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

**CRIMINAL APPEAL NO.AAU 108 of 2020**
**[In the High Court at Suva Case No. HAC 37 of 2019S]**

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| **BETWEEN** | : | **JEKOPE ROKOVUKI NAIMAWI** |
| | | ***Appellant*** |
| **AND** | : | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, RJA** |
| **Counsel** | : | **Appellant in person** |
| | : | **Mr. R. Kumar for the Respondent** |
| **Date of Hearing** | : | **21 October 2022** |
| **Date of Ruling** | : | **26 October 2022** |

# RULING

[1] The appellant had been indicted in the High Court at Suva for murder of Maria Tala contrary to section 237 of the Crimes Act, 2009 committed on 10 January 2019 at Nasinu in the Central Division.

[2] After full trial, the majority of assessors had expressed an opinion of guilty for murder against the appellant. The learned High Court judge had agreed with the assessors and convicted the appellant of murder. He was sentenced on 13 August 2020 to life imprisonment with 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.

[3] The appellant's appeal against conviction and sentence made in person is timely. However, his initial appeal contained no grounds of appeal against sentence; neither

did his subsequent appeal papers. At the hearing he only urged 05 grounds of appeal against conviction set out in the document dated 24 November 2021 and a single additional ground of appeal set out in the document dated 05 January 2022 against conviction.

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

> *Grounds of appeal*
>
> *GROUND 1*
>
> *THAT the investigation carried out by police was procedurally flawed, prejudiced and detrimental to the interest of justice for the Appellant, a fact the trial Judge ignored therefore he was wrong in law.*
>
> *GROUND 2*
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> *THAT the trial Judge erred in law and in fact when he accepted the charge of murder against the Appellant when it stood defective and wrong in law.*
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> *GROUND 3*
>
> *THAT the learned trial Judge erred in law and in fact in not deeply analyzing each of the prosecution witnesses statement as it was tendered after the allegation while it was still fresh on their minds.*
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> *GROUND 4*
>
> *THAT the trial Judge erred in law and in fact when he failed to warn and independently address the assessors on the credibility of Exhibit No: 3 which was tendered as evidence.*
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> *GROUND 5*
>
> *THAT the learned trial Judge had erred in law and in fact in neglecting the fact of not independently and clearly addressing the assessors on the collapse of the evidence that came alight during trial in determining the credibility of the principal witness causing a miscarriage of justice.*

*Additional Ground of Appeal*

*Ground 1*

*THAT the Trial Judge erred in law, pursuant to section 288 of Criminal Procedure Decree, he had failed to determine the voluntariness of the confessional statement in a voir dire hearing before putting the same to the assessors and admitting it as evidence against the appellant, after having full knowledge that the State had confirmed not to rely on such evidence. Thus, occasioning in a grave miscarriage of justice.*

[5] The trial in his judgment had summarized the case as follows:

6. *In this case, it was the evidence that will guide my decision. The prosecution's case largely hinged on the acceptance or otherwise of Ms. Jennifer Tuitoga's (PW3) evidence. She was the 15 year old Form 4 student neighbour of the accused. Her family house was approximately 20 to 30 footsteps from the accused's house. Her family and the accused's family knew each other well. They were part of the same neighbourhood. She woke up on 10 January 2019, to witness the accused, his wife the deceased and their friends drinking homebrew among pine trees next to their house.*

7. *Ms. Tuitoga saw the accused and his wife arguing and fighting during the homebrew party. She witnessed the accused throwing the bucket of homebrew on the deceased. She witnessed their verbal fights. She witnessed the deceased fleeing from the party to seek refuge in their house. She hid the deceased under her bed. She witnessed the accused carry the deceased to their house. She ran to the accused's house and peeped into the same through the louver windows. She saw the accused open the benzene bottle and poured the same on the deceased. She saw him light a match. She saw him throw the lighted match at the benzene soaked deceased. She saw the deceased burning as a result. I had carefully watched and assessed Ms. Tuitoga's demeanour and character, while she was giving evidence in court for two days. In my view, her evidence was that of an innocent child whose desire was nothing but to tell the truth. She told us what she innocently witnessed on the 10th of January 2019. She basically witnessed the accused committing the murder of his wife on 10 January 2019. I accept Ms. Tuitoga's (PW3) evidence. She was a very credible witness.*

8. *On 24 January 2019, the accused was medically examined by Doctor Liaquat H.K. Niazi (PW8) at the Makoi Banabai Health Centre. The doctor recorded his medical examination in a medical report, which was tendered as Prosecution Exhibit No. 2. In D (10) of the report, the doctor asked the accused to give him a brief history of the case before he medically examined him. The accused admitted to the doctor that he and his wife had an argument and that he had burnt her, as he was drunk. This admission, appear to support Ms. Tuitoga's (PW3) version of events, as described above.*

9. *On 24 January 2019, Sergeant 1853, Luke Lewabeci (PW6) formally charged the accused at the Nasinu Police Station in the English Language. He recorded the formal charging, and tendered the same as Prosecution Exhibit No. 1. According to PW6, the accused admitted to him that he poured premix fuel on his wife and lit the fire, as he was angry with her. This admission again appears to support Ms. Tuitoga's (PW3) version of events.*

10. *As to the cause of the deceased's death, I accept the evidence of Doctor Avikali Mate (PW9). In fact, her evidence was not seriously contested by the defence. Doctor Mate did the post-mortem examination on the deceased on 23 January 2019. She tendered her post-mortem report as Prosecution Exhibit No. 4. According to her, the cause of the deceased's death was sepsis, bilateral Lobar pneumonia, infected full thickness burns - 45% of total body surface area, pericardial and pleural effusion Ascites.*

[6] As to the defense case the trial judge had said that the appellant gave evidence and called a witness on his behalf at the trial. The appellant's position had been as follows:

> *'[20] The accused's case was very simple. On oath, he denied the State's allegation against him. He admitted the deceased was burnt in his house, at the material time. He admitted, only himself and the deceased were in the house, at the material time. He said, the deceased accidently kicked the gallon of benzene, she slipped and allegedly sat on the benzene. He said, he heard the benzene explode and the deceased caught fire. He said, they later took her to CWM Hospital between 5 pm and 6 pm on 10 January 2019. He denied admitting the murder allegation to police when formally charged on 24 January 2019. He appeared to say that the above was nothing but a fabrication by police, and asks you to disregard the same.'*

***GROUND 1***

[7] The appellant has rolled-up two complaints in this ground of appeal. One is that the investigation done by the police was procedurally flawed, prejudicial and detrimental to him. The appellant's argument here is incoherent and I cannot gather what his complaint really is. If at all, it is to the effect that the police had failed to take a statement from the deceased for the 12 days that lapsed between the incident and her death and the failure on the part of the police to arrest the appellant soon after PW3's

statement. These are, however, purely trial issues that should have been raised at the trial stage.

[8] He also argues that the trial judge's directions to the assessors were focused mainly on the prosecution case and therefore, it was not balanced, objective and fair. He also complains that the trial judge had not addressed the assessor on the flawed investigation. The defense counsel do not seem to have raised any concerns with regard to any of these aspects by way of redirections. While the summing-up may not be a model for addressing the assessors, I do not think that there is much weight and substance in the complaints.

***GROUND 2***

[9] The appellant challenges the information as being defective on the basis that the date of the offence had been given as 10 January 2019 whereas the death of the decease had occurred on 22 January 2019. The State concedes that it should have been 22 January 2019 but argues that it had hardly prejudiced the appellant's defense and no miscarriage of justice had occurred.

[10] The main consideration in situations where there is some infelicity or inaccuracy of drafting is whether the appellant knew what charge or allegation he or she had to meet and it was important that the appellant and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted [see **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) and **Veiyagavi v State** [2021] FJCA 183; AAU105.2015 (29 April 2021)]. I note that the defense counsel had not raised any objection to the information at the trial; nor had the defense been misled with regard to the allegation or defense as a result of the error.

***Causation***

[11] Under the same ground of appeal the appellant also argues that the trial judge had failed to address the assessors on the possibility of the bacteria called 'sepsis' entering the deceased's blood stream through the brunt area during the period of her

'unprotected' stay in the hospital which had affected her vital organs leading to her death. At the same time it is also his contention that morphine injunctions given to the deceased that caused her death because they caused allergy to the deceased which proposition, however, does not appear to have ben even raised at the trial.

[12] According to CDC (Centre for Decease Control and Prevention) in U.S. which is the nation's leading science-based, data-driven, service organization, sepsis is the body's extreme response to an infection. It is a life-threatening medical emergency. Sepsis happens when an infection you already have triggers a chain reaction throughout your body. Infections that lead to sepsis most often start in the lung, urinary tract, skin, or gastrointestinal tract. Without timely treatment, sepsis can rapidly lead to tissue damage, organ failure, and death. Sepsis, or the infection causing sepsis, starts before a patient goes to the hospital in nearly 87% of cases. When germs get into a person's body, they can cause an infection. If you don't stop that infection, it can cause sepsis. Bacterial infections cause most cases of sepsis. Sepsis can also be a result of other infections, including viral infections, such as COVID-19 or influenza, or fungal infections.

[13] Thus, the appellant's notion that there was a bacteria called sepsis is ill-conceived. Sepsis is the result of infection, bacterial or otherwise. It is clear from medical evidence that the cause of the deceased's death was sepsis, bilateral Lobar pneumonia, infected full thickness burns - 45% of total body surface area, pericardial and pleural effusion Ascites. Thus, septicaemia or sepsis is the direct result of the infection due to the burns the deceased suffered and according eye-witness (PW3) the appellant was solely responsible for setting the deceased alight. It is clear that burns caused by the appellant's act were the operating cause of death.

[14] Therefore, the nexus between the offending act on the part of the appellant and the cause of death is clear; causation is well-established. The accused's act need not be the sole cause or even the main cause of death of the victim's death but it is enough that the accused's act significantly contributed to that result [**Nacagilevu v State** [2016] FJSC 19; CAV 023.2015 (22 June 2016) and **Tegu v State** [2016] FJSC 32; CAV0008.2016 (26 August 2016)].

***Fault element***

[15] The Court of Appeal recently considered the concepts of recklessness in detail in **Livai Kaiviti Ratabua v The State** AAU 129 of 2016 (29 September 2022). The appellant seems to challenge the verdict on the basis that the fault element of intention was not proved by the facts. He cites examples such as him putting out the fire on the deceased and taking her to hospital, the deceased's failure to implicate him in the murder, the deceased having given her consent for him to be with her in hospital, how the deceased lived for 12 days after the incident if he intended to kill her etc. However, it was not essential for the prosecution to prove intention but was quite sufficient it was proved that the appellant was reckless as to causing the death of the deceased. The prosecution argues that if not intention, the act of burning the deceased alive clearly established recklessness on the part of the appellant. In my view, it is the appellants' acts culminating in him setting the deceased alight that are the relevant to determine his fault element whereas his subsequent conduct after the event may be relevant only in the matter of sentence.

***Criticism of trial counsel***

[16] Procedural requirements to raise a ground of this nature set out in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) have not been complied with and therefore this ground of appeal cannot be entertained.

***GROUND 3***

[17] The gist of the appellant's complaint is that the trial judge had not dealt with inconsistencies in the evidence in the summing-up or judgment, particularly of eye-witness PW3. The inconsistencies highlighted relate to the distance between her house and that of the appellant, as to who smelled benzene, the extent of burns suffered not being consistent with the kind of fire that engulfed the deceased as described by PW3 *vis-à-vis* the appellant's acts of pouring benzene and setting her on fire. He also alleges that the evidence of Dr. Avikali Mate who performed the post-mortem examination (PW9) does not corroborate the evidence of PW3.

[18] In the first place I do not find the alleged inconsistencies are so material as to affect the credibility of PW3. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance [see **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280]. Secondly, medical evidence in fact corroborates the evidence the eye-witness.

***GROUND 4***

[19] The appellant criticizes the trial judge for not having directed the assessors on the CV of Dr. Avikali Mate (Exhibit 3) who performed the post-mortem examination. In effect, he seems to challenge the expertise or competence of the doctor. According to the summing-up, Doctor Mate's evidence and conclusion were not seriously contested by the defence. The defence does not appear to have challenged the doctor's expertise or the opinion. The issues raised by the appellant now with regard to of Dr. Avikali Mate and his findings on the cause of death should have been properly canvassed at the trial.

***GROUND 5***

[20] The appellant's complaint is on what he perceives to be undue interference of the trial judge in the evidence of eye-witness in favour of the prosecution. However, without the trial transcripts, I cannot examine this complaint. It is for the full court to undertake that task with the assistance of complete appeal record. A similar complaint was examined by the Court of Appeal in **Lal v State** [2022] FJCA 27; AAU047.2016 (3 March 2022) and discussed applicable legal principles.

***GROUND 6***

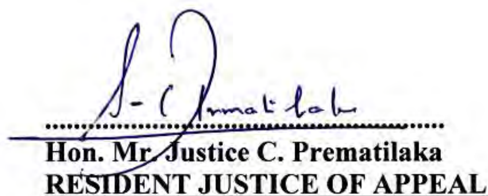
[21] The appellant argues that it was wrong for the trial judge to have admitted the cautioned statement without a *voir dire*.

[22] In **<u>Rokonabete v The State</u>** [2006] FJCA 40; AAU0048.2005S (14 July 2006) it was held that it would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it.

[23] It appears from the appellant's submissions that there was no challenge to the admission of the cautioned statement and charge statement at the trial. It is for the appellant's trial counsel to have raised the necessity to have a *voir dire* inquiry if it was required. State counsel submitted that the only challenge was based on fabrication and not involuntariness and therefore, there was no need for a *voir dire* inquiry.

***<u>Order of the Court:</u>***

1. Leave to appeal against conviction is refused.



**Hon. Mr. Justice C. Prematilaka**
**<u>RESIDENT JUSTICE OF APPEAL</u>**