

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

CRIMINAL APPEAL NO.AAU 140 of 2020
[High Court at Labasa Case No. HAC 46 of 2019]

BETWEEN : **YOGESH ROHIT LAL**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. T. Kean for the Appellant**
: **Mr. M. Vosawale for the Respondent**

Date of Hearing : **20 July 2022**

Date of Ruling : **21 July 2022**

RULING

- [1] The appellant had been indicted in the High Court at Labasa on a single count of murder contrary to section 237 of the Crimes Act, 2009 committed on 21 August 2019 at Wainikoro, Labasa in the Northern Division.
- [2] The appellant had pleaded guilty to murder. The trial judge had sentenced the appellant to mandatory life imprisonment with a minimum serving period of 24 years.
- [3] The appellant's appeal against conviction and sentence is late by 08 months and a week. His counsel indicated at the hearing that he wished to abandon the conviction appeal and undertook to file a From 3 in due course. Accordingly, the Legal Aid Commission pursued only the sentence appeal.
- [4] The facts narrated in the sentencing order are as follows.

[1] Saleszni Devi was a daughter, wife and mother. On 21 August 2019, she was a victim of gratuitous violence at the hands of her husband. She was killed in her home. The offender has pleaded guilty to her murder.

[2] Ms Devi was 34 years old. She had been married to the offender for nearly 18 years. Together they had three young children. Two months before she was killed, she had moved to live with her parents in Wainikoro, Labasa. Her matrimonial home was in Daku, Labasa. When Ms Devi moved to her parents' home, she took her youngest child (2-year old daughter) with her. She left her two other children (a son and a daughter) with the offender.

[3] On the day Ms Devi was killed she was at home with her mother and daughter. According to the photographs of the crime scene, the house was made of corrugated iron and timber with basic facilities.

[4] The offender left his home at 6.30pm on a bus and arrived at Ms Devi's home at around 7pm when it was dark. After arriving at Ms Devi's home, the offender disconnected the electricity and hid at the back of the house. When Ms Devi came out to check the main switchboard, the offender sneaked from behind and struck her on the head with the cane knife he had brought from his home. She sustained injuries to her hand and head. Ms Devi's mother rushed to her daughter's rescue but the offender pushed her away. Her mother pleaded with the offender to spare her daughter from harm. The offender did not listen.

[5] The attack on Ms Devi was in the presence of her two-year old daughter. Despite being seriously injured, Ms Devi ran inside her house for safety. But the offender pursued her inside the house and struck her multiple times in the neck and head with the cane knife. Ms Devi's mother tried to stop the offender but to no avail. Ms Devi died at the scene. She sustained multiple deep slash wounds to her head, neck, left upper limb and posterior trunk. Her skull and facial bones were exposed due to the slash wounds and her neck was almost severed.

[6] After killing Ms Devi, the offender left the house and returned to his home in Daku. He took the cane knife with him. When he arrived at his home, he called his immediate family and friends and told them that he had killed Ms Devi and was waiting for the police. The offender was arrested on the same night at around 9.30pm from his home. He has been in custody on remand since the date he was arrested.

[7] When the offender was interviewed under caution by the police, he answered only a few questions. He said he was involved in a maintenance dispute with his wife after they separated and that his wife was threatening to kill him and settle down with another person in Suva with their youngest child. He also claimed that his wife was of promiscuous character. He made similar claims when he addressed the court at the sentencing hearing.

- [5] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).
- [6] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.
- [7] The delay of this appeal is very substantial. The appellant's explanation is that he had been advised (by whom is not mentioned) that since he had pleaded guilty he could not appeal. He also avers that he was not aware of the procedure of lodging an appeal. The appellant was represented by counsel and it is inconceivable that right of appeal was not explained to him. Thus, the reasons for the delay are not acceptable. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The grounds for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vide Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; 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). For a ground of appeal timely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a reasonable prospect of its success in appeal.

[9] The ground of appeal urged on behalf of the appellant is as follows.

01st Ground of appeal (Sentence)

That the learned Sentencing Judge erred in principle when sentencing the Appellant in that:

i. He set a minimum term, which was harsh compared to other murder cases.

ii. There was also no guidelines as to what factors his lordship had considered when determining the length of the minimum term.

iii. Having accounted for certain factors was prejudicial to defence which is reflected in Sentence.

[10] The gist of the appellant's complaint is that the minimum serving period was harsh and excessive compared with comparable cases, there exists no guidelines as to what matters should be considered in fixing a minimum serving period and the trial judge had taken certain material not admitted by the appellant into account which had prejudiced the appellant.

[11] As the trial judge had remarked, life imprisonment is the only and mandatory sentence available for murder (see Nute v State [2014] FJSC 10; CAV0004 of 2014 (19 August 2014)). Therefore, primarily the most important matter that needs attention is the minimum serving period of 24 years.

[12] 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) as opposed to the mandatory sentence 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)).

- [13] 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. However, 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)]
- [14] 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.

- [15] According to the trial judge, the presence of aggravating factors set out at paragraph 15 of the sentencing order justified imposing a minimum serving period. However, he had not set out what factors led to the decision to make the minimum serving period 24 years. Paragraph 15 is as follows.

[15] The fact that Ms Devi was a victim of extreme violence in her own home where she was entitled to safety and security is an aggravating factor. Ms Devi was vulnerable because she was living in a rural community with little support. She was attacked at night with a weapon. The offender brought the cane knife concealed in a sack from his home. He turned off the electricity to either cause the occupants to come out of the house or to conceal his identity. The offender's actions show that he came to Ms Devi's home with the intention to carry out an execution kind of killing. Another aggravating factor is that he carried out the execution in the presence of his two-year old child. '

- [16] At this stage it could only be assumed that the trial judge may have considered all the circumstances surrounding the commission of the offence as set out in the sentencing order in addition to the aggravating features in arriving at the decision to fix 24 years

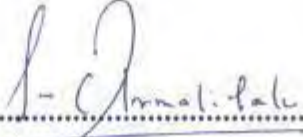
as the minimum term. As demonstrated from the remarks made in *Balekivuya* by the Court of Appeal, there may be a need for the Court of Appeal or the Supreme Court to give some guidelines on the exercise of the discretion in sentencing an accused under section 237 of the Crimes Act (i) as to what matters 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.

- [17] The appellant has cited several sentencing decisions handed down by the High Court in comparable cases where the accused and the deceased were in a matrimonial or domestic relationship and except in one case where 12 years were given as the minimum term, the sentencing judges had decided 18 years as the minimum term.
- [18] It is not clear whether there is currently in place a fully-fledged Mercy Commission constituted as per section 119(2) of the Constitution. However, the counsel for the appellant submitted that a petition for pardon is entertained by the Office of the Attorney-General who is the chairperson of the Commission and processed. Therefore, it appears that the minimum term fixed on a murder convict is crucial for him/her to decide when he/she can petition for mercy, for until the minimum serving period is over no accused seems eligible to do so.
- [19] The appellant also submits that it was wrong for the trial judge to have considered a psychological report of the appellant not relied on by either party and was not part of summary of facts.
- [20] It appears from paragraph 13 of the sentencing order that the trial judge had considered the fact that the appellant was not remorseful even after pleading guilty but thought that the killing was justified. The psychological report had lent support to that view. Therefore, it is clear that the trial judge may not have given any discount for the appellant's remorse in fixing the minimum term. However, though it may be argued that psychological report, not being part of the summary of facts, should not have been considered without consulting the parties, I cannot see how the report had caused material prejudice to the appellant in terms of the minimum term imposed.

[21] Considering all the matters discussed above on the minimum term of the life sentence, I believe it is best to leave it to the full court revisit the question of minimum serving sentence. However, I should not be understood to mean that it was necessarily disproportionate to the gravity of the crime. I simply do not make any finding on that at this stage and cannot pronounce on the appellant's chances of success in his complaint. It is a matter for the full court to decide.

Order

2. Enlargement of time to appeal against minimum term of the life sentence is allowed.



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



The seal of the Court of Appeal, Fiji, is circular. It features a central emblem depicting a group of people, possibly a court or a historical scene. The words "COURT OF APPEAL" are written in a circle around the top, and "FIJI" is written at the bottom.