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

CRIMINAL APPEAL NO. AAU 114 OF 2016
(High Court HAC 241 of 2014)

BETWEEN : THE STATE

Appellant

AND : SITIVENI QIO VASUTURAGA

Respondent

AND

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(High Court HAC 241 of 2014)

BETWEEN : SITIVENI QIO VASUTURAGA

Appellant

AND : THE STATE

Respondent

Coram : **Calanchini P**

Counsel : **Mr L Burney for the State**
Mr A K Singh for Vasuturaga

Date of Hearing : **30 October 2019**

Date of Ruling : **11 December 2019**

RULING

[1] Sitiveni Qio Vasuturaga (Vasuturaga) was tried in the High Court at Suva on two counts of murder and one count of attempted murder by a judge sitting with assessors. On the first count of murdering his wife the assessors returned unanimous opinions that Vasuturaga was not guilty of murder but was guilty of manslaughter. On the second count of murdering his mother-in-law, a majority of the assessors returned opinions of not guilty of murder but guilty of manslaughter. The third assessor was of the opinion that Vasuturaga was guilty of murder. On the third count of attempted murder the assessors returned unanimous opinions of not guilty.

[2] In a written judgment delivered on 1 August 2016 the learned trial Judge convicted Vasuturaga on count 1 of murdering his wife. On count 2 the Judge acquitted Vasuturaga of murdering his mother-in-law but convicted him on the alternative offence of manslaughter. The appellant was acquitted on the offence of attempted murder.

[3] On 5 August 2016 Vasuturaga was sentenced to the mandatory sentence of life imprisonment with a minimum term of 21 years to be served before a pardon may be considered for the conviction for murdering his wife. He was sentenced to 7 years imprisonment for the manslaughter conviction. The sentences were ordered to be served concurrently.

[4] This is the State's timely application for leave to appeal against the acquittal for murder on count 2 involving Vasuturaga's mother-in-law.

[5] It would appear that Vasuturaga filed on 6 September 2016 a notice of appeal that had been initially handwritten and dated 2 September 2016. As a result this is also Vasuturaga's timely application for leave to appeal against the conviction for murdering his wife and sentence.

State's application for leave

[6] The State seeks leave to appeal the acquittal of Vasuturaga on the count of murder and the conviction on the lesser offence of manslaughter of Salaseini Kunayasi who was Vasuturaga's mother-in-law on the following grounds:

> *"That the verdict of acquittal is unreasonable and cannot be supported having regard to the evidence in that it was not open to a reasonable tribunal to find that the words uttered and acts done by Salaseini Kunayasi deceased may have been of such a nature as to be likely when done to an ordinary person to deprive him of the power of self-control and to induce him to stab her repeatedly causing her death."*

[7] Before considering the issue raised by this ground it is convenient to state briefly some relevant background facts that are reproduced from the State's submissions. In August 2014 Vasuturaga was living with his wife, their adopted daughter, his mother-in-law and his two nephews in a rented two bedroom house at Namuana Village Kadavu. On 10 August 2014 an argument started between Vasuturaga and his mother-in-law. She called him names and repeatedly swore at him. His wife joined in the argument siding with her mother. When the wife tried to leave the house, Vasuturaga prevented her from doing so. The two of them continued to argue in the kitchen. The wife picked up a kitchen knife which Vasuturaga took from her and stabbed her in the neck and chest. One of the nephews attempted to stop Vasuturaga from further attacking the wife and was himself stabbed in his right hand and chest. Vasuturaga then went into the sitting room, and later to the porch where he repeatedly stabbed the mother-in-law to death.

[8] The prosecution case relied primarily on the inculpatory statements in the caution interview in which Vasuturaga admitted to stabbing both the wife and the mother-in-law several times and swinging the knife at the nephew (Jimmy Morrell). Post mortem reports were produced and tendered. The nephew gave evidence that he witnessed Vasuturaga stabbing the wife and the mother-in-law multiple times.

[9] At the trial Vasuturaga gave evidence stating that when he stabbed the wife and the mother-in-law he did not intend to cause their deaths. He also relied on the defence of self-defence for the murder of the wife and the defence of provocation for the murder of the mother-in-law. Counsel for Vasuturaga in his written submissions has provided a summary of the background facts that does not differ in any significant manner from the State's summary.

[10] By convicting Vasuturaga of manslaughter and acquitting him of murder of the mother-in-law, the trial Judge in effect agreed with the majority opinions of the assessors. It must be recalled that it was not disputed that Vasuturaga stabbed the mother-in-law 11 times on the back of the head and back top shoulder and other parts of the body causing serious injuries that resulted in her death. In paragraph 13 of his judgment the Judge sets out the factual basis for concluding that the defence of provocation had been established thereby reducing the offence to one of manslaughter. The facts upon which the Judge relied and upon which he has assumed the assessors relied were stated as:

> *"The relationship between the accused and his mother-in-law was full of tension when she joined the accused and his wife in Kadavu. The mother-in-law was always putting the accused down, and bent on breaking up their marriage. She did not like the accused and was always encouraging her daughter to leave him."*

[11] The State relies on the decision of the Supreme Court in **Codrokadroka –v- The State** [2013] FJSC 15; CAV 7 of 2013, 20 November 2013. The Supreme Court approved the Court of Appeal's summary of the judicial approach to provocation under sections 203 and 204 of the Penal Code Cap 17 (now repealed). Whether that decision is of any assistance to the State in this application will depend upon whether the provisions of sections 203 and 204 are replicated in section 242 of the Crimes Act 2009 being the legislation in force at the time of offending in this case. For the purposes of this application there is no significant difference. Of the maters that the Supreme Court accepted as being relevant to the issue of provocation, it is arguable that in this case there was no credible narrative of a resulting loss of self-control by Vasuturaga. It is also

arguable that there was no credible narrative of an attack on the mother-in-law by Vasuturaga that was proportionate to the provocative words or deeds even if it were accepted that there was a credible narrative of provocative words. Therefore leave to appeal the acquittal for murder on count 2 is granted.

Vasuturaga's application for leave against conviction.

[12] The grounds of appeal upon which Vasuturaga relies in support of his application for leave to appeal the conviction for the murder of his wife are set out in a document *"2nd Amended Notice of Appeal"* dated 1 February 2019 as:

> *"1. That the Learned Trial Judge erred in law when he overturned the decision of the Majority of Assessors without any cogent reasons in respect of count 1.*
>
> *2. The Learned Judge erred in Law when he held that "The defence did not rely on the defence of provocation in the murder of his wife, so as to reduce the same to manslaughter. It would therefore appear that the defence contended and the three assessors accepted that, when the accused stabbed his wife, as previously described at the material time, he did not intend to cause her death, but only seriously harm her. This is where I disagree with the three assessors." (para 8 of the Judgment).*
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> *3. That the Learned Trial Judge erred in law when he directed the Assessors as: "On the other hand, the incident occurred on 10 August 2014. The trial started on 25 July, 2016, almost 2 years afterwards. So, it was arguable that the accused had enough time to prepare his defence, before trial" implying that the Appellant was lying without any evidence before him (para 42 of the summing Up) para 9 of the judgment.*
>
> *4. That the Learned Trial Judge erred in law when he directed the assessors and himself that: "It was arguable that, when a person stabs someone in the neck and chest with a kitchen knife, as that tendered in Prosecution Exhibit 4, that person logically must intend to cause the person's death" (para 44 of the summing up) para 9 of the judgment.*
>
> *5. That the Learned Trial Judge erred in law when he failed to hold that the Appellant's act amount to 'involuntarily manslaughter' and as such the Appellant's current conviction amount to miscarriage of Justice.*

> 6. *That the Learned Judge erred in law and facts when he failed to hold that what the Appellant did against his wife was a self defence and as such should have been acquitted for Murder."*

[13] Although most of the grounds are described as errors "*in law*" the submissions filed by Counsel have proceeded on the basis that leave is required and consequently this Ruling has considered the grounds as involving mixed law and fact.

[14] Ground one claims that the trial Judge erred when he overturned the unanimous opinions of the assessors of manslaughter by convicting the appellant for the murder of his wife Elenoa Waqaicece (count 1). In his judgment the trial Judge has complied with his obligation when disagreeing with the opinions of the assessors. The Judge has clearly stated the basis upon which he has concluded that the appellant was guilty of murder. It must be accepted that by stabbing his wife in the manner described in the summing up, which was not disputed by the appellant, at the very least the appellant was reckless in his conduct as to causing the death of his wife, although he claimed that he did not intend to kill her. This ground is not arguable.

[15] In relation to ground 2 I have concluded that the trial Judge on the evidence did not need to direct himself and or consider whether the deceased's conduct raised the issue of provocation. This ground is not arguable.

[16] Ground 3 is not arguable as the conclusion that the appellant intended to kill his wife or was reckless as to causing her death was open to the Judge on the evidence and he has explained his reasons for that conclusion.

[17] In my opinion grounds 5 and 6 do not raise any further issues that have not already been considered in grounds one to four. Leave to appeal against conviction is refused on these grounds.

Leave to appeal against sentence

[18] The appellant's grounds of appeal against sentence:

> *"That the learned trial Judge erred in law when he acted upon a wrong principle; took irrelevant matters to guide or affect him and nevertheless the minimum term of 21 years to be served is harsh and excessive."*

[19] Section 237 of the Crimes Act 2009 provides that the penalty for a person convicted for murder is a mandatory sentence of imprisonment for life with a judicial discretion to set a minimum term to be served before pardon may be considered. The minimum term is not an early release term. The Mercy Commission may or may not recommend a pardon to the President under section 119 Constitution. It is doubtful whether the ground is a proper ground of appeal against sentence. However even if it is so considered, then the appellant has not identified an arguable error in the exercise of the sentencing discretion and the term fixed by the Judge does not indicate an identifiable error when the circumstances of the case are taken into account. Leave to appeal against sentence is refused.

Orders:

1. *State is given leave to appeal acquittal of Vasuturaga for the murder of his mother-in-law.*
2. *Vasuturaga's application for leave to appeal conviction for the murder of his wife is refused.*
3. *Vasuturaga's application for leave to appeal sentence is refused.*

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL