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

CRIMINAL APPEAL NO.AAU 165 of 2015
[In the High Court at Suva Case No. HAC 365 of 2013]

BETWEEN	:	**JOSATEKI TABUA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**05 June 2020**
Date of Ruling	:	**12 June 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of attempted murder contrary to section 44 and section 237 of the Crimes Decree, 2009.

[2] The information on the count of attempted murder was as follows.

> ***'Statement of Offence***
>
> ***ATTEMPTED MURDER****: Contrary to section 44 and section 237 of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of Offence***
>
> ***JOSATEKI TABUA*** *on the 27th day of October, 2013 at Toorak, Suva, in the Central Division, attempted to cause the death of* ***TIMAIMA VATUBUA****, and at the time, intended to cause the death.'*

[3] After full trial, on 25 September 2015 assessor No. 1 and 2 had opined that the accused was guilty of attempted murder as charged. Assessor No. 3 had opined that the accused was not guilty of attempted murder, but guilty of the lessor alternative offence of Act with Intent to Cause Grievous Harm. The learned High Court judge had agreed with the majority of assessors and convicted the appellant of attempted murder in his judgment on 28 September 2015. He was sentenced on 02 October 2015 to life imprisonment with a minimum serving period of 08 years.

[4] The appellant being dissatisfied with the conviction and sentence imposed had signed a timely notice of appeal on 23 November 2015 and submitted written submissions on 03 May 2017. The State had filed written submissions on 09 February 2018. The Legal Aid Commission had thereafter filed amended grounds of appeal only against conviction but had prayed that leave to appeal be granted against sentence as well. Written submissions on behalf of the appellant on conviction had been filed on 11 May 2020 and the State had replied on 04 June 2020.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

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

Ground One

THAT the summing-up may have lacked the adequate and proper direction regarding the issue of intention.

Ground Two

THAT the conviction was unreasonable and cannot be supported by law and facts, since the State was not relieved from the burden to prove the element of 'intention to kill' beyond reasonable doubt, for the offence of attempted murder, thereby causing a grave miscarriage of justice.

[7] A somewhat detailed summary of evidence of the prosecution is necessary to examine the appellant's grounds of appeal and they are as follows.

Prosecution evidence

The complainant Timaima Vatubua had been a police officer for 9 years. The appellant had been his de facto partner. Both of them were living together at Charles Street, Toorak. On 27 October 2013 she had been at a social gathering at Nasova and then gone to the Union Club around 1.00 am and been there for about 4 hours. She had met some police officers and been drinking there. She with the appellant and 3 others from Charles Street had left Union Club around 5.30 am to go to Charles Street. They had been drinking at their place for about ½ hour when their friends at the neighbourhood drinking with them left.

The complainant had started an argument with the appellant for calling her to come to Charles Street while she was drinking at the club. Then she had told the appellant that she did not want him anymore and she had gone to the bedroom and locked the door from inside. The appellant had got angry when she said that she did not want him. In about 10 minutes she had heard a hard knocking on the door. She did not want to open the door. Then the appellant had forcefully opened the door and had come inside with the kitchen knife. He had swung the knife on to her right chest and on the left lower ribs. She had then pushed him and ran outside the bedroom to the main road. She had felt blood coming and had gone to the hospital in a taxi. She had collapsed as she entered the emergency unit. The knife she was struck by the appellant had been produced in court. She had been admitted in the hospital, for 3 weeks in the ICU and another 2 weeks in the surgical ward. In cross examination the complainant had said that she was the one who started the argument with the appellant but denied swearing at the appellant and punching him on his face. She had further said that when she ran out after the stabbing, the appellant had not tried to stop her and that the appellant had got frustrated as she brought another man home. In re-examination she said that she told the appellant that she did not like him anymore as she no longer loved him.

Witness Ilisoni Ratu had heard a drinking party at the complainant's place and thereafter quarrelling and fighting. After that when he heard shouting, he had gone towards the complainant's home. He said Timaima ran out of the house. Timaima had looked shocked crying and bleeding from the chest. He had met Josateki at the front door. He said that Josateki looked shocked. Josetaki had been holding a knife. He had

wanted Josateki to drop the knife. Josateki had dropped the knife and apologized for what happened. His friend had taken Timaima to hospital.

According to medical evidence 01st stab injury had been a bleeding the most. It had been on her right upper chest just below the right collar bone and the 02cm cut with 05cm depth had cut through the subclavian vein. Surgical intervention had been needed to stop bleeding. The complainant had been given a total of 13 units of blood. The 02nd stab wound had been on her left lower chest between 10th and 11th rib space. The 03rd stab injury had been on her left breast, 01cm wide and about 04cm deep. The medical opinion had been that the injuries would have been caused by a kitchen knife. The complainant had been admitted on 27/10/2013 and discharged on 29/11/2013. Out of the 33 days of hospitalization, 2 ½ weeks the complainant had been in the ICU and thereafter in the surgical ward. The wounds had been serious enough for the complainant to die because of severe bleeding and she had undergone a second operation on 13 November 2013 where her abdominal wounds burst open. She had undergone a third operation in November 2014 where the repair on her diaphragm gave away during labour where she would have lost her life.

Accused's evidence

When the friends left, the complainant had wanted to follow them to drink more. The appellant had told her that they can drink on another day. The complainant had got angry and both had an argument. He had stopped her from going as he was embarrassed because they were surrounded by barracks and neighbours could see that she was drunk. The complainant had started swearing at him.

He had tried to make her sit on the bed to make her go to sleep. Then she had punched him. She had told him to look for another woman as she was talking to another man. When she said that, he had got frustrated and was very painful. He had found her sleeping with another man. He had gone to the kitchen to get a knife to frighten her. He was very angry and hurt. He hand had just struck her. According to him because of the anger, pain and had no peace his hand just struck her. When she ran out of the room he had not tried to stop her. He had followed her. When he realized that she had got injured he had stopped striking her with the knife. He had followed her to see what happened to her as she was injured.

He said he accepted her even after she brought another man into the house as he wanted to change her to prove what others say was wrong. He said he cooperated with the police and he told the police in his caution interview statement what actually happened.

In cross examination he said that he really loved her. He said he could have forgiven her on 27/10/2013 but the anger that he felt at that time was too much. He said everything had built up to that moment. He said he used the knife to frighten her and he did not see any stick or broom around instead of the knife. He said he broke down the locked door to do that. He said that he did not see blood coming out at that time after he struck her. He said that he knew that using a knife would cause injuries. In re-examination he said that he did not know that it would be this serious. It happened out of his anger and he did not even realize that he had injured her.

01st ground of appeal

[8] The appellant's complaint appears to be that the summing-up lacked directions on the fault elements of attempted murder in that the learned trial judge had referred only to intention on 08 occasions but presumably not knowledge. In **Vosa v State** [2019] FJCA89; AAU 0084 of 2015:06 June 2019 the Court of Appeal reiterating section 44(3) of the Crimes Decree stated that for attempted murder the fault elements are intention or knowledge whereas for murder intention, knowledge or recklessness are the fault elements. Obviously, one might question why recklessness is not part of the fault elements in attempted murder or whether it is an oversight by the drafters of the Crimes Act. That issue, however does not arise in this case and could be looked into in an appropriate case.

[9] It appears that the trial judge had not addressed the assessors or himself on the fault element of knowledge in attempted murder. However, how it had prejudiced the appellant is not explained by him.

[10] The appellant also complains that the learned trial judge had not drawn the attention of the assessors on his cautioned interview to consider whether what he had mentioned there unequivocally satisfy the fault element of intention to cause death. The cautioned interview had been produced at the trial and referred to in paragraph 34, 35 and 51 of the summing-up but not available to me at this stage. However, the summing-up or the judgment does not suggest that the appellant had taken a stance any different to his evidence at the trial in the cautioned interview.

[11] The learned trial judge had addressed the assessors on the fault element of 'intention to kill' for attempted murder in paragraph 10 and directed them how to infer intention from circumstances in paragraph 11 of the summing-up. The trial judge had specifically directed the assessors to consider whether the appellant had entertained only an intention to cause grievous harm if they were to find that he did not have intention to kill the complainant in paragraph 13, 14 and 57 of the summing-up.

[12] The learned High Court judge had also placed the appellant's evidence fully before the assessors in paragraphs 37- 45 of the summing-up for the assessors to decide the question whether the appellant had intended to kill the complainant or merely intended to cause grievous harm to her.

[13] In his judgment also the trial judge has analyzed the appellant's position that he wanted to merely frighten the complainant but not intended to kill her and after an analysis of his own had come to the conclusion that he had intended to kill her when he stabbed her three times causing near fatal injuries though he may have been remorseful later.

[14] Though the facts were superficially similar, the crucial difference in ***Vosa*** was that in that case the appellant had pleaded guilty and was convicted for attempted murder based on the summary of facts where the cautioned interview and the charge statement had been attachments but the trial judge seemed to have overlooked the cautioned interview and the charge statement completely in convicting the appellant for attempted murder when it could not be unequivocally inferred from the cautioned interview and the charge statement that he had entertained an intention to cause the death of the victim. Giving the benefit of doubt in that regard, instead of sending him back to face a new trail Vosa's conviction of attempted murder entered by the trial judge was substituted with a verdict of guilty of the offence of 'Act with Intent to Cause Grievous Harm' under section 255 (a) of the Crimes Act, 2009 and sentenced.

[15] In the present case the appellant had faced a full trial where he placed his position fully before the assessors and the trial judge. The assessors were asked to consider his position that he did not intend to kill the complainant which appears to have been his position in the cautioned interview as well and also to consider whether he was guilty of the offence of 'Act with Intent to Cause Grievous Harm'. However, the assessors had rejected the appellant's position and trial judge for well-articulated reasons had agreed with assessors.

[16] In **Ali v State** [2020] FJCA 11; AAU31.2015 (27 February 2020) the Court of Appeal upheld a similar complaint (to that of ***Vosa***) where the appellant had pleaded to a charge of attempted murder but sent the case back to the High Court for the appellant to plead to the information without reducing the guilty verdict of attempted murder to a lesser offence like the Court did in ***Vosa***.

[17] Therefore, this ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[18] This ground of appeal can be considered in some way as an extension of the first ground of appeal. The appellant argues again based on ***Vosa*** that the trial judge may have fallen into an error in drawing an unequivocal inference of an intention to cause death of the complainant. The appellant also seems to argue that because there was no evidence of premeditation or preplanning he could not be said to have entertained an intention to kill the complainant. Premeditation or preplanning is a not a *sine qua non* to infer an intention to cause death. If there is evidence of premeditation or preplanning it would be easier for the deciders of fact to uphold an intention to cause death. But the absence of such evidence does not *ipso facto* negate such an inference. Intention can be formed even on the spur of the moment.

[19] In fact, in this case the evidence that the appellant had gone to the kitchen, picked up a knife and forcefully opened the door of the complainant's bedroom to deal several near fatal blows to the complainant may be suggestive of some premeditation by the appellant formed within a very brief period of time.

[20] I cannot comprehend the appellant's argument that the State had been relieved of proving the element of 'intention to kill'. The learned trial judge had placed the burden of proving every aspect of the offence of attempted murder beyond reasonable doubt fairly and squarely on the prosecution.

[21] On what basis the appellate court could interfere with the decision of the assessor and that of the judge in a situation like this has not been demonstrated by the appellant. In **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 the Court of Appeal said

'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.'

[22] Therefore, there is no reasonable prospect of success in the appellant's second ground of appeal against conviction as well.

Appeal against sentence

[23] Since the appellant has prayed for leave to appeal against sentence as well, I have examined the sentencing order of the learned trial judge in the light of guidelines in **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011 to see whether there is an arguable sentencing error capable of achieving reasonable prospect of success in appeal.

[24] I do not find that the learned trial judge has committed any sentencing error in imposing an imprisonment of life which is mandatory subject to a minimum serving period of 08 years on the appellant.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL