in **R v. Forde** (1923) 17 Cr. App. R. 99 has held that:

> *"A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) That the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it; or (2) That upon the admitted facts he could not in law have been convicted of the offence charged.*

[5] This is an appeal against sentence in accordance with section 21(1) (c) of the Court of Appeal Act.

[6] Section 21(1)(c) of the Court of Appeal Act states:

> *"A person convicted on trial before the (High Court) may appeal under this part to the Court of Appeal to the Court of Appeal –*
> *(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law."*

[7] On 25th April 2013 the Court of Appeal Registry received the petition of appeal form the Appellant which has been lodged within time.

[8] On 2nd August 2016 a Single Judge of the Court of Appeal has granted leave to appeal against the sentence.

[9] For the murder of Ravinesh Kumar the learned High Court Judge had sentenced the accused to life imprisonment and has set a minimum period of 15 years before pardon may be considered pursuant to section 237 of the Crimes Decree.

[10] For causing grievous harm to Hans Raji the learned High Court Judge has sentenced the accused for 4 years imprisonment.

[11] The learned High Court has further ordered the said two sentences and the accused's pre-existing sentence to run concurrently. In **R v. Foy** [1962] All E.R (246) it was held that:

> *"Life imprisonment means imprisonment for life, and prisoners so sentenced who are released from prison during their lifetime are only released on licence, the sentence of life imprisonment remaining on them until they die; accordingly, a sentence of imprisonment to run consecutively to a sentence of life imprisonment is invalid, the proper sentence in such a case being a sentence of imprisonment to run concurrently with the sentence of life imprisonment."*

[12] Section 237 of the Crimes Decree provides for the sentence of murder as follows:

> *"Penalty – Mandatory sentence of imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered."*

[13] Accordingly for a conviction for the offence of murder the sentence ***is fixed by law,*** and minimum term to be served has been subjected to ***judicial discretion***. (Emphasis added).

[14] The word sentence is defined in the Court of Appeal Act at Section 2 as follows:

> *"'Sentence' includes any order of the Court made on conviction with reference to the person convicted and any disqualification, penalty punishment or recommendation made or imposed by the Court and 'sentenced' shall be construed accordingly."*

[15] The appellant is pursuing one ground of appeal against sentence which is to the effect that,

> *"The Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that 15 years minimum term was excessive in view of the Appellant's guilty plea, mitigating factors and his remand period."*

[16] Accordingly the instant appeal is only on the question of, whether having regard to the facts and circumstances of the case the minimum period of 15 years to be served before pardon be considered is excessive or not.

[17] The learned Trial Judge in the course his reasoning for the sentence has observed that, (at page 45):

> *"(21) In this case the attack on the deceased was ferocious. You clearly had an intention to kill when you struck the deceased with fatal blows. If convicted after trial a minimum term in the range of 18 to 20 years would have been justified. But regard must be paid to your late guilty plea, previous good character, disadvantaged background and remand period. I take all these matters with account."*
>
> *(22) Your sentence must reflect the society's disapproval of your conduct taking away a human life and attacking a vulnerable woman with a cane knife. In sentencing you, I bear in mind that is not only you but others must be deterred from committing this type of offences."*

[18] Since the appellant has pleaded guilty to both counts against him, a detailed account of the facts (which are not in dispute), which led to the death of the deceased will not be considered here.

[19] On 17th April 2011 at about 8.30 p.m. the Appellant had gone to the house of the deceased. The Appellant having lured the deceased out of his bedroom on the pretext of hiring his vehicle had struck him several times with a cane knife. Thereafter the Appellant had attacked Hans Raji, the mother of the deceased with the cane knife, who

was watching the incident standing, at the footsteps of the entrance of the house and screamed to raise alarm.

[20] The fallowing two factors are worthy of specific consideration.

(1) The deceased was a youth of 23 years at the time of his death.

(2) The motive for this premeditated crime has been a mere flimsy one.

[21] As regards the motive for the crime the Appellant had stated in his caution interview, (Page 134 of the proceedings)

> *"Q.83 What was the reason for you to kill Ravinesh Kumar.*
> *A. He used to tell me that he wanted to have sex with my cousin sister Sabana.*
>
> *Q.84 What you tell him when he said his words to you.*
> *A. I warned him not to say anything about my sister next time.*
>
> *Q.85 If you have warned him then why you killed him.*
> *A. He again said same thing to me about my sister.*
>
> *Q.86 When he said again to you.*
> *A. Friday afternoon 15.4.2011.*
>
> *Q.87 Then why you didn't hit him that time.*
> *A. I didn't have anything with me to hit him and I again warned him that I will kill him one day.*

[22] It appears that in pursuance of the instant appeal, against the impugned minimum term of imprisonment the appellant intends to seek an opportunity to avail himself to an early pardoning.

[23] It should be noted here that the impugned minimum sentence is not a bar for the Appellant to avail himself to the constitutional remedy available to him, enshrined in section 119 of the Constitution of Fiji, which is the primary source of law and the basic law of the land.

[24] Article 119 of the Constitution of the Republic of Fiji provides for the setting up of the Mercy Commission and its functions.

[25] Article 119(3) provides that on the petition of any convicted person, the Commission may recommend that the President exercise a power of mercy by

(a) granting a free or conditional pardon to a person convicted of an offence;

(b) postponing the carrying out of a punishment, either for a specific or indeterminate period; or

(c) remitting all or a part of a punishment.

[26] Eventhough the Penalty Provision for Section 237 makes it clear that the penalty for murder is a mandatory term of life imprisonment the President has the power to grant a pardon on the recommendation of the Mercy Commission as provided for under Section 119 (3)(a) of the 2013 Constitution.

[27] In **Salesi Balekivuya and Saimoni Tukana v. The State** [2016] FJCA16; AAU0081.2011 (26 February 2016) Calanchini P has held that,

> *"[38] It should be noted that under section 119(3) of the Constitution any convicted person may petition at any time the Mercy Commission to recommend (a) a pardon; (b) postponement of punishment or; (c) remission of punishment. However, it would be reasonable to conclude that the Mercy Commission would take into*

account the sentencing judgment and the actual sentence imposed during the cause of its deliberations."

Calanchini P has further held that,

> *"Finally and importantly, it is abundantly clear from the observations made above that the discretion to set a minimum term under section 237 of the Decree is not the same as the mandatory requirement to set a non parole term under section 18 of the Sentencing Decree."*

[28] Saleem Marsoof J. in the Supreme Court observed in **Qurai v. State** [2015] FJSC 15; CAV 24.2014 decided on 20 August 2015:

> *"In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence."*

[29] In **Harper** [1980] 1 SCR 2, 1979, Justice Estey of Canada's Supreme Court held that:

> *"An appellate Court should be extremely reluctant to interfere with the exercise of a discretionary power by a trial judge. However, there are cases ... where justice demands that the exercise of discretion be reviewed. If a judge proceeds on principle properly applicable to the facts of a case and makes a decision judicially, in the exercise of his discretion, this Court will not interfere. But, if it appears that a judge has misdirected himself, or that his decision is so clearly wrong as to amount to an injustice, the Court can and should review the facts upon which the judgment ought to be given."*

[30] The Supreme Court of Fiji in **Simeli Bili Naisua v. The State** Criminal Appeal No.CAV0010 of 2013 has stated:

> *"Appellate Courts will interfere with a sentence if it is demonstrated that the trial Judge made one of the following errors:*
>
> *(i) Acted upon wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant considerations."*

[31] In the instant case the record does not show that the learned High Court Judge has made any of the aforesaid errors.

[32] Having regard to the aforesaid circumstance we are of the view that the sentence imposed by the learned High Court Judge is appropriate, having been properly approved of the purpose, which sentence is directed as set out in the aforesaid paragraphs 21 and 22 of his Sentencing Order.

[33] In **Anesh Ram v. State** AAU 0087 of 2010

> *"It has been held that the 20 year minimum period in these circumstances is lenient. In the case of **Timoci Ravurabota** (16 November 2011) Marshall J noted that premeditated killings attract a minimum term in the region of twenty years."*

[34] The murder committed in the instant case is premeditated and having regard to the totality of the evidence and circumstances of the case we hold that the 15 year minimum term is not excessive and would meet the ends of justice.

Wengappuli JA

[35] I agree with the conclusions of Bandara JA.

Orders of the Court

The orders of the Court are:

1. *Appeal against the sentence is dismissed.*
2. *Sentence affirmed.*

Hon. Justice W.D. Calanchini
PRESIDENT COURT APPEAL

Hon. Justice N. Bandara
JUSTICE OF APPEAL

Hon. Justice A. Wengappuli
JUSTICE OF APPEAL