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

CRIMINAL APPEAL NO.AAU 0042 of 2018
[In the High Court at Suva Case No. HAC 091 of 2015L]

BETWEEN	:	**VENKTESH PERMAL GOUNDAR**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Mr. S. Lutumailagi for the Appellant**
	:	**Mr. Y. Prasad the Respondent**
Date of Hearing	:	**02 August 2021**
Date of Ruling	:	**06 August 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva on one count of murder contrary to section 237 of the Crime Act of 2009 committed on 04 April 2015 at Lautoka in the Western Division.

[2] The information read as follows:

Statement of Offence

MURDER: Contrary to section 237 of the Crime Act of 2009.

Particulars of Offence

VENKTESH PERMAL GOUNDAR *on the 4th day of April 2015 at Lautoka in the Western Division murdered* ***SHERAL SANDHYA.***

[3] After full trial, the assessors had been of the unanimous opinion that the appellant was guilty of murder. The learned High Court judge had agreed with the assessors' opinion, convicted him for murder and sentenced him on 20 April, 2018 to mandatory life imprisonment with a minimum serving period of 18 years.

[4] The appellant's appeal lodged by his lawyers against conviction and sentence had been timely (15 May 2018). His written submissions had been filed on 22 July 2019 and supplementary submissions had been filed on 09 October 2019. The state too had filed written submission on 21 January 2020. Both parties had consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions alone without an oral hearing in open court or via Skype.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*

(iii)Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[7] The appellant's grounds of appeal against conviction and sentence are as follows:

Conviction

Ground 1

That the opinion of the assessors was perverse in that the evidence pointed to lack of mens rea regarding intent to kill in the face of the unchallenged evidence that the Appellant had a propensity to bouts of suicide attempts which negated an intent to kill.

Ground 2

That the Learned Judge erred in law and in fact in directing the assessors that the appellant had stated to the Police that he intended to end their lives was ambivalent in that the appellant had told the Police that he "did not want to live anymore"., which fact was inconsistent with an intention to kill another.

Ground 3

That the Learned Judge erred in law and in fact by failing to direct the assessors that notwithstanding the admissibility of the appellant's alleged confession to the Police the appellant was severely adversely impacted by the physical injuries from the burn he had received coupled with the fact of his wife's death at the time of rendering his statement to the police and such disability may have impacted on his statement.

Ground 4

That the Learned Judge erred in law and in fact in failing to direct the assessors that the 35 percent burn to the Human body resulting in death was a rarity and that the assessors should have considered whether the injuries received from the burns did in fact cause the death of the deceased.

Ground 5

That the Learned Judge erred in law and in fact in failing to direct the assessors that there was a possibility of secondary infection causing the death of the deceased and the possibility of such secondary infection being caused by Hospital negligence.

Ground 6

That the Learned Judge erred in law and in fact in placing an unfair emphasis on the testimony of the Pathologist thereby creating the impression that the

medical report was irrefutable when in fact the Pathologist had admitted that there was an absence of blood test to confirm presence of infection micro-organisms which could be fatal to the deceased.

Ground 7

That the Learned Judge erred in law and in fact in allowing post-mortem report to be tendered as an exhibit together with the Oral testimony of the Pathologist who introduced new matters not in the said post-mortem report.

Ground 8

That substantial miscarriage has been caused to the appellant by the Prosecutions failure to provide a witness statement of the Pathologist to the defence and compounding such failure by equating a post-mortem report with a witness statement.

Ground 9

That the Learned Judge erred in law and in fact by shifting the burn of proof on a critical matter that is the post-mortem report by suggesting to the assessors in his summing up that the post-mortem Pathologist was not challenged by "any other expert" when the burden rested with the Prosecution throughout the trial to establish all the elements of the offence beyond a reasonable doubt.

Ground 10

That the weight of the evidence does not support a conviction for murder and in all the circumstances of the case the evidence at best would found a case on manslaughter.

Sentence

Ground 11

The Sentence is manifestly harsh and excessive in all the circumstances of the case.

Ground 12

The Learned Judge erred in law and in fact in putting a ceiling on the timeframe within which the President of the Republic of Fiji may grant a pardon.

[8] The trial judge had summarised facts in the sentencing order as follows:

> *2. The facts were as follows: On the day of the incident, that is, 4 April 2015, you were 32 years old and married to the deceased. The deceased was then*

aged 25 years old. The two of you had been married for the previous nine years, and had three young children, aged eight years, four years and one and half years. You worked as a joiner for "Mahogany Industries", while your wife worked at "Bargain Box Shop" at Lautoka. Both of you resided at Raviravi, Ba.

3. *Prior to the incident, you were experiencing matrimonial difficulties with your wife. You two were living separately and your wife was having a relationship with another man, a police officer. She had shifted to Lautoka, and she had taken out a "Domestic Violence Restraining Order" (DVRO) against you. The custody of your children was shared among the two of you. You were aggrieved by the above state of affairs. You felt you had done a lot for your family and you felt your wife had broken up the family by "cheating" on you.*

4. *You then planned to end your wife's life. You bought some paint thinner and a gas lighter from Lautoka. On 4 April 2015, you met your wife at "Bargain Box Shop" at Lautoka to exchange the custody of a child. You later rub the paint thinner on her body and set her alight. She suffered 35% burnt to her body. She was rushed to Lautoka Hospital for medical attention. She died 10 days later as a result of her burn injuries and the effect thereof. You were later tried and convicted of her murder.*

[9] The appellant had chosen to remain silent and called no witnesses.

01st, 02nd and 03rd grounds of appeal

[10] The appellant's counsel had made submissions on the above grounds together. The counsel's grievance is that the trial judge had not addressed the assessors on the fault elements of the offence of murder and not left with them the alternative verdict of manslaughter.

[11] It appears, as submitted by the respondent, that the trial judge had directed the assessors adequately on the fault element at paragraphs 13, 14 and 41 of the summing-up. He had also left the alternative verdict of manslaughter with the assessors (see paragraphs 16, 17 and 42) as recommended by Lord Clyde in **Von Starck** [2000] 1 WLR 1270 at 1275; [2000] UKPC 5 and by Lord Bingham in **Coutts** [2006] UKHL 39 (see also **Pickering v State** AAU 159/2019 (30 July 2021). However, the assessors had obviously rejected a verdict of manslaughter because they had accepted that the fault element for murder had been satisfied beyond reasonable doubt.

[12] As seen from the summing-up, the evidence of the two eye-witnesses and the appellant's answers in the cautioned interview seem to have clearly established the fault element for murder.

[13] Therefore, there is no reasonable prospect of success in the above three grounds of appeal.

04th, 05th, 06th, and 09th grounds of appeal

[14] The appellant's counsel submits that the trial judge had not directed the assessors on the aspect of causation namely the act of the appellant having set the deceased alight and her cause of death namely septicaemia.

[15] From medical evidence it is clear that there had not been any *'novus actus interveniens'* ("new act intervening") breaking the chain of causation.

[16] Paragraph 39 of the summing-up shows that 35% of burning of the deceased's body had directly contributed to the infection in the blood leading to septicaemia. In terms of section 246 (1) (2) and (b) of the Crimes Act, 2009 even if the appellant's act had substantially contributed as opposed to being an immediate, main or sole cause of death, to the death of the deceased that was sufficient to bring home a conviction for murder against the appellant [see also **R v David Keith Pagett** (1983) 76 Crim. App R. 279 at 288 and **Blaue** [1975] All ER 446)].

[17] In the circumstances the trial judge was not required to address the assessors on *'novus actus interveniens'.*

[18] Therefore, there is no reasonable prospect of success in the above four grounds of appeal.

07th and 08th ground of appeal

[19] The appellant's counsel argues that the prosecution took the defence by surprise by leading new evidence of the doctor that was not in the post-mortem examination report and also not providing the witness statement of the doctor to the defence.

[20] In **Ali v State** [2011] FJCA 28; AAU0041.2010 (1 April 2011) relied on by the appellant's counsel the complaint against the doctor who had performed the autopsy was on a complete different footing and the remarks made by the Court of Appeal in that case cannot be applied to this case.

[21] There is nothing to suggest that the forensic pathologist who had given evidence had deviated from what he had stated in the post-mortem report as to the cause of death. Similarly, there is nothing to prevent such an expert from elaborating matters relating to his findings in court as a result of questioning not only by both parties but by the trial judge as well. Such evidence does not fall into the category of 'additional evidence'. If he is restricted only to the matters recorded in the post-mortem report, there is no purpose in summoning such a witness to give evidence in court at all.

[22] In **R. v. Abbey** [1982] 2 S.C.R. 24 speaking for the Court, Dickson J. (as he then was) said at p. 42:

> *With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)*

[23] It was held in **Davie v. Magistrates of Edinburgh** [1953] S.C. 34, at p. 40, by Lord Cooper:

> *Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.*

[24] In **R v Beland** [1987] 2 SCR 398; [1987] 43 DLR the Supreme Court of Canada stated:

> *'16. ……The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. Where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received.'*

[25] It is clear that the doctor's evidence is well within the scope of expert evidence as laid down in the above cases. I do not think that the defence had been 'ambushed' by his evidence.

[26] Therefore, there is no reasonable prospect of success in the above two grounds of appeal.

10th ground of appeal

[27] The appellant's counsel has not dealt with this ground of appeal in his written submissions. This ground of appeal seems to argue that the conviction is unreasonable or cannot be supported having regard to the evidence.

[28] However, upon examining the summing-up, I cannot but feel that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt (see **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The**

Queen [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[29] Further it appears that on the whole of the facts, reasonable assessors, after being properly directed, would without doubt have convicted and therefore no substantial miscarriage of justice within the meaning of the proviso to section 23(1) of the Court of Appeal Act has occurred [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015). In other words, the conviction appears to be inevitable in the sense that it was not open to the assessors and the trial judge to acquit the appellant and thus, there was no substantial miscarriage of justice (**Baini v R** (2012) 246 CLR 469; [2012]. HCA 59 and **Degei & 3 Others v State** [2021] FJCA; AAU 005.2016 (03 June 2021)].

[30] It should also be pointed out that the appellant had been represented by counsel at the trial and he had not sought any redirections on the alleged non-directions or omissions in the summing-up on many of the points now raised by the appellant. Therefore, the appellant is not even entitled to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)] without cogent reasons.

11th ground of appeal (sentence)

[31] The appellant's counsel contends that the sentence is harsh and excessive.

[32] I do not see any sentencing error in the trial judge's decision to impose the mandatory life imprisonment in terms of section 237 of the Crimes Act (see **Nute v State** [2014] FJSC 10; CAV0004 of 2014 (19 August 2014) as that is the only sentence that could have been imposed for murder.

12th ground of appeal

[33] The appellant seems to complain about the trial judge's decision to impose a minimum serving period and fixing that period as 18 years. He relies on **Yunus v State** [2013] FJSC 3; CAV0008 of 2011 (24 April 2013) which however dealt with a totally different

issues namely (i) whether the Court of Appeal had jurisdiction to entertain an application for leave to appeal given that the sentence was one of life imprisonment, which is one "fixed by law" within the meaning of that phrase in section 21(c) of the Court of Appeal Act, and the minimum period of 17 years recommended by the trial judge in terms of section 33 of the Penal Code as it existed prior to the Amendment Act of 2003, being a mere recommendation and (ii) whether the Court of Appeal acted within the ambit of its jurisdiction as contained in section 21(c) of the Court of Appeal Act, when it purported to substitute a fixed minimum period of 18 years in place of the 17 years that had been recommended by the trial judge as the minimum period to be served by the Appellants, before they become eligible for remission.

[34] The minimum period to be served before a pardon may be considered is a matter of discretion on the part of a sentencing judge depending on the facts and circumstances of the case.

[35] The provisions of section 18 of the Sentencing Act will have general application to all sentences, including where life imprisonment is prescribed as a maximum sentence (such as for rape & aggravated robbery) unless a specific sentencing provision excludes its application. A sentencing court is not expected to select a non-parole term or necessarily obliged to set a minimum term when sentencing for murder under section 237 of the Crimes Act. As a result any person convicted of murder should be sentenced in compliance with section 237 of the Crimes Act for a mandatory sentence of life imprisonment. For the same reason the discretion given to the High Court under section 19(2) of the Sentencing and Penalties Act, being an enactment of general application, does not apply to the specific sentencing provision for murder under section 237 of the Crimes Act. Under section 119 of the Constitution any convicted person may petition the Mercy Commission to recommend that the President exercise a power of mercy by amongst others granting a free or conditional pardon or remitting all or a part of a punishment. Therefore, the right to petition the Mercy Commission is open to any person convicted of murder even when no minimum term had been fixed by the sentencing judge in the exercise of his discretion (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015).

[36] The discretion to set a minimum term under section 237 of the Crimes Act is not the same as the mandatory requirement to set a non-parole term under section 18 of the Sentencing and Penalties Act. Specific sentence provision of section 237 of the Crimes Act displaces the general sentencing arrangements set out in section 18 of the Sentencing and Penalties Act. The reference to the court sentencing a person to imprisonment for life in section 18 of the Sentencing and Penalties Act is a reference to a life sentence that has been imposed as a maximum penalty, as distinct from a mandatory penalty. Examples of life imprisonment as the maximum penalty can be found, for example, for the offences of rape and aggravated robbery under the Crimes Act [vide **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016)]

[37] In **Balekivuya v State** (supra) the Court of Appeal dealt with the issues surrounding the discretion to set a minimum period and how the length of that term should be determined:

> *'[42] Balekivuya also challenges the length of the minimum period set by the trial Judge. As I observed earlier,* ***there is no guidance as to what matters should be considered by the judge in deciding whether to set a minimum term. There are also no guidelines as to what matters should be considered when determining the length of the minimum term.***
>
> *[43]* ***He should however give reasons when exercising the discretion not to impose a minimum term****.* ***He should also give reasons when setting the length of the minimum term.*** *Some guidance may be found in the decision of* ***R v Jones*** *[2005] EWCA Crim. 3115, [2006] 2 Cr. App. R (S) 19 for the purpose of deciding whether a minimum term ought to be set. The Court of Appeal observed at paragraph 10:*
>
> > *"A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life."*
>
> *In determining what the length of the minimum term should be a trial judge should consider the personal circumstances of the convicted murderer and his previous history.*
>
> *[48] It is clear that the sentencing practices that were being applied prior to the coming into effect of the Crimes Decree, the Sentencing Decree and the Constitution no longer apply.* ***Whatever matters a trial judge should consider when determining whether to set a minimum term and the length of that term under section 237, the process is not the same as arriving at a head sentence and a non-parole period.*** *In my judgment the*

decision whether to set a minimum term and its length are at the discretion of the trial judge on the facts of the case.

[38] The trial judge had stated as to the reasons for 18 years as the minimum serving period as follows:

> *5. There is only one sentence for murder and that is a mandatory life imprisonment (section 237 of the Crimes Act 2009). The law gives the court power to fix a minimum term to be served before a pardon may be considered by His Excellency the President of the Republic of Fiji (section 119 of the 2013 Constitution of the Republic of Fiji).*
>
> *6. Sheral Sandhya married you when she was 16 years old. You were 23 years old at the time. You were married for 9 years. You and her brought three young children to this world. You obviously loved one another. Yes, problems crept into your matrimonial life. Prior to the incident, you two were living separately. Your wife had decided to share a relationship with another person. You couldn't accept that, so you planned to kill her and in fact killed her. There was no need to do that. There were several options available to you to choose from, but instead you choose murder. You must therefore not complain when your liberty is taken away for life to pay for your crime.*
>
> *7. You are 37 years old. This is your first offence. You have three young children. You obviously worked hard to raise your family. You now saying you are remorseful. But your wife had lost her life.*
>
> *8. I sentence you to the mandatory life imprisonment. Given the matters mentioned above, I set 18 years as the minimum term to be served before a pardon may be considered by His Excellency the President of the Republic of Fiji.*

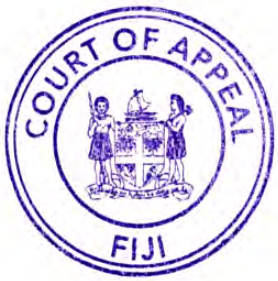
[39] Therefore, I cannot say that the trial judge had committed a sentencing error in setting 18 years as the minimum serving period and I am not inclined to grant leave to appeal against sentence as I do not see a reasonable prospect of success in appeal in that regard.

[40] However, I think that there is a need for the Court of Appeal or the Supreme Court to give some guidelines (i) as to what matters should be considered by the trial judge in deciding whether to set a minimum term and (ii) as to what matters should be considered when determining the length of the minimum term in sentencing an accused

under section 237 of the Crimes Act. Therefore, I allow leave to appeal against sentence.

Orders

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



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL