

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

CRIMINAL APPEAL NO. AAU0084 of 2015
[High Court Case No. HAC040 of 2015)

BETWEEN : **ETONIA VOSA** *Appellant*

AND : **THE STATE** *Respondent*

Before : **Hon. Mr Justice Daniel Goundar**

Counsel : **Appellant in Person**
Mr S Vodokisolomone for the Respondent

Date of Hearing : **6 December 2017**

Date of Ruling : **26 January 2018**

RULING

- [1] This is a timely application for leave to appeal against conviction and sentence, and bail pending appeal.
- [2] The appellant was charged with attempted murder of his former wife contrary to sections 44 and 237 of the Crimes Act 2009. On 16 May 2015, he pleaded guilty to the charge in the High Court at Suva. On 16 June 2015, the appellant was sentenced to life imprisonment with a minimum term of 8 years before being considered for a pardon.
- [3] The appeal is governed by section 21(1) of the Court of Appeal Act 1949. The appellant may appeal on any question of law alone as of right. For mixed questions of fact and law, or fact alone, leave is required. Leave is also required to appeal against

sentence. Section 35(1) gives a single justice of appeal power to grant leave. A single justice of appeal also has power to dismiss an appeal that is frivolous or vexatious pursuant to section 35(2) of the Court of Appeal Act 1949.

[4] There is no suggestion that this appeal is frivolous or vexatious.

[5] The grounds of appeal in summary are:

- (i) Incompetency of defence counsel.
- (ii) Guilty plea was ambiguous.
- (iii) The admitted facts did not disclose the offence of attempted murder.

[6] At the hearing, the appellant abandoned the appeal against the sentence.

[7] The definition and penalty for murder is provided by section 237 of the Crimes Act 2009 as follows:

“237. A person commits an indictable offence if-

- (a) The person engages in conduct; and*
- (b) The conduct causes the death of another person; and*
- (c) The first mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.*

Penalty – mandatory sentence of imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered.”

[8] Attempt is defined by section 44 of the Crimes Act 2009 as follows:

“(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offences is one of fact.

(3) Subject to sub-section (7), for the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

[9] It is arguable that section 44(3) of the Crimes Act 2009 has altered the common law definition of attempted murder that required proof of an intention to kill only to be guilty of that offence (see, Wybrow v R Crim App R 141,146-147)

[10] In his caution interview, which was rendered as part of the facts by the prosecution, the appellant said that he did not intend to kill his wife. He said he acted in the spur of the moment with anger during an argument with his wife.

[11] The facts admitted by the appellant were:

“Background

1. The accused is Etonia Vosa, 28 years, self employed of Tamavua.
The complainant is Vaciseva Seru, 29 years, Staff Nurse at CWM hospital, Suva. In January 2015, she resided at 73 Howell Road, Suva.
2. The accused and the complainant were married in 2007 and have two children, a daughter and a son. In November of 2014, the accused and the complainant divorced. Currently the children are 5 years and 7 years old.

Offence

3. On 2 January 2015, between 3.30 pm and 4 pm, the complainant was at her flat at 73 Howell Road, Suva, with her two children. She was lying in bed when the accused woke her. The complainant asked the accused to leave. She could smell liquor on him. She asked not to see the children when he was drunk. The accused asked for food and was served by the complainant. He sat on the kitchen table and ate.

4. The complainant went into her bedroom while the accused ate in the kitchen. While the complainant was in her bedroom, the accused went to the kitchen sink, picked up a kitchen knife which was about 30cm in length and went towards the complainant's bedroom. When the complainant was returning to the kitchen, she met the accused, standing at her bedroom door.
5. Without saying anything, the accused, attempted, with intent to cause, or was reckless as to causing the death of Vaciseva Seru and stabbed her several times with the kitchen knife, on her upper body. The complainant fell in the bathroom which was next to her bedroom door. She used her arms to defend herself.
6. The accused threw a kitchen knife when the blade bent. The complainant pushed the accused away and ran out of the bathroom. As she ran towards the back door, she noticed her children were watching and crying.
7. The accused tried to stop the complainant from running out of the house. The complainant got away and ran up a flight of steps and call for help.
8. The accused walked away from the complainant's flat. He was put under citizens arrest and escorted to Samabula Police Station in a taxi.
Annexed and marked at PE 1 is photograph number 22 of the photographic booklet showing the entrance to the bedroom and bathroom.
Annexed and marked as PE 2 is photograph number 24 of the photographic booklet showing the entrance to the bathroom.
Annexed and marked as PE 3 is photograph number 33 and 34 of the photographic booklet showing the kitchen knife.

Report

9. The matter was reported at the Samabula Police Station on the same day by the accused. The Samabula Police personnel visited the complainant's flat and sealed of the area.

Medical Findings

10. The complainant was taken to CWM hospital for medical attention. She was admitted into the Intensive Care Unit (ICU). The complainant's medical report revealed 7 lacerations:

- i. 2 cm x 0.5 mm on front left forehead
 - ii. 1 cm x 0.1 mm on upper left eyebrow
 - iii. 3 cm x 0.5 mm on upper left arm
 - iv. 4 cm x 0.5 mm on left wrist
 - v. 1 cm x 1 mm on left posterior elbow
 - vi. 2 cm x 0.5 mm on left posterior elbow
 - vii. 2 cm x 0.5mm on left posterior elbow
11. The complainant also had a stab wound on her neck which required repair by surgery. She was placed on a ventilator for 14 days. She was discharged from ICU on 17 January 2015 and discharged from CWM hospital on 20 January 2015. She was admitted in hospital for 18 days.
- Annexed and marked as PE 4 is the medical report of the complainant
- Annexed and marked as PE 5 is a letter from Dr Karthik Mudliar dated 13 January 2015

Caution Interview and Formal Charge

12. The accused was caution interviewed on 3 January 2015 at the Samabula Police Station. He made full and voluntary confessions to stabbing the complainant several times with a kitchen knife on 2 January 2015 at 73 Howell Road, Suva. He was then formally charged for attempted murder.
13. In the caution interview, the accused said he was at the complainant's house for Christmas and New Years and later left. He returned to meet the children. The night before he returned, he consumed alcohol with others.
14. The complainant asked if he drank alcohol and he told her he did. She told him to leave or she would call the police. He sat down to eat food served by the complainant.
15. The accused claimed that he had arguments with the complainant and she was swearing at him. He got really angry thinking that he will never see his children again.
16. He saw the complainant walking to the toilet and picked a knife from the dish rack and stood outside the toilet to wait for her. He wanted to injure her. He

stabbed her several times on her upper body when she came out and when he saw the knife had bent, he threw it.

17. He said that this was a learning step for the complainant. He was angry and wanted to teach her a lesson. The complainant ran out of the house and he ran after her to bring her back in the house so that the problem could be theirs alone.

Annexed and marked as PE 6 is the record of interview of the accused.

18. The accused made a further statement during the formal charge. The accused claimed that there were marital problems which led to a divorce. He claimed the complainant has an extra marital affair. He left his job to look after their two children.

19. On the day of the incident, the accused claimed the complainant swore at him. He picked up a knife and stabbed her. He stated he felt sorry for his children but is satisfied with what he did. He said he is happy she will learn a lesson.

Annexed and marked as PE 7 is the charge statement of the accused.

Dated this 1st day of June 2015

(Signed)

State Counsel”

- [12] Paragraph 5 of the facts makes reference to the appellant’s state of mind when he stabbed the victim several times with the kitchen knife. The appellant admitted to have acted with an intention to cause death or was reckless as to causing the death of the victim.
- [13] The question is whether an accused is guilty of attempted murder if he was reckless as to causing death of the victim. This is a question of law alone and the appellant does not require leave to argue a question of law alone.
- [14] However, the question whether the appellant’s guilty plea was ambiguous is a question of mixed law and fact. The appellant’s contention that he was unaware of the consequences of his guilty plea to attempted murder is arguable. He submits that neither his counsel nor the High Court Judge advised him that the sentence for

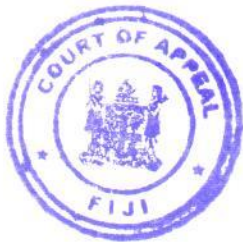
attempted murder was fixed by law. The appellant submits that if he had known that he would be liable to mandatory life imprisonment, he would have not pleaded guilty to the charge.

[15] Without the court records, it cannot be ascertained whether the appellant's guilty plea was ambiguous. But there is a concern that the appellant did not understand the consequences of his guilty plea when he pleaded guilty to attempted murder.

[16] For these reasons, leave to appeal against conviction is granted. But I am not satisfied that the appeal has a very highly likelihood of success for the appellant to be granted bail. There is no question that the appellant will have served his sentence before the appeal is heard. He is serving life imprisonment.

Orders

1. *Leave granted.*
2. *Bail refused.*



A handwritten signature in blue ink, appearing to read "Daniel Goundar", is written over a horizontal dotted line.

Hon. Mr Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions for the State