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

CRIMINAL APPEAL NO.AAU 0045 of 2017
[In the High Court at Suva Case No. HAC 339 of 2015S]

BETWEEN	:	**BINESH PRASAD**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Appellant in person**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**04 August 2021**
Date of Ruling	:	**06 August 2021**

RULING

[1] The appellant had been indicted in the High Court of Suva on five counts of murder, one count of attempted murder, one count of arson and one count of damaging property committed on 15 October 2015 at Nasinu in the Central Division.

[2] The information read as follows:

FIRST COUNT

Statement of Offence

ARSON: *Contrary to section 362 (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BINESH PRASAD *on the 15th day of October 2015 at Nasinu in the Central Division wilfully and unlawfully set fire to the dwelling house of* ***HANS WATI****.*

SECOND COUNT

Statement of Offence

MURDER: *Contrary to Section 237 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BINESH PRASAD *on the 15th day of October 2015 at Nasinu in the Central Division, murdered* ***JEI NARAYAN.***

THIRD COUNT

Statement of Offence

MURDER: *Contrary to Section 237 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BINESH PRASAD *on the 15th day of October 2015 at Nasinu in the Central Division, murdered* ***PRISIKA DEVI.***

FOURTH COUNT

Statement of Offence

MURDER: *Contrary to Section 237 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BINESH PRASAD *on the 15th day of October 2015 at Nasinu in the Central Division, murdered* ***ULESHNI IREN LATA****.*

FIFTH COUNT

Statement of Offence

MURDER: *Contrary to Section 237 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BINESH PRASAD *on the 15th day of October 2015 at Nasinu in the Central Division, murdered* ***IMRAN ERSHAD ALI****.*

SIXTH COUNT

Statement of Offence

MURDER: *Contrary to section 237 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BINESH PRASAD *on the 15th day of October 2015 at Nasinu in the Central Division, murdered* ***FARIA FARNAAZ ALI****.*

SEVENTH COUNT

Statement of Offence

ATTEMPTED MURDER: *Contrary to section 44 (1) and 237 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BINESH PRASAD *on the 15th day of October 2015 at Nasinu in the Central Division attempted to murder* ***JOTISHMA NEELAM****.*

EIGHTH COUNT

Statement of Offence

DAMAGING PROPERTY: *Contrary to section 369 (1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

BINESH PRASAD *on the 15th day of October 2015 at Nasinu in the Central Division wilfully and unlawfully damaged the taxi registration number LT 2786 valued at $18,500.00, the property of* ***MOHAMMED KHALIL****.*

[3] The appellant had pleaded guilty to the information on 31 January 2017. The summary of facts had been presented by the prosecution on 01 February 2017 and the appellant had admitted the same. He had been sentenced on 15 February 2017 to mandatory life imprisonments in respect of murder charges with 28 years of minimum serving period before pardon may be considered, mandatory life imprisonment in respect of the attempted murder charge with 10 years of minimum serving period before pardon may be considered, 10 years of imprisonment for arson and one year imprisonment for damaging property; all sentences to run concurrently.

[4] The trial judge had set out briefly the summary of facts in the sentencing order as follows:

> *3. On 1 February 2017, the prosecutor presented their summary of facts in court. Briefly, they were as follows. On 15 October 2015, the accused was 33 years old. In 2004, he married Uleshni Iren Lata, the deceased in count no. 4. At the time of her death, Ms. Lata was 29 years old. The couple had a 10 year old daughter, Prisika Devi, the deceased in count no. 3. The accused, his wife and daughter normally resided with his wife's family prior to the incident. They resided at Lot 59, Navosai Road, Narere. The house was divided into 3 flats. The main flat (ie Flat No. 2) were occupied by the accused, his wife, daughter and in-laws. The house belonged to his mother-in-law, Hans Wati (PW1). Another flat was occupied by Imran Ershad Ali, the deceased in count no. 5. He was 30 years old, at the time. Living with him was his wife, Faria Farnaaz Ali, who was the deceased in count no. 6. She was 22 years old at the time.*
>
> *4. The problem in this case started as a result of the disagreements between the accused and his wife. It reached a stage where the wife and her family obtained a "Domestic Violence Restraining Order" against the accused. The order forbade the accused to stay with his wife and daughter at Lot 59 Navosai Road, Narere. He was not to contact his family and in-laws. This made the accused upset and angry. This was the catalyst to what occurred on 15 October 2015. On the early morning of 15 October 2015, the accused with another was driving in a rental car from Tavua, Rakiraki, Korovou, Nausori and to Narere. On the way, the accused got three 20 liters plastic containers from Rakiraki. In Korovou he filled the containers with unleaded fuel from a Mobile Service Station. He drove down to Nausori and Narere. At about 11.30 pm on 15 October 2015, he approached his in-laws' house. He poured unleaded fuel around the house. He called his wife. She appeared and open the door. The accused threw the fuel on her and set her on fire.*
>
> *5. The fire spread rapidly in the house, and burnt his wife, daughter and father-in-law to death. Mr and Mrs Ali were also burnt to death in their flat. Jotishma Neelam was also burnt, but survived the incident. Mohammed Khalil's taxi was a write-off, as a result of the damage by fire.*

[5] I examined the complete summary of facts and it contains a lot more elaborate descriptions of each and every count with physical and fault elements.

[6] The appellant had appealed in person against the sentence on 22 March 2017 and it had been treated as timely though out of time by a few days. However, the contents of the appeal grounds suggest that he was canvassing the conviction as well.

[7] Subsequently, he had tendered amended grounds of appeal against conviction (26 July 2017 & 18 December 2019) and sought to abandon the sentence appeal subsequently (17 December 2019). Later he had retracted it and pursued the sentence appeal as well. He had filed written submissions on conviction (18 December 2019) and as well as sentence (21 December 2020). The state had filed written submissions on 25 January 2021 on conviction and made oral submissions on sentence. Both parties made submissions at the leave to appeal hearing *via* Skype.

[8] 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), **Chaudry 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)].

[9] 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.

[10] Grounds of appeal urged by the appellant are as follows:

Conviction

Ground 1

THAT the Trial Judge erred in law and in fact as he did not consider the existence of provocation when domestic violence restraining order was issued against the Appellant.

Ground 2

THAT the Learned Trial Judge erred in law when he failed to order a medical check in regards to the Appellant state of mind during the material time of the offending.

Ground 3

THAT the Learned Trial Judge erred in law when failed to direct himself that the Appellant was heavily intoxicated during the material time of the offending thereby he does not have any criminal liability in this case.

Ground 4

THAT the Appellant did not have the intention to kill anyone and that he had lost control.

Ground 5

THAT the Trial Judge failed to take into consideration that the Appellant had no previous record of offences of violence.

Ground 6

THAT the Trial Judge erred in law and in fact when he adjudged the plea of guilty made before counsels for the State and defence affronts justice and a substantial miscarriage of justice had occurred.

Ground 7

THAT the Learned Trial Judge failed to direct himself when he failed to consider the evidence of immunity granted accomplice evidence.

Ground 8

THAT the Trial Judge erred in law in misdirecting himself for a clear direction into accepting the Appellant's equivocal guilty plea before considering the whole nature of the case.

Ground 9

THAT the Trial Judge failed to give a chance to being found not guilty depriving the Appellant.

Ground 10

THAT the Trial Judge failed to direct himself about these matters and not consider them constituted a wrong direction on a question of law which predicated the decision.

Ground 11

THAT the Trial Judge failed to direct himself that the statements given by Prosecution witnesses were inconsistent.

Ground 12

THAT the Learned Trial Judge had erred in law and in not analyzing all the facts before him before he made a decision to accept the Appellant's equivocal guilty plea. Such error of the Learned Trial Judge in by failing to make independent assessment of the evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, has given rise to a grave miscarriage of justice.

Ground 13

THAT the Trial Judge erred in law in not setting aside the Appellant's equivocal plea by way of analyzing and drawing inferences to assist him in coming to a correct conclusion.

Sentence

THAT the sentence is manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

Ground 01

[11] The appellant submits that the trial judge had failed to consider the issue of provocation that arose as a result of Domestic Violence Restraining Order issued against him.

[12] At a trial, the defence cannot require the issue of provocation to be left to the jury unless there has been a credible narrative of events suggesting the presence of three elements – act of provocation, sudden loss of self-control (both actual and reasonable) and retaliation proportionate to the provocation [vide **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020)].

[13] The Court of Appeal recently considered a complaint in **Masicola v State** [2021] FJCA; AAU 073.2015(29 April 2021) similar to the one raised by the appellant and stated that even on the most favorable view of the defense version as revealed in the summary of facts, a credible narrative of an act of provocation, loss of self-control, both actual and reasonable, and an act of retaliation proportionate to the provocation could not be seen as expected by law relating to the partial defense of provocation and the evidential basis for running the defense of provocation simply did not exist on the summary of facts.

[14] The Court of Appeal further held in ***Masicola:***

> *'[22] Rather than the question whether the trial judge should raise with the defense counsel any concerns the judge might have had regarding available defenses before accepting a plea, in my view the more relevant question is whether the judge can be satisfied that the summary of facts unequivocally and unmistakably establish the essential elements of the offence with which the appellant had been charged and if not, the guilty plea should be rejected (see **DPP v Jolame Pita** [1974] 20 Fiji LR 5; **Michael Iro v R** [1966] 12 Fiji LR 104 and **Nawaqa v The state** [2001] FJHC 283, [2001] 1 Fiji LR 123). If, however, the trial judge feels that the facts and circumstances disclosed in the summary of facts may reasonably give rise to a complete or partial defense he may either not accept the plea of guilty or allow the withdrawal of the guilty plea (for e.g. **R v Sheikh and Others** [2004] Crim. 492).'*

[15] Having examined the summary of facts unequivocally admitted by the appellant, I do not find a credible narrative of provocation at all in as much as after receiving the DVRO he had on 14 October made preparations by collecting various items including benzene with the intention of burning the house and on 15 October around midnight he had called his wife, thrown benzene on her (that splashed on the settee and the floor too) and set fire to her. The fire had soon engulfed the house. Before fleeing the scene the appellant had thrown benzene around the house also and set fire to it.

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

02nd and 07th grounds of appeal

[17] The appellant argues that the trial judge had failed to consider the doctrine of diminished responsibility in as much as he was in a depressed state of mind in setting fire to the house and the trial judge should have obtained a medical report of him.

[18] In **Darshani v State** [2018] FJSC 25; CAV0015.2018 (1 November 2018) Keith, J said as follows, *inter alia,* in the context of section 104 of the Criminal Procedure Act, where the appellant had attempted to argue in appeal that the plea of guilty was equivocal on the basis of diminished responsibility but where she had pleaded guilty to all counts and where those pleas were unequivocal:

> *'[32].....The difficulty for the petitioner is that such a defence cannot get off the ground without a medical or psychiatric report addressing the state of her mental health when the killings took place. At present, no such medical report has been prepared. Her counsel merely asserts that such a report may provide a basis for arguing that her mental health at the time may have afforded her a defence to the two counts of murder – the defence of diminished responsibility not being available in a case of attempted murder.* ***The evidential basis for running the defence of diminished responsibility simply does not exist at present.'***

[19] Similarly in the case of the appellant too, the evidential basis for running the defense of diminished responsibility simply does not exist. There is not an iota of material in the summary of facts suggesting such a proposition. The trial had no basis to order a medical report on the appellant.

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

03rd ground of appeal

[21] The appellant submits that the trial judge had erred in law in as much as the appellant was intoxicated and could not be held criminally liable.

[22] The summary of facts does not suggest that the appellant was intoxicated at the time of the incident.

[23] In any event, **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.....' In any event,*

[24] Accordingly, this appeal ground simply has no reasonable prospect of success.

04th ground of appeal

[25] The appellant submits that he had no intention to kill anyone in the house.

[26] The trial judge had considered the fault element of murder as far as the appellant was concerned at paragraph 13 of the summing-up at the trial against the co-accused who was eventually acquitted:

'13. Accused No. 1 admitted the third element of "murder", as discussed in paragraph 10(iii)(a) hereof. He admitted that when he burnt Hans Wati's dwelling house on 15 October 2015, he intended to cause the above people's death by burning them to death. Because of the above, the court found Accused No. 1 guilty as charged on count no. 1, 2, 3, 4, 5 and 6. It then convicted him on those counts on 1 February 2017.'

[27] The summary of facts suggests nothing short of an intention to commit murder on the part of the appellant. If not intention, the appellant had definitely been guilty of recklessness as required for murder.

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

05th ground of appeal

[29] The appellant submits that he had no previous record of committing violent offences.

[30] This appeal ground against conviction is simply misconceived.

06th ground of appeal

[31] The appellant submits that he was uneducated and had no knowledge of court proceedings and acted on the advice of the defense counsel. He alleges flagrantly incompetent advocacy on the part of his counsel.

[32] The appellant challenges his plea of guilty on the basis that his counsel from Legal Aid Commission made him plead guilty. However, the appellant had not followed **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) where judicial guidelines were pronounced regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal urged on behalf of the appellant. Thus, this ground of appeal cannot be entertained at this stage.

[33] In any event, the trial judge had been mindful of the voluntariness of the appellant's plea as shown by paragraph 6 of the sentencing order:

> *'6. The court checked with the accused's counsel to see that he was admitting to all the elements of the offences from count no. 1 to 8. Through his counsel, the accused admitted the particulars of offences in count no. 1 to 8, and admitted the prosecution's summary of facts. The accused also admitted all the elements of the offences from count no. 1 to 8. As a result of the above, the court found him guilty as charged on all counts, and convicted him accordingly on those counts.'*

[34] In **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter that:

> *'[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).'*

[35] The Supreme Court in **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) also had usefully referred to the role of the defense counsel and the trial judge *vis-à-vis* a guilty plea in the matter of a plea as follows:

> *'[21] Frequently it can happen that after an offence has been committed, about which an Accused person feels deeply ashamed, that various explanations are given to the police or to the court. Subsequently an Accused can retract some or all of those explanations. It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what*

it considers should have been the areas of questioning or advice to be given by a lawyer to his client…….'

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

08th ground of appeal

[37] The appellant complains of his co-accused in the case being given immunity by the state and legal consequences of an accomplice giving evidence.

[38] The co-accused, Mathew Gunua' case had proceeded to trial and he had been acquitted in the end. Even if Mathew Gunua had been granted immunity at some stage in order to call him as a witness in the case against the appellant the prosecution did not have to call him eventually because the appellant pleaded guilty to all counts in the information. Mathew Gunua had, of course, given evidence on his behalf at the trial against him and stated *inter alia* that the appellant had told him that he was going to burn down his in-laws' house and kill everybody that night but he did not believe that the appellant was capable of carrying out his threat (see paragraph 28 of the summing-up). However, the prosecution had not relied on Mathew Gunua's evidence at his trial against the appellant in the summary of facts.

[39] This appeal ground is also misconceived.

09th, 10th , 11th and 12th grounds of appeal

[40] The appellant argues that the trial judge had not considered and analyzed the totality of evidence before accepting his guilty plea and that his plea was equivocal.

[41] Guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (see **R v Murphy** [1975] VR 187) and a valid plea of guilty is one that is entered in the exercise of a free choice (see **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132).

[42] The primary source of a guilty plea is the summary of facts. If the facts are accepted by defense counsel's client, the accused, the plea can proceed. If not, the case must proceed on a not guilty plea and a trial must take place (vide **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019). Supreme Court in ***Samy*** had approved limited use of disclosure statements (but disapproved going on a voyage of discovery looking into the case record and drawing inferences) and also disapproved over reliance on them as they are, without a trial, unsworn and untested (unless an agreed fact) and also because, procedurally, upon a plea no formal evidence is taken.

[43] Therefore, once the appellant admitted the summary of facts there was obligation on the part of the trial judge to have delved into evidence or analyzed/evaluated them for inconsistencies or made an independent assessment of or drawing inferences from evidence.

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

Ground of appeal (sentence)

[45] I do not see any sentencing error in the trial judge's decision to impose mandatory life imprisonments 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 and attempted murder.

[46] The appellant seems to complain about the trial judge's decision to impose a minimum serving period of 28 years.

[47] The trial judge had been guided by the Supreme Court decision in **Waqanivalu v State** [2008] FJSC 44; CAV0005.2007 (27 February 2008) in imposing the minimum serving period of 28 years.

[48] In ***Waqanivalu*** the Supreme Court considered a submission that the recommended minimum term of nineteen years by the trial judge and affirmed by the Court of Appeal was excessive on the accused who had pleaded guilty to 05 counts of murder

and one count of attempted murder. The accused was sentenced to five terms of life imprisonment in relation to the counts of murder, and to ten years' imprisonment on the count of attempted murder. All sentences were to be served concurrently. The sentences in relation to these counts were to be served consecutively with a sentence of ten years imprisonment which the accused was already serving for unrelated offences, namely robbery with violence and assault with intent to cause grievous bodily harm. The Court of Appeal had concluded that it was clear from the accused's criminal history, and from the appalling nature of these crimes, that he was a highly dangerous individual and the nineteen year period recommended by the trial judge was entirely appropriate.

[49] Thus, it is clear that the accused in ***Waqanivalu*** had to serve a total minimum period of 29 years or less because he was already serving a sentence of ten years imprisonment for unrelated offences, namely robbery with violence and assault with intent to cause grievous bodily harm. Otherwise, both the trial judge and the Court of Appeal and even the Supreme Court thought that 19 year minimum serving period on murder counts was justifiable.

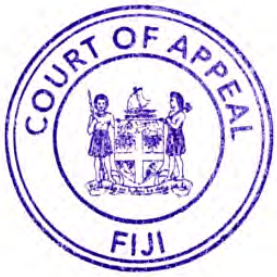
[50] However, in the appellant's case other than the counts for which he pleaded guilty he was not serving any other sentence or even had a previous criminal history. Therefore, in my view by fixing 28 years based on ***Waqanivalu*** as the minimum serving period the trial judge may have committed a sentencing error.

[51] I also 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.

[52] Therefore, I am inclined to grant leave to appeal against the sentence only in so far as the minimum serving period is concerned so that the full court may more fully consider this aspect of the 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