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

CRIMINAL APPEAL NO.AAU 0094 of 2017
[In the High Court at Suva Case No. HAC 274 of 2015]

BETWEEN	:	**CHARLES RONIL BHAN**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**03 August 2020**
Date of Ruling	:	**04 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of murder contrary to section 237 of the Crimes Decree, 2009 and one count of theft contrary to section 291(1) of the Crimes Decree, 2009 committed on 15 August 2015 at Tamavua, Suva in the Central Division.

[2] The information read as follows.

Count 1

Statement of Offence

MURDER: *Contrary to Section 237 of the Crimes Decree 2009.*

Particulars of Offence

CHARLES RONIL BHAN *on the 15th day of August, 2015 at Tamavua, Suva, in the Central Division, murdered* ***LUI RAMLOO RAMAN.***

Count 2

Statement of Offence

THEFT*: Contrary to Section 291 (1) of the Crimes Decree 2009.*

Particulars of Offence

CHARLES RONIL BHAN *on the 15th day of August, 2015 at Tamavua, Suva, in the Central Division, dishonestly appropriated a Skyworth brand TV worth $777 and a Phillips brand home theatre system worth $200, the property of* ***SONIA KAMAL****, with the intent to permanently deprive* ***SONIA KAMAL*** *of her property.*

[3] On 07 December 2015 when the plea was taken for the first time the appellant had pleaded not guilty to the information. Having informed court that he wished to reconsider the plea, the appellant, represented by his counsel, had changed his plea and pleaded guilty to the information on 07 April 2016. On 14 April 2016, the amended summary of facts had been presented and admitted by the appellant. On 22 April 2016 the prosecution and defense had filed their respective sentencing and mitigation submissions.

[4] The learned trial judge had stated in his sentencing order that he had convicted the appellant having been satisfied that his plea of guilty to both counts was unequivocal. The learned High Court judge had sentenced the appellant on 28 April 2016 to mandatory life imprisonment with a minimum serving period of 12 years on murder charge and 09 months imprisonment on the charge of theft.

[5] The appellant had by himself filed an application seeking enlargement of time (28 April 2017) to appeal against conviction and sentence supported by an affidavit (31 May 2017) explaining the reasons for the delay; all of which had reached the CA registry on 12 June 2017. The delay is about 12-14 months. Thereafter, the appellant had tendered an application in Form 3 to abandon his appeal against sentence on 20 June 2018. Written submissions of the appellant had been received on 10 July 2018. The state had filed written submissions on 22 January 2020. The appellant had

thereafter filed an additional ground and submissions and additional submissions on the first ground of appeal on 25 March 2020. Though, time was given by this court, the state had not responded to the appellant's additional ground and submissions or the additional submissions on the first ground, but the state counsel made oral submissions at the hearing. The appellant relied on his grounds of appeal and submissions already filed.

[6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State: Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[7] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[8] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[9] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'.** I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a ***'real prospect of success'*** *(see* ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....*

[10] Grounds of appeal urged on behalf of the appellant are as follows.

Ground 1 - That the Appellant was not given or informed of his Right to appeal by the Honourable Sentencing Judge, and in doing such took away the Appellant's right to appeal.

Ground 2 – That the Learned sentencing Judge considered and took into account that the Appellant had pleaded guilty to both counts as per the information filed, and while considering that failed to explained to the Appellant the substance of pleading guilty and its immediate effect, the learned sentencing Judge fell into an error by not asking the Appellant whether the plea is in his own free will or he is induced. It is submitted that this is a question of law and leave should be granted. (full particulars will be given after the receipt of the court record).

Ground 3- That the Appellant being a lay person and a First offender with the law was incapable of making the right decision of pleading guilty and thus submits that his plea was equivocal.

Ground 4 – That the Representing Counsel of Legal Aid also misled the Appellant and therefore induced him into pleading guilty and promised a lesser sentence.

Ground 5 - That the learned Sentencing Judge failed to direct his mid on the lesser alternative count of manslaughter, thus fell into an error to consider accepting the plea of guilty. Thus rendering this conviction being unsatisfactory and unsafe. Therefore, leave should be granted on this ground.

Ground 6 - That the learned Sentencing Judge also failed to consider that the time of the alleged offence committed. The Appellant was drunk, thus was intoxicated sand his will was over-borne and then there was also a degree of provocation from the deceased.

Ground 7 - That the learned Sentencing Judge also failed to take into account the nature and gravity of the offence, whereby he did not took into consideration, the cause of the death was due to the failure of heart. He failed to direct his mind to this vital piece of evidence before arriving to a final sentence.

'Ground 8 - That he was not given an opportunity to change the plea of guilty before sentencing.

[11] The summary of facts as narrated in the sentencing order is as follows.

> *3. The brief facts of the case you admitted are; that you were a Carpenter living in Rifle Range,Lautoka. You are 29 years old. The deceased is the father of the complainant Sonia Kamal. They were living in Sakoca Settlement, Tamavua, Suva.*
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> *4. In August 2015, you came to Suva in search of employment. Through the assistance of a church member, you were provided accommodation in complainant's house and you secured employment in Suva.*
>
> *5. On 14/08/2015 night you did not come to the complainant's house. On 15/08/2015 complainant left for work at about 7am leaving her father LuiRamloo Raman at home.*
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> *6. After consuming alcohol you came to Sakoca at about 8am. When you returned to the house, the deceased questioned you about why you were drinking whole night. He was holding a stick and he slowly hit you with it. Then you punched the deceased and pulled him to complainant's bedroom and punched him again several times. The deceased fell on the bed face up. Then you climbed on the deceased and punched him again several times on the face and the neck. You saw the blood coming out of the deceased's mouth.*
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> *7. Then you went and brought a taxi and you stole the Television and the home theatre system which belonged to the complainant. You then pawned the Television at a pawn shop and the home theatre system was given to the taxi driver in lieu of the fare. Both items were later recovered by police.*
>
> *8. You were 29 years old and the deceased was 87 years old.*
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> *9. The post mortem examination was conducted at CWM hospital and the cause of death opined by the pathologist was 'death due to injuries to the deceased's face that led to the accumulation of blood in his mouth and down to his throat which ultimately resulted in him choking to death.'*

[12] Though not stated in the summing-up, the appellant's cautioned interview which had been part of the disclosures and therefore would have been available to the trial judge for perusal, reveals that the appellant had hired the same taxi that he had travelled from Suva to Sakoca settlement at Tamavua to flee the deceased's house with stolen goods. He had also admitted that the stick the deceased hit him with slowly was the one the deceased used to scratch his back. He had also stated that the deceased had started walking away after yelling at him when the appellant had punched him. When

the deceased pushed the appellant, he had got hold of him by his shirt and punched him on his neck and face. After the appellant fell on the bed and was lying his face up, the appellant had got on top of him and punched again. After the appellant saw the blood coming out of the deceased's mouth only, he had stopped the beating but had not cared even to check whether the 87 years old deceased was alive or dead before he fled the house with the stolen items. He had even turned the house girl who had come to attend to house hold chores away by lying that the 'old man' was in hospital. Until the deceased's daughter arrived in the afternoon the deceased was lying on the bed and it cannot be gathered at what time he had passed away.

[13] The direct cause of death had been asphyxia, the antecedent causes being aspiration of blood and blunt trauma to face. Thus, it is clear that the deceased had died due to the appellant's assault which had left his right hand swollen due to punching the deceased.

01st ground of appeal

[14] The appellant's complaint is that he was not given the right of appeal by the trial judge who sentenced him. I think the appellant's endeavor here is to explain his delay in appealing belatedly rather than taking it up as a ground of appeal because what happened after he was convicted and sentenced cannot form a ground of appeal against his conviction.

[15] Section 14(2)(o) guarantees the right of an accused's appeal or review by a higher court. There was no legal or constitutional obligation on the part of the trial judge to have 'given' the appellant a right of appeal. The trial judge had no such capacity. The right of appeal does not depend on the judge who sentences an accused. The mere absence of counsel due to an inadvertence when the sentence was pronounced would not make a difference.

[16] The appellant was defended by an experienced counsel from Legal Aid Commission and it is unthinkable that he had not informed the appellant of his right to appeal and for all practical purposes the appellant would have got to know of his right to appeal from his inmates too before the lapse of 12 14 months.

[17] This ground of appeal has no prospect of success.

02nd and 03rd grounds of appeal

[18] The appellant argues that his guilty plea was not unequivocal for the reason that the trial judge had failed to explain to him the substance of his plea and its effect. He also alleges that the trial judge had not formally inquired from him whether his plea of guilty was voluntarily given or he was induced to plead which according to him was a duty cast upon a trial judge.

[19] In the often cited decision in **Masicola v State** AAU73 of 2015: 10 May 2019 [2019] FJCA 64 , Calanchini P sitting as a single Judge discussed the duty of a trial judge on equivocation of the plea and having said that equivocation may be evidenced by ignorance, fear, duress, mistake or even the desire to gain a technical advantage, stated *inter alia*

> *'[4] However those two principles must be considered in the context of the particular circumstances of the present application. At the trial the appellant pleaded guilty to all three counts. He was represented by Counsel. With both the appellant and Counsel present in court the prosecution read out a detailed summary of the facts. Through his counsel the appellant admitted the summary of facts.'*
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> *'[9] It does not follow that a judge is necessarily prevented from assessing whether a plea of guilty is equivocal when an accused person is represented by counsel. Furthermore it does not follow that a plea of guilty by an accused person who is represented by counsel should be regarded always as an unequivocal plea.'*

[20] Even ***Masicola*** does not (I think quite correctly) cast a positive duty on the trial judges to embark on an elaborate inquiry into the equivocation of a plea of guilty, particularly when the accused is represented by legal counsel who is expected to carefully consider all disclosures including the confessional statements, if available, and other evidence including medical evidence before advising the accused that the best course of action is a plea of guilty.

[21] Calanchini P made the following observations in ***Masicola*** in the context where the trial judge thinks, is of opinion or has reason to believe that the material before him including the agreed summary of facts and/or cautioned statement/charge statement reasonably suggests that the plea of guilty may be equivocal or when the said material reasonably raises a defense.

> *'[3] The only ground of appeal against conviction relates to the defence of provocation. The ground involves consideration of two principles. The first principle is that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (**Nalave v The State** [2008] FJCA 56; AAU 4 and 5 of 2006, 24 October 2008). Equivocation may be evidenced by ignorance, fear, duress, mistake or even the desire to gain a technical advantage (**Maxwell v R** [1996]) 184 CLR 501. The second principle is that it is the duty of a trial judge in Fiji to decide whether on the evidence he should direct the assessors and himself on the availability of any alternative defence or verdict that is not raised by the defence (**Praveen Ram v The State** [2012] 2 Fiji LR 34.*
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> *[10] The issue in this application is whether the judge, on the basis of the agreed summary of facts, was entitled to conclude that the guilty plea was unequivocal. A trial judge is required to address the defence of provocation if there is evidence that raises the issue of provocation. In my judgment there is no reason why that obligation should not apply when a judge is required to determine whether a plea of guilty is unequivocal based on an agreed summary of the facts presented by the prosecution.*
>
> *[11] If the agreed summary of facts suggests that the plea of guilty may be equivocal due to mistake or ignorance then the judge is, in my opinion, at the very least required to raise the issue with Counsel for the accused.'*

[22] Though some trial judges do prefer to inquire from the accused whether his plea of guilty is voluntary and explain the consequences of the plea out of abundance of caution even when the accused is defended by legal counsel, in my view, absence of such questioning cannot *per se* be a basis for a legitimate ground of appeal to challenge the guilty plea.

[23] Though it is not possible to gather as to what transpired in the original court from the time of the appellant pleaded guilty leading to him being sentenced without the complete appeal record, it is clear that the trial judge had been satisfied that the appellant's guilty plea was unequivocal. There is no material before me to suggest that it is not so.

[24] These two grounds have no real prospect of success in appeal.

04th ground of appeal

[25] The appellant makes a serious allegation against his trial counsel that he had misled and induced the appellant to plead guilty on the promise of a lesser sentence. The Court of Appeal set down the procedure to be followed prior to advancing a ground of appeal based on criticism of trial counsel in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019). The appellant has not followed the guidelines given in ***Chand*** and therefore, I shall not consider this ground of appeal.

05th ground of appeal

[26] The appellant's argument here is that the trial judge had failed to direct his mind to the lesser charge of manslaughter. The basis of the appellant's contention appears to be that the trial judge had failed to see whether the fault element of murder *i.e.* intention to kill was satisfied before proceeding to convict him.

[27] It appears from his cautioned interview that the appellant had said that he did not mean to kill the deceased. However, in terms of section 237 of the Crimes Act, 2009 it is not only when an accused intends to cause the death of the deceased but also when he is reckless as to causing the death of the deceased he commits murder.

[28] Therefore, even if the appellant lacked the intention to kill he cannot escape the criminal liability for murder if he had been reckless as to causing the death of the deceased. Having perused not only the summary of facts but also the cautioned statement along with the medical evidence, I do not think that the appellant's position that he may not have entertained the requisite intention and therefore should have been convicted for manslaughter could be sustained. The trial judge had the same material before him and would have been convinced that the appellant had entertained the necessary fault element, namely recklessness if not intention.

[29] This ground of appeal has no real prospect of success in appeal.

06th ground of appeal

[30] According to the appellant the trial judge should have considered provocation and intoxication. While it cannot be denied that had there been credible and adequate material available to the trial judge on either of them, he could have considered the same in the proper legal context whether to convict him for murder or not but mere anger or consumption of some alcohol cannot reduce culpability from murder to a lesser offence.

[31] In his cautioned statement, the appellant had stated that he came home in the morning around 8.00 a.m. after drinking grog at his workmate's place at Flagstaff and then having consumed beer in a night club in Suva in the previous night till about 6.30 a.m. of the following day and got angry and punched the deceased 5-6 times on his mouth and neck when the deceased confronted him as to why he had been drinking and where he had been etc. and hit him with a stick slowly.

[32] However, he had also stated that the deceased had started walking away after yelling at him when the appellant had again punched him. At that point the deceased had pushed the appellant, most probably to avoid further beating, but the appellant had got hold of him by his shirt and punched him on his neck and face. After the appellant fell on the bed and was lying his face up, the appellant had got on top of him and punched him again until he started bleeding from his mouth.

[33] An appellant's burden is high when it comes to canvassing a conviction on the grounds of provocation as held in **Codrokadroka v State** [2008] FJCA 122; AAU0034.2006 (25 March 2008) which summarized the approach as follows:

> *1. The judge should ask himself/herself whether* ***provocation*** *should be left to the assessors on* ***the most favourable view*** *of the defence case.*
> *2. There should be a "credible narrative" on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*
> *3. There should be a "credible narrative" of a resulting loss of self-control by the accused*
> *4. There should be a "credible narrative" of an attack on the deceased by the accused which is* ***proportionate*** *to the provocative words or deeds.*
> *5. The source of the* ***provocation*** *can be one incident or several. To what extent a past history of abuse and* ***provocation*** *is relevant to explain*

*a **sudden** loss of self-control depends on the fact of each case. However cumulative **provocation** is in principle relevant and admissible.*
*6. There must be an evidential link between the **provocation** offered and the assault inflicted.*

[34] In my view, the conduct of the appellant as described in detail above in particular the number of blows delivered on the deceased's body and other attendant circumstances may well militate against the successful defense of provocation in the light of ***Codrokadroka***.

[35] **Blackstone's Criminal Practice 1993 page 39 at A3.8 and A3.9** states on voluntary intoxication:

> *'Intoxication is not a defense as such. It is, for example, no defense to say (as is undoubtedly true in many cases) that the accused would not have acted as he did but for the fact that his inhibitions were reduced due to the effect of alcohol. On the contrary, intoxication operates so as to restrict what would otherwise be valid defenses of mistake, inadvertence or automatism. However, intoxication provides very credible evidence of the fact that the accused did in fact make the mistake he alleges or that he did in fact fail to foresee the obvious risk he was running or that he was indeed in a state of automatism. The restrictions which the law imposes on defenses caused by intoxication are a response to the evidential power of intoxication in supporting such defenses and to the frequency and ease with which such defenses could be put forward.'*
>
> *'The restrictive rules only apply where the accused's intoxication is voluntary.....'*

[36] The conduct prior to, during and after the melee suggests without doubt that the appellant was acting very rationally. The manner in which he committed the offence of theft and how he fled the scene provide ample evidence that alcohol had not affected his rationality. He was very well aware of what he was doing and had the mental capacity to plan the theft and fled the scene. Thus, intoxication or drunkenness would not operate in favour of the appellant given the facts of this case.

[37] Therefore, I do not think that there is a real prospect of success in this ground of appeal.

07th ground of appeal

[38] The appellant submits that the trial judge had not taken into account that the cause of death was heart failure. However, the summary of facts and the report of the Post-Mortem Examination reveal otherwise. I have already adverted to the cause of death before and need no repetition.

[39] Therefore, there is no prospect of success in this ground of appeal.

08th ground of appeal

[40] The appellant finally argues in his additional ground of appeal preferred for the first time on 25 March 2020 that he was not given an opportunity to change the plea of guilty. He states that he had the intention of changing his plea before sentencing and informed the same to the court clerk who had assured him that the trial judge would be informed of it upon his arrival but it did not happen. However, this appears to be clearly an afterthought, as the appellant had waited from 28 April 2016 to 25 March 2020 to come out with this fundamental concern. The excuse of absence of his counsel due to an inadvertence on 28 April 2016 is a mere ruse.

[41] The appellant had ample opportunity from 10 February 2015 to 28 April 2016 to change his mind and withdraw his plea of guilty. Further, what he had stated on 25 March 2020 is totally unsubstantiated.

[42] Therefore, there is no real prospect of success in this ground of appeal.

[43] The delay is substantial and the reasons for the delay are unconvincing though an extension of time would not prejudice the respondent.

Order

1. Enlargement of time to appeal against conviction is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL