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

CRIMINAL APPEAL NO.AAU 153 of 2016
[In the High Court at Labasa Case No. HAC 04 of 2015]

BETWEEN	**:**	**SHAREEN WATI RAI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Ms. S. Ratu for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**01 April 2021**
Date of Ruling	**:**	**07 April 2021**

RULING

[1] The appellant had been indicted in the High Court of Labasa with another (01st accused in the High Court and the appellant in AAU 0088 of 2017) on one count of murder contrary to section 237 of the Crimes Act, 2009 committed on 13 January 2015 at Labasa in the Northern Division.

[2] The information read as follows:

Statement of Offence

MURDER*: Contrary to Section 237 (a), (b) and (c) of the Crimes Decree No: 44 of 2009.*

Particulars of Offence

BESUN DEO *and* ***SHAREEN WATI RAJ*** *on the 13th day of January 2015 at Labasa in the Northern Division murdered* ***PARMA NAND****.*

[3] At the conclusion of the summing-up on 02 September 2016, the assessors' unanimous opinion was that the appellant was guilty as charged. The learned trial judge had agreed with the assessors in his judgment delivered on the same day, convicted the appellant as charged and on 06 September 2016 imposed mandatory life imprisonment with 20 years of minimum serving period on the appellant.

[4] The appellant had filed a timely appeal against conviction in person on 09 September 2016. Thereafter, the Legal Aid Commission had filed amended grounds of appeal and written submissions on 20 March 2019. The state had tendered its written submissions on 21 March 2019.

[5] In terms of section 21(1)(b) 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) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] The grounds of appeal against conviction urged on behalf of the appellant are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *That the Learned Trial Judge erred in law and in fact when he opined that the Appellants claim of fabrication of caution interview cannot be true given the circumstantial evidence corroborating her evidence.*
>
> ***Ground 2***
>
> *That the Learned Trial Judge erred in law and in fact when he failed to adequately address the issue on alibi.*

[7] The learned trial judge had summarized the evidence led by the prosecution in the sentencing order as follows:

> *'[2] The deceased was the estranged husband of the second accused who after leaving her husband entered into a relationship with the first accused. Divorce proceedings between the deceased and the second accused were being contested over matrimonial property and custody of the one child and the protracted nature of these proceedings appeared to severely irk the first accused, the wife's new de facto partner and between them they resolved to "settle" the matter once and for all. The deceased was seen to have been arguing with the couple in a bus on the 13th January 2015 and the deceased feared for his safety by telling a neighbour that "they will kill me and throw me".*
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> *[3] In the early evening of the 15th the two accused took a bus to Tabicola Tiri on the outskirts of Labasa where the deceased lived. The ex-wife called the deceased and asked him to come and meet her because she had brought their son to see him. The deceased did go to meet her but took a friend with him. When they encountered the ex-wife she was with the first accused but no son. They met on the road in a desolate farm area. A dispute quickly arose about the matrimonial property and the first accused started attacking the deceased. He was punched by the first accused and hit with a stone by the second accused. The deceased fell to the ground and on the instructions of the wife the first accused attempted to strangle him. This was all observed by the deceased's friend. When the victim was semi-conscious or unconscious they both picked his body up and took it a few metres off the road and threw him face down into a swamp filled with water.*
>
> *[4] The pathologist has opined that he died of asphyxiation by drowning.*

01st ground of appeal

[8] The appellant's argument is that it was unfair on the part of the trial judge to have declared her position that the cautioned interview was a fabrication as untrue due to the circumstantial evidence. She also argues that it is erroneous to rely on circumstantial evidence to interpret the truth of the confessional statement.

[9] The prosecution had relied on eye-witness evidence, circumstantial evidence, medical evidence and the appellant's cautioned statement to prove its case. The appellant had given evidence at the trial proper and challenged her cautioned interview as a fabrication by the interviewing officer and also stated that she had been assaulted and

threatened by the police. She had also said in evidence that she was at home at the material time and called an *alibi* witness in support her position.

[10] The basis of the appellant's argument emanates from paragraph 9 of the judgment.

> *'[9] The second accused's allegations of brutality were also over exaggerated and were not supported by any medical or other supporting evidence. Her evidence that the confessions in her interview were fabricated cannot be true given the circumstantial evidence corroborating her answers.'*

[11] The trial judge had directed the assessors as to the circumstantial evidence available at paragraphs 24-29 of the summing-up. Then the trial judge had put the appellant's cautioned interview in the correct perspective at paragraphs 33-41 and in particular referred to the appellant's contention of police assault and fabrication at paragraphs 36 and 37. Further, her evidence on police assault and fabrication had been explained at paragraph 58. Nowhere had the trial judge directed the assessors to assess the appellant's cautioned interview based on circumstantial evidence. The appellant has not complained of the manner in which the trial judge had directed the assessors regarding her cautioned interview. In the end, the assessors had obviously rejected the appellant's allegations of assault and fabrication.

[12] What the trial judge had said at paragraph 09 of the judgment is specific to the allegation of fabrication and according to him the answers given by the appellant in the cautioned interview are in line with the matters elicited by the prosecution through independent witnesses on various circumstances surrounding and leading up to the death of the deceased. This may have been possible on a comparison of the cautioned interview answers and the circumstances coming from different sources. I do not think that there is anything inherently wrong with that proposition regarding an allegation of fabrication.

[13] I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal regarding the trial judge's role in trial proceedings with assessors in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020) and **Waininima v State** [2020] FJCA 159;AAU0142 of 2017 (10 September 2020) followed by a few other rulings. My conclusions were subsequently summarized in

State v Mow [2020] FJCA 199; AAU0024.2018 (12 October 2020) and several other rulings. They are as follows:

> "*What could be ascertained as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court is supported by evidence so that a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter ([vide* ***Mohammed v State*** *[2014] FJSC 2; CAV02.2013 (27 February 2014),* ***Kaiyum v State*** *[2014] FJCA 35; AAU0071.2012 (14 March 2014),* ***Chandra v State*** *[2015] FJSC 32; CAV21.2015 (10 December 2015) and* ***Kumar v State*** *[2018] FJCA 136; AAU103.2016 (30 August 2018)]."*
>
> *"…… a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge."*

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

02nd ground of appeal

[15] The appellant complains that the trial judge had not adequately addressed the assessors on her *alibi*. The gist of her argument is that the trial judge had stated at paragraph 7 of the judgment that the appellant's evidence and that of her *alibi* witness differed but not discussed that aspect adequately.

[16] The trial judge had directed the assessors on her *alibi* evidence at paragraph 57 and that of her *alibi* witness who happened to be her stepson at paragraph 66 of the summing-up. The directions on law relating to *alibi* evidence is at paragraph 72.

[17] The judge's directions on how the assessors should treat *alibi* evidence cannot be faulted in the light of guidance given in **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and later in **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020). The assessors had obviously rejected the appellant's *alibi*. The trial judge had considered the *alibi* evidence at paragraph 7 of the judgment and rejected it too. In the light of overwhelming evidence against the appellant including that of the eyewitness it is not surprising that both the assessors and the trial judge had rejected the defence of *alibi*.

[18] In Fiji the assessors are not the sole judges of facts. The judge is the sole judge of facts in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

[19] Therefore, there is no reasonable prospect of success in the 02nd ground of appeal.

[20] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act (which were echoed in **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98):

> *'……..**Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based**…*….

[21] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[22] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test

is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[23] In my view the evidence led by the prosecution satisfies tests in both **Sahib** and **Kaiyum**.

Order

1. Leave to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL