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

CRIMINAL APPEAL AAU 0064 OF 2014
(High Court HAC 003 of 2014 at Lautoka)

BETWEEN : **PRIYA DARSHANI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Gamalath JA
Bandara JA

Counsel : **Mr M Fesaitu for the Appellant**
Ms J Prasad for the Respondent

Date of Hearing : **18 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Calanchini P

[1] The appellant was charged with two counts of murder contrary to section 237 of the Crimes Act 2009 and with three counts of attempted murder contrary to sections 44 and

237 of the Crimes Act. On 3 April 2014 the appellant pleaded guilty to all five counts in the High Court at Lautoka and was subsequently convicted as charged. On 8 May 2014 the appellant was sentenced to the mandatory term of imprisonment for life pursuant to section 237(2) of the Act. The learned Judge then proceeded to consider aggravating and mitigating factors before determining that the appellant must serve a non-parole term of 20 years pursuant to section 18(1) of the Sentencing and Penalties Act 2009.

[2] The background facts which were set out in the summary of facts submitted in the High Court may be reproduced at this point. The appellant was 22 years old and unemployed. She lived in a de facto relationship with Mokai Falakiko Patolo, a machine operator at Royal Noni Fiji (Kura Factory). Mokai Patolo was also in a de facto relationship with Taufa Patolo who was 33 years old and unemployed. Together they had four children. The appellant also had a child with Mokai Patolo. The appellant and Mokai Patolo lived in a separate house in Lawaki in Lautoka.

[3] On 18 December 2013 at about 10.00am the appellant went to Viseisei, Lautoka, to the house where Taufa Patolo and her 4 children were staying. Upon seeing the appellant, Taufa Patolo (the deceased) had an argument with the appellant on why she had come to her house. During the course of the argument the appellant picked up a crow bar which was lying on the ground outside the house and struck Taufa Patolo on her head. Taufa Patolo was carrying her 7 months old baby, Sarah Patolo, at the time she was struck and they both fell to the ground. The appellant struck Taufa Patolo several times on the head with the crow bar and then struck the 7 months old baby on her head. The appellant then pursued the other 3 children who were inside the house. She struck each of them with the crow bar and thereby caused serious injuries to each of them. Taufa Patolo and her 7 months old baby died instantly and the three children lay in the house seriously injured. The appellant left the house. Neighbours subsequently alerted Mokai Patolo after they had heard the commotion and saw the family injured in and around the house. The neighbours apparently saw the appellant leaving the Patolo's residence carrying her own son.

[4] The post mortem was conducted and a report prepared in respect of the two deceased. Medical reports were prepared in respect of the three injured children.

[5] The appellant filed in person a timely notice of appeal against conviction and sentence on 4 June 2014. On 18 September 2014 the Legal Aid Commission, on behalf of the appellant filed an amended notice of appeal against sentence on the following ground:

> *"The learned trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that 20 years non-parole period was excessive."*

[6] The appeal against conviction will be taken to have been abandoned by the appellant and will be marked dismissed. On 7 October 2014 a further amended application for leave to appeal against sentence was filed by the Legal Aid Commission relying on the ground that:

> *"The learned trial Judge erred in principle and also erred in failing to take into account some relevant considerations resulting in a non-parole period of 20 years which was excessive."*

[7] In a ruling delivered on 10 June 2015 a Judge of the Court granted leave to appeal against sentence on the ground that the appellant's complaint that the non-parole period of 20 years was excessive was arguable since it related to the exercise of the sentencing discretion by the sentencing court. On 16 June 2015 the Legal Aid Commission filed a further amended notice of appeal relying on the grounds that:

> *"1. The learned trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that 20 years non-parole was excessive.*
>
> *2. The learned trial Judge erred in law when he sentenced the appellant to 20 years non-parole period contrary to section 237 of the Crimes Act 2009."*

[8] At the hearing of the appeal both parties relied on submissions filed at the hearing of the application for leave and presented brief oral argument on the issues raised by the appeal.

[9] The grounds of appeal in its various forms and to a lesser extent the submissions by the parties reflect a misunderstanding of the sentencing regime for a person convicted of murder or attempted murder. The approach to sentencing for murder was significantly altered in 2010 with the introduction of the Crimes Decree 2009 which came into effect on 1 February 2010 and is now known as the Crimes Act 2009. Prior to that date the law relating to sentencing for murder was based on various provisions in and judgments given under the Penal Code. The transformation was complete with the coming into effect of the Constitution in 2013.

[10] Pursuant to section 237(2) of the Crimes Act the penalty for murder is a mandatory sentence of imprisonment for life, with a judicial discretion to set a minimum term to be served before a pardon may be considered. This provision should be contrasted with other penalty provisions which do not include the word "*mandatory*." Those penalty provisions are caught by section 3(4) of the Sentencing and Penalties Act 2009 which provides that:

> *"Any penalty for any offence prescribed by law shall be deemed to be the maximum penalty that a court may impose for that offence after taking account of the provisions of this Act."*

[11] It follows that where a mandatory sentence is prescribed for an offence under the Crimes Act the provisions of the Sentencing and Penalties Act do not apply since pursuant to section 3(4) the Act only applies to sentences that can be regarded as maximum sentences.

[12] The section was discussed at length by this Court in **Aziz –v- The State** [2015] FJCA 91; AAU 112 of (13 July 2015). At paragraph 5 the Court noted:

"Under section 237 of the Crimes Decree the penalty for murder is expressly stated to be a mandatory sentence of imprisonment for life with a judicial discretion to set a minimum term to be served before a pardon may be considered. This is a particular sentencing enactment that applies specifically to an offender convicted of murder. Pardon is part of the prerogative of mercy exercised by the President on the recommendation of the Mercy Commission under section 119 of the Constitution. The pardon may be free or conditional (section 119 (3) (a)). The effect of a free pardon is to clear the person from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction, but not to remove the conviction (8 (2) Halsburys 827)."

[13] The relevant provisions were considered again by this Court in **Balekivuya and Tukana -v- The State** [2016] FJCA 16; AAU 81 of 2011 (26 February 2016). The Court noted in the following paragraphs the issues that distinguish section 237 of the Crimes Act from section 18 of the Sentencing and Penalties Act:

*"36. Section 237 provides for a mandatory sentence of life imprisonment for a person convicted of murder. It must be recalled that life imprisonment means imprisonment for life (Lord Parker CJ in **R v Foy** [1962] 2 All ER 246). The trial Judge when sentencing a person convicted of murder is required to exercise a discretion in two ways. The first is whether a minimum term should be set. The second is the length of the minimum term that should be served before a pardon may be considered. The use of the word "pardon" in the penalty provision is not the same as what is sometimes referred to as an "early release" provision. The word "pardon" is not defined in the Crimes Decree nor is it defined in the Sentencing Decree. The only reference to the word "pardon" that is relevant to sentencing is to be found in section 119 of the Constitution. Under section 119(3) the Prerogative of Mercy Commission (the Mercy Commission), on the petition of a convicted person, may recommend that the President exercise a power of mercy by, amongst others, granting a free or conditional pardon to a person convicted of an offence.*

37. In my judgment the effect of section 237 when read with section 119(3) of the Constitution is that a convicted murderer may not petition the Mercy Commission to recommend a pardon until that person has served the minimum term set by the trial Judge. The

reference to minimum term in section 237 has nothing to do with early release. The Mercy Commission may or may not make the necessary recommendation to the President. Furthermore, the matters that the Mercy Commission takes into account in deciding whether to recommend a pardon may or may not be the same as the matters that are taken into account by the trial judge when he sets the minimum term.

38. ___

39. *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.*

40. *The non-parole period is determined after the trial judge has arrived at what is referred to as the head sentence. The head sentence is premised on the existence of a prescribed maximum (<u>not</u> mandatory) penalty from which a tariff is identified, a starting point determined, aggravating and mitigating factors considered, any early plea of guilty credited and finally, under section 24 of the Sentencing Decree, a deduction made for time spent in remand as time already served. However the position is different when the head sentence is a mandatory sentence of life imprisonment. There is no basis for undertaking the approach described above when the head sentence is fixed by law. Furthermore there is no basis for proceeding to determine a non-parole period for a person sentenced to the mandatory life sentence for murder since the specific sentence provision of section 237 of the Decree displaces the general sentencing arrangements set out in section 18 of the Sentencing Decree. In my judgment the reference to the court sentencing a person to imprisonment for life in section 18 of the Sentencing Decree is a reference to a life sentence that has been imposed as a maximum penalty, as distinct from a mandatory penalty. Examples of prescribed maximum penalties can be found for the offences of rape (___) under the Decree.*

41. *For all of the reasons stated above I have concluded that there is no requirement for a trial judge to consider the time spent in remand when he has imposed the mandatory head sentence of life imprisonment upon a conviction for murder under section 237 of the Decree. Further given that the minimum term, if one is set,*

does no more than entitle the convicted person to petition the Mercy Commission to recommend a pardon in my judgment there is no requirement for the trial judge to consider the time spent in remand when setting the minimum term under section 237 of the Decree. In my view section 24 of the Sentencing Decree has no application to the specific sentencing provisions in section 237 of the Decree."

[14] It follows that the discretion exercised by the sentencing court miscarried by fixing a non-parole period instead of fixing a minimum term before a pardon may be considered. To that extent the appeal should be allowed on ground 2.

[15] If ground one is considered as an appeal against the decision to impose a minimum term of 20 years as being excessive then it is necessary to consider in detail the sentencing court's decision. This was a brutal and nasty series of crimes committed against a mother and her baby on the one hand and against the mother's three other older children on the other hand. It was in every sense of the word an unprovoked attack on one adult and four children who happened to be the partner and children of a man with whom the appellant was also in a de facto relationship. However in his sentencing decision the learned Judge has made no reference to the issues of deterrence or rehabilitation. A proper consideration of these factors and a balanced assessment would have resulted in a lower minimum term before a pardon might be considered. The appeal is allowed on ground 1 and the minimum term before a pardon may be considered is reduced to 17 years.

Gamalath JA

[15] I agree.

Bandara JA

[16] I agree with reasons, conclusions and proposed orders of Calanchini P.

Orders:

1. *Appeal against conviction dismissed.*
2. *Appeal against sentence allowed.*
3. *The sentence imposed by the High Court is set aside.*
4. *The appellant is sentenced to life imprisonment with a minimum term of 17 years before a pardon may be considered.*

Hon. Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice W Bandara
JUSTICE OF APPEAL