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

CRIMINAL APPEAL NO.AAU 120 of 2020
[In the High Court at Suva Case No. HAC 189 of 2020]

BETWEEN : **WANG QI YONG**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. Niudamu for the Appellant**
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **17 June 2022**

Date of Ruling : **20 June 2022**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of murder contrary to section 237 of the Crimes Act, 2009 committed on 13 May 2019 at Namadi Heights in the Central Division.

[2] After full trial, the assessors had expressed a unanimous opinion that the appellant was guilty of murder. The learned High Court judge had agreed with the assessors and convicted the appellant as charged. The appellant had been sentenced on 03 September 2020 to life imprisonment without a minimum serving period.

[3] The appellant's appeal is timely. His lawyers have urged three grounds of appeal against conviction before this court. They are as follows.

(1) That the learned Judge erred in fact and in law by convicting the appellant on the charge of murder when the evidence of admissions made by the appellant points to voluntary manslaughter

(2) That the learned Judge erred in fact ad in law for not directing the assessors at paragraph 35 of his summing up the qualifications that the Chinese Interpreter in the caution interview has to allow the assessor to decide whether to rely on the admissions or not.

(3) That the learned Judge erred in law and in fact that may have caused a substantial miscarriage of justice in convicting the appellant without any regard to the fact that State was not relieved from the burden to prove the element of 'intention to cause the death of deceased or reckless as to cause the death of deceased, beyond a reasonable doubt.'

[4] The evidence in the case in a nutshell as given in the sentence order reads as follows.

'[1] The victim is a 33-year old female from mainland China. She was working in the sex industry in Fiji. She provided sexual services from a residential property in Namadi Heights.

[2] The offender is a 43-year old male also from mainland China. He had been in Fiji for about a year working on a fishing vessel. His first contact with the victim was through the social media platform WECHAT. He knew the victim worked in the sex industry. They exchanged a few messages and eventually the offender agreed to meet the victim at her residence. He went to the victim's home on the night of 12 May 2019 for sexual services. The victim welcomed him and provided sexual services. He slept at her residence that night.

[3] The following morning when the offender woke up, the victim offered him further sexual services to which the offender agreed. He offered a payment of $300.00 to the victim for the services, but she demanded an extra $100.00. When the offender refused to pay the extra $100.00 the victim prevented him from leaving the bedroom by locking the door and blocking his way. The offender pushed the victim to the side and the argument ended up in a physical scuffle. She scratched him on the neck and slapped his hand. He got furious. He reacted by grabbing her neck with his hands and strangling her till she lost consciousness.

[4] According to the medical evidence the victim died of asphyxia by manual strangulation. The force used was significant. The victim died within 15-30 seconds.

[5] After strangling the victim, the offender remained in the bedroom until other occupants of the house discovered the body of the victim inside her bedroom with the offender. Under caution the offender admitted strangling the victim but said he was provoked and that he did not intend to kill her. He offered to plead

guilty to manslaughter but the State rejected that offer. The offender was convicted after trial.

[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 in a timely appeal for leave to appeal against conviction 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) distinguishing 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)].

01st ground of appeal

[6] The appellant's contention that evidence adduced at the trial points to voluntarily manslaughter as opposed to murder is based on his having acted under alleged provocation as seemingly propounded in his evidence (and in the charge statement) at the trial by the appellant. However, in his cautioned interview he appears to have taken up the position that he was acting in self-defence purportedly under provocation according to his counsel's written submissions. Self-defence is a total defence whereas provocation is only a partial defence. Conscious responsive act in self-defence is based on the perceived threat by an accused whereas the accused's loss of self-control is the cornerstone of acting under provocation.

[7] The appellant's stance of provocation at the trial as a partial defence is consistent with his offer to plead guilty to manslaughter and strategically may have had a greater chance of success. In the light of the hybrid defence combining self-defence and provocation taken up by the appellant, the trial judge had dealt with both self-defence and provocation in the summing-up.

[8] The appellant's complaint is that in the context of his defence of provocation the trial judge had failed to direct the assessors on his personal characteristics which, it appears, is discussed in jurisprudence more in relation to self-defence.

[9] When an accused relies on self-defence, the trial judge should direct the assessors to consider whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds (vide **Naitini v State** [2020] FJCA 20 AAU135 of 2014, AAU 145 of 2014)

[10] The test is not wholly objective. It is the belief of the accused based on the circumstances as he or she perceives them to be, which has to be reasonable. The test is not what a reasonable person in the accused's position would have believed. It follows that where self-defence is an issue, account must be taken of the personal characteristics of the accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his or her response to the threat (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015).

[11] **Narayan v State** [2020] FJCA 189; AAU0610.2017 (6 October 2020), I had the occasion to remark:

> *'[14]..... If and when the factual matrix giving rise to ' self-defense ' is believed, the assessors have to then consider whether it could be said that the accused believed upon reasonable grounds that it was necessary in **self-defense** to do what he did. If the accused had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. **However, the test is not wholly objective and it is the subjective belief of the accused based on the circumstances, as perceived by him, that counts but that belief should be objectively reasonable in those circumstances that he was in immediate danger of death or serious injury and that to kill or inflict serious injury provided the only reasonable means of protection.** The fact that an appellant has taken up ' **self-defense** ' in his evidence does not necessarily make it a credible story and the assessors should always act upon it.*

[12] The Court of Appeal in **Masicola v State** [2021] FJCA 176; AAU073.2015 (29 April 2021) and **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020) examined the past decisions and principles relating to provocation and stated as follows.

*'[10] In **Regina v. Duffy** [1949] 1 All E.R. 932 the gist of the defence of provocation was encapsulated by Devlin J. in a single sentence in his summing-up, which was afterwards treated as a classic direction to the jury:*

> *"Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary **loss of self-control**, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."*

*[11] The counsel for the appellant heavily relies on the decision in **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017) in support of the sole ground of appeal. In **Codrokadroka v State** [2008] FJCA 122; AAU0034.2006 (25 March 2008) the Court of Appeal in relation to section sections 203 and 204 of the Penal Code dealing with provocation has engaged in an exhaustive analysis and come out with the approach that should be taken as follows.*

> *'1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.*
>
> *2. There should be a **"credible narrative"** on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*
>
> *3. There should be a "credible narrative" of a resulting **loss of self-control** by the accused.*
>
> *4. There should be a "credible narrative" of an attack on the deceased by the accused which is **proportionate** to the provocative words or deeds.*
>
> *5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a **sudden loss of self-control** depends on the fact of each case. However cumulative provocation is in principle relevant and admissible.*
>
> *6. There must be an evidential link between the provocation offered and the assault inflicted.'*

*[12] The Supreme Court in **Codrokadroka v State** [2013] FJSC 15; CAV07.2013 (20 November 2013) adopted the above propositions as accurately reflecting the approach that should be taken by a trial judge to the issue of provocation.*

*[13] In **Tapoge** the Court of Appeal had applied both the CA and the SC decisions in **Codrokadroka** to section 242 of the Crimes Decree and further observed as follows.*

'[15] Provocation is not a complete defence to an unlawful killing. It is a partial defence. Killing with provocation reduces culpability from murder to manslaughter. This lesser culpability is the effect of section 242 of the Crimes Act 2009.

'[16] There is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial. The scope of that duty in relation to provocation was explained by Lord Devlin in ***Lee Chun Chuen v R*** *(1963) AC 220 as follows:*

> *Provocation in law consists mainly of three elements – the* ***act of provocation****, the* ***loss of self-control****, both actual and reasonable, and* ***the retaliation proportionate to the provocation****. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.'*

[13] The trial judge has addressed the assessors substantially on self-defence at paragraphs 11-15 and on provocation at paragraphs 23-26 and 42 & 43 of the summing-up. At paragraph 26 the judge had specifically directed the assessors to consider the appellant's personal circumstances. He had dealt with these two defences in the judgment as follows.

'[4] I feel sure that the force that the Accused used to strangle the victim was out of all proportion to the anticipated attack (scratching and slapping) by the victim. The force used by the Accused to strangle the victim to death was unreasonable, and therefore, he cannot have been acting in self defence.

[5] I feel sure that a person having the powers of self-control to be expected of an ordinary, sober person, of the Accused's age and sex would not have been provoked to lose his self-control and do what the Accused did in this case. I feel sure that the Accused intended to cause death or was aware of a substantial risk that death will occur and I also feel sure that there was no provocation in the legal sense.

[14] In the circumstances, I do not see a reasonable prospect of success on this ground of appeal.

02nd ground of appeal

[15] Going by the summing-up and the judgment, there is nothing to indicate that any issue of competence with regard to the interpreter had been raised at the trial. The appellant's counsel admitted as much during the hearing. The appellant could not have done so in

the light of the fact that he was relying on his version of events given at the cautioned interview to advance his defences and therefore, he understandably could not challenge the competence of the interpreter. In fact his evidence the trial is in material particulars consistent with his cautioned interview. There is no merit at all in this ground of appeal.

03rd ground of appeal

[16] The appellant argues that the conviction for murder may have occasioned a miscarriage of justice in as much as the trial judge had entered the conviction without having regard to the fact that the prosecution was not relived of the burden of proving that either the appellant intended to cause the death of the deceased or that he was reckless as to causing her death.

[17] The judgment of a trial judge cannot 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 (see **Fraser v The State** [2021] FJCA 185; AAU 128 of 2014 (5 May 2021)

[18] The trial judge had addressed the fault element of murder completely in the summing-up at paragraphs 17-22. He had also directed himself on it briefly in the judgment. Therefore, I find no merit in this ground of appeal as well.

[19] If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[20] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court of having seen and heard the witnesses and stated

that it was in a better position to assess credibility and weight and the appellate court should not lightly interfere but based its decision on the reading of the whole record. In my view, it was open to the assessors and the trial judge on the material available to find the appellant guilty of murder (see **Pell v The Queen** [2020] HCA 12 and **M v The Queen** (1994) 181 CLR 487, 494)

Order

I. Leave to appeal against conviction is refused.

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