IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 108 OF 2018
Lautoka High Court No. HAC 11 of 2015

BETWEEN	:	**PAULIASI NAUASARA**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Mataitoga, JA** **Qetaki, JA** **Morgan, JA**
Counsel	:	**Appellant in person** **Mr. S. Kumar for the Respondent**
Date of Hearing	:	**6 July 2023**
Date of Judgment	:	**27 July 2023**

JUDGMENT

Mataitoga, JA

High Court

[1] The appellant [Pauliasi Nauasara] was indicted in the High Court at Lautoka on one count of murder contrary to section 237 (1) of the Crimes Act, 2009 committed on 25 June 2015 at Lautoka in the Western Division.

[2] The information read as follows.

'***Statement of Offence***

***MURDER**: contrary to section 237 (1) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***PAULIASI NAUASARA on the 25th of June 2015** at Lautoka in the Western Division murdered **MICHAEL SEOSBORNE.**'

[3] The trial was held over 4 days at the High Court at Lautoka.

[4] After the summing-up, the assessors returned a not guilty verdict on the Murder charged but guilty of the lesser charge of manslaughter. The learned trial judge disagreed with the assessor's verdict, convicted the appellant of the Murder as charged. He sentenced him on 15 November 2018 to mandatory life imprisonment with a minimum term of 18 years to serve.

[5] The appellant's counsel filed a timely appeal (22 November 2018) against conviction and sentence and written submissions on the same grounds of appeal on 08 February 2021. The state had tendered written submissions on 24 November 2021.

Court of Appeal

[6] The Application for leave to appeal against conviction and sentence, by the appellant was refused by the Court of Appeal [Judge alone] on 23 December 2021.

[7] On 19 September 2022 the Appellant submitted a Notice of Motion to renew his appeal to the full court and submitted new grounds in support. This is permissible under section 35(3) of the Court of Appeal Act. It should be noted that these second set of grounds of appeal were submitted after the Court of Appeal [Judge Alone], had ruled on the 23 December 2021, that leave to appeal is refused both against conviction and sentence.

Test for Leave to Appeal – Section 35(3) Court of Appeal Act

[8] This being a renewed application for leave to appeal under section 35(3) of the Court of Appeal, the test for leave to appeal against conviction and sentence is 'reasonable prospect of success' see **Caucau v. State** [2018] FJCA 171, **Navuki v State** [2018] FJCA 172;

[9] In **Sadrugu v. The State** [2019] FJCA 87, the Court outlined the following:

> *"[10] Therefore, the main task for the appellate court at the leave stage is to differentiate an arguable ground of appeal from a non-arguable ground of appeal. If the threshold for leave to appeal is too low, the appellate court would be clogged and inundated with appeals which are unlikely to succeed in the end consuming the court's valuable time and limited resources when meritorious appeals needing its attention lag behind in the ever-increasing queue.....*
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> *[11] ... Ordinarily, an arguable ground should mean a ground which is capable of being argued plausibly. It cannot be based on a mere argument for the sake of an argument. In other words, it should be reasonably arguable (**DeSilva v The Queen** [2015] VSCA 290 (5 November 2015). The threshold for leave to appeal has also been described as having a 'sufficiently arguable ground' (**Bailey v Director of Public Prosecutions** [1988] HCA 19; (1988) 78 ALR 116; (1988) 62 ALJR 319; (1988) 34 A Crim R 154 (3 May 1988) or even having a 'real prospect of success' (**R v Miller** [2002] QCA 56 (1 March 2002). 'No prospect of success' and 'reasonable prospect of success' too has been used as appropriate tests to decide the question of leave to appeal.*
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> *[12] **S v. Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7* the Supreme Court of Appeal of South Africa, in my view, enunciated the correct approach as to whether leave to appeal by the high court should have been granted or not as follows:
>
> > *'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required*

to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. (emphasis added)

*[13] Therefore, I think that the test of reasonable prospect of success as described in **Smith** should be used to differentiate arguable grounds from non-arguable grounds at the stage of leave to appeal. I shall proceed to consider the Appellant's appeal accordingly."*

Grounds of Appeal

[10] In reviewing the grounds of appeal in this leave application, the principles enunciated above will guide the assessment that will be made.

[11] The following appeal grounds were submitted by the appellant against conviction:

"(1) That the learned trial Judge and in turn the COA erred in law and in fact by failing to identify that there was no link in between the appellant's act and the deceased death. This is especially since the law requires an accused to be convicted of murder only if the accused act contributed significantly to the victim's death para 20 of the summing up.

(2) That the learned trial judge and in turn the COA, (Single Bench) erred in law and in fact by failing to convict the appellant on an alternative count of manslaughter, instead of murder this is especially since evidence vividly indicates that the actual cause of death was not due to the impact sustained (conduct) by the deceased but due to septicemia and multiple bad sores.

(3) That the learned trial judge erred in law and in fact by convicting the appellant of murder despite finding for himself (at para 41, 42 and 43 of the summing up) that the actual cause of the victim's death was septicemia due to bad sores.

(4) That the learned trial judge erred in law and in fact convicting the appellant of murder despite the prosecutions failure to prove beyond reasonable doubt that the substantial or operative or imputable cause of the victim's death was due to the injuries which the victim has sustained and/or the act of the appellant contributed significantly to the victim's death.

(5) *That the learned trial judge erred in law by convicting the appellant for 'murder based on a defective information and charge statement' this is especially since no matter took place on the 25th of June, 2015. The appellant was home on that particular day and had never even gone anywhere close to the victim hence the appellant pleaded 'not guilty' at the commencement of trial when the information was read to him afresh.*

(6) *That the learned trial judge erred in law and in fact by failing to decide – as a question of law – whether the appellants unlawful and deliberate acts caused or was a cause of the victims death; and as to whether the prosecution has or has not and as to whether the prosecution has or has not satisfied beyond reasonable doubt the mental element of the offence murder – this is especially since the evidence reveals that the victims never died at the scene of crime, neither did he died in hospital due to the unlawful and deliberate acts of the appellant ... rather, he died due to* ***septicemia*** *– an event which could happen – and could happen to anyone being left in bed unattended and without necessary care by medics.*

(7) *That the learned trial Judge erred in law (at para 46 of his summing up) by* ***wrongly directing himself on the cause of death,*** *and by failing to take into account that the* ***actual cause of the victim's death was not due to the history of head injuries*** *but due to the* ***developed multiple bed sores*** *leading to* ***septicemia*** *– as correctly emphasized at para 45 of the summing up.*

(8) *That the learned trial judge erred in law by convicting the appellant of murder without properly directing himself – based on the defense evidence to a possible defense* ***provocation*** *by the victim to the appellants* ***gifted motor vehicle****, despite the appellant on the particular day of the incident gave a free ride to his drunken friend whom the appellant had known for years.*

Assessment of the Grounds of Appeal

[12] In my view the 8 grounds of appeal submitted by the appellant can be consolidated into 3, namely:

(i) Claim by the Appellant that cause of death did not arise as a result of the assault he inflicted on the deceased on the 21 March 2015 but from negligent medical treatment he received from the medical staff at Lautoka Hospital. Grounds 1-4, and 6 & 7 set out in paragraph 10 above cover this issue of causation;

(ii) Defective Indictment which incorrectly states that the deceased was murdered on 25 June 2015 and not 21 March 2015. This is the claim in ground 5.

(iii) Error of law in not properly directing the assessors on the defence of provocation. This is the claim in ground 8. In fairness, the defence never raised the issue at trial.

Defective Indictment

[13] Firstly, it is best to deal with the appeal ground which claims that the Information and charge statement was defective. That ground states:

> *(5) That the learned trial judge erred in law by convicting the appellant for 'murder based on a defective information and charge statement' this is especially since no matter took place on the 25th of June, 2015. The appellant was home on that particular day and had never even gone anywhere close to the victim hence the appellant pleaded 'not guilty' at the commencement of trial when the information was read to him afresh.*

[14] The appellant claims that on 25 June 2015, he was home all day long and did not go anywhere close to where the victim. This, he contends, is why he pleaded not guilty when the information was read to him. This claim is not denied by the respondent nor is there any explanation given as to why the date of death of Michael Semiti Osborne was chosen by the State to be the date on which the murder took place.

[15] The evidential implication of this date 25 June 2015, is that the respondent must prove beyond reasonable doubt that on 25 June 2015, the appellant [Pauliasi Nauasara] engaged in conduct that caused the death of Michael Semiti Osborne and that the appellant intended to cause, or was reckless, causing, the death of Michael Semiti Osborne or, as noted in para 20 of the summing up, that the accused's act contributed significantly to the victim's death. There was no reference in the charge to the grevious harm sustained by the deceased from the assaults by the appellant on the 21 March 2015, which the prosecution must prove beyond reasonable doubt is the cause of the victim's death.

[16] No evidence was led at the trial that the appellant engaged in conduct on the 25 June 2015 causing the death in question. Nor was there a necessary link made between the conduct on 21 March 2015 being a contributing factor to the death on 25 June 2015.

[17] The statement of offence reads that:

> ***Murder: Contrary to section 237(1) of the Crimes Act No 44 of 2009***
>
> *a. The particulars of offence read:*
>
> *b. Pauliasi NAUASARA on 25 June 2015 at Lautoka in the Western Division murdered Michael Semiti Osborne*

[18] Section 58 Criminal Procedure Act states:

> *(a) a statement of the specific offence or offences with which the accused person is charged; and*
> *(b) such particulars as are necessary for giving reasonable information as to the nature of the offence charged.*

[19] In this case, section 58 is not satisfied because the date in question - 25 June 2015 – albeit a material particular, does not provide reasonable information as to the nature of the offence. It is on this grounds that the appellant contends that the trial was so flawed from the outset such that the conviction produced cannot withstand an appeal.

[20] Can section 58 of the CPC operate to save the imperfectly drawn up statement of offence? My own view is that it does not.

[21] Generally, a charge or statement of offence should state all the elements of the offence and contain particulars as to the time, place and manner of the commission of the offence. There is a distinction made between the essential factual ingredients required for the validity of a charge and the particulars needed to allow the defendant to adequately prepare a defence. There are also requirements of charges in stating an offence both generally and for specific offences.

[22] In considering arguments about want of particularity of a statement of offence, the context in which the argument is raised is of importance. The difference between what is necessary for the statement contemplated in section 58 and what is sufficient in the form of an information may be important. There is a distinction between the matter of what constitutes sufficient particularity to support the validity of information and the question whether in the exercise of his or her discretion a judge should order the prosecution to provide further and better particulars to a defendant. Be that as it may, section 58 does not do away with the common law requirement that an information must identify the essential factual ingredients of the actual offence alleged to have been committed. [See **Smith v Moody** [1903] 1 KB 56 for common law requirements].

[23] Another fatal defect is the lack of reference in the charge of the intention [is it recklessness or intention], an essential element of the offence of murder, that the prosecution intends to prove beyond reasonable doubt in this case. Even the trial charge was not sure which mental element of the charge is the prosecution is relying on. At page 312 of the court Record the following Q & A exchange took after the State had closed it case and before summing up, between the trial judge and the prosecutor is recorded:

> ***'Judge:*** *What is the State's case intention or recklessness?'*
>
> ***Mr. Babitu:*** *[Prosecutor] My Lord, in this case when we started, we were thinking broadly on recklessness, after hearing the evidence it falls properly on intention but it's basically in the middle*
>
> ***Judge:*** *You will have to choose*
>
> ***Mr. Babitu:*** *That is why in my closing submissions I have left it to the assessors, my submission, my Lord of the words that were uttered."*

[24] The above exchange showed that, the trail judge is not clear on what is the case of the State regarding the essential element of intention. He has now asked the State to clarify their position after the case for both parties have closed. If the trial judge and the state prosecutor are themselves not clear on the case of the prosecution on this essential element of the

offence charged, the impact of this defect in the preparation of the defense case is even more prejudicial and more unfair. The consequence of the above, is that the appellant is not informed correctly and precisely, of what evidence he can expect at the trial and thereby prepare his case accordingly.

[25] In the High Court case of **Sakiusa Kaukimoce v The State** [2009] FJHC 22 the court held that failure to include an essential element of an offence, in the manner of the wording of the charge cannot be saved by section 119 & 122 of the Criminal Procedure Code [what is now section 61 of the Criminal Procedure Act] because without inclusion of all essential elements, the charge would be in law a nullity.

[26] The Supreme Court in **Alifasi Kirikiti v State** [2015] FJSC 13, on a claim of defective charge due to lack of adherence to requirements of sections 58 and 61 of the Criminal Procedure Act held that:

> *"[29] The particulars allege that the Petitioner stole cash in company. The offence created by section 311 (1) (a) is rob in company. The difference between rob and steal is the use of force. It is not frivolous to claim that the charge was defective because there was no reference to the use of force or any reference to a fact or acts that might constitute the use of force. In my judgment a ground of appeal that has the effect of claiming that the charge is defective on account of non-compliance with sections 58 and 61 of the Criminal Procedure Decree is not a frivolous ground. This is even more so the case when the particulars have not been drafted in accordance with Form 8 in the Criminal Procedure Decree 2009 (Forms) Rules."*

[27] In **State v Brian Singh** [2007] FJCA 47, the Court of Appeal in addressing similar claims of defective charges stated as follows:

> *"The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the State intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the prosecution adduces."*

[28] In **R v Fahey & Others** [2001] QCA 82, where the Queensland Court of Appeal had to address a claim of defective indictments, the Court said:

> *'The submission for AD is that the indictment omits an element or ingredient of the offence and that this is fatal. Some reliance was placed upon John L Pty Ltd v Attorney-General (NSW) [1987]163 CLR 508 in which an information which failed to identify a "material" of an information to ground a summary offence. Broadly speaking the function of an information has been seen as fulfilling two requirements, first informing the court of the identity of the offence and second providing the accused with the substance of the charge. It was recognised as a common law requirement that the information should condescend to identifying the essential factual ingredients of the actual offence.*
>
> *The John L case would seem to be an instance of an information which failed to tell the defendant what was alleged against him. It alleged that he had made a misleading statement about intended future conduct, but failed to specify any material particular of what was said to be false or misleading. The case is perhaps not far from the borderline of cases where a sufficient general allegation might be cured by the provision of particulars. But in any event, the basis of the defect that invalidated the information here lies in the disadvantage suffered by the defendant by reason of an information that failed to tell him what the prosecution alleged against him.'*

[29] In the present case, the defect in the information lies in the disadvantage suffered by the appellant as a result of the incorrect information set out in the charge, specifically that the offence he was charged with took place on the wrong date – 25 June 2015. This is evident by the appellant's plea at the trial when the information was read to him afresh.

[30] It is apparent that there is more than just a variance between the charge information and the evidence led at trial. It is apparent that it had a material effect on the conduct of the defence at the outset of the trial when the appellant pleaded not guilty.

[31] In my view, there is an error that is material to the merits of this case. The formulation and presentation of charges is a matter of fundamental importance in the administration of criminal justice. It is apparent that this is a case where a failure to properly and accurately

particularise reasonable information as to the nature of the offence charged, has had a material effect upon the manner in which the case of the appellant proceeded at trial.

[32] As noted earlier in these reasons, the respondent must prove beyond reasonable doubt that the appellant engaged in conduct on 25 June 2015 and that the conduct on that day, caused the death of Michael Semiti Osborne. However, the evidence led by the respondent at trial related to conduct that took place on 21 March 2015. Moreover, no link established between the events of 21 March 2015 being a contributing factor to Michael Semiti Osborne's death on 25 June 2015. That he died as a result of septicemia is undisputed.

[33] Sections 14 and 15 of the Constitution 2013 sets out the rights of accused persons. Section 14(2) (b) of the Constitution provides that every person charged with an offence has the right to be informed in legible writing, in a language that he or she understands, of **the nature of and reasons of the charge**. Section 15(1) of the Constitution, provides that "every person charged with an offence has the **right to fair trial** before a court of law.' These constitutional rights were brought in 2013, when the Constitution 2013 were promulgated. Now that means that when the Crimes Act 2009 and Criminal Procedure Act 2009 were promulgated, the provisions therein must be read with overriding consideration of the rights enshrine in the Constitution 2013. A new imperative in the particulars needed in charges against accused persons was ushered in by the Constitution 2013. Mere reliance on the statutory form 8, under section 300 Criminal Procedure Act is inadequate.

[34] Fairness in the context for upholding the right of an accused person, includes that he is properly informed as to the nature of the charge. This inherently includes particulars relevant to the charge, such as the correct date an offence. This is particularly so, when the date is a relevant ingredient of the offence, as in the present case.

[35] This is so, because the constitutional right in section 14(2)(b) is deeply rooted in one's rights to due process and the presumption of innocence. Due process dictates that an accused be fully informed of the reason and basis for their indictment. This would allow an accused to properly form a theory and to prepare their defense.

[36] Is this defect in the charge fatal? To establish in this particular case whether the charge is fatal, one must examine whether the error affected the determinative process or the opportunity for a lesser verdict for the accused or if it might have affected the quality of the trial overall. The perceptions of such potential effects may suggest a miscarriage of justice.

[37] The present case is not one where the error is inconsequential. The document on which the trial proceeded did not comply with Section 58 of the Criminal Procedure Act. The statement of offence erroneously stated: *Pauliasi NAUASARA on 25 June 2015 at Lautoka in the Western Division murdered Michael Semiti Osborne.* As a result of the incorrect date, when the charge was read to the appellant afresh, he pleaded 'not guilty'.

[38] The failure to properly and accurately draw up relevant particulars necessary for giving reasonable information as to the nature of the offence charged is significant and distinguished in the present case. This because there is more than a variance between the charge information and the evidence led at trial. The erroneous date on the statement of offence had a material effect upon the manner in which the case of the appellant proceeded at trial, in that the focus of the evidence led by the respondent in implicating the appellant was related to the assault that took place on 21 March 2015. Where a link is required to have been made between the incident on the 21 March 2015 and the death of Michael Semiti Osborne on 25 June 2015, none was made. That Michael Semiti Osborne died of septicemia was undisputed.

[39] As earlier referred to in paragraph 19 and 20 above, the prosecution position on what is its case was on intention was confusing. When asked by the trial judge; whether it was intention or recklessness, the prosecutor said they started with recklessness and ended up with intention, but basically it falls in between and that is why he had left it to the assessors to decide. What about the appellant and his constitutional right to be informed precisely on the nature of the case he is facing. No thought given to how all this impact the rights of the

other important person in the trial, the appellant. This is so unfair and prejudicial to the appellant's ability to prepare his case properly.

[40] Cases in which courts have had to consider whether a badly drawn statement of offence is capable of amendment are by no means uncommon. In this case, the respondent could have amended the information at any time before the trial concluded in the High Court without prejudicing the interest of the accused, but they did not.

[41] For the above reasons, I am of the view that the defect in the charge is fatal and that the effects have led to a miscarriage of justice.

[42] I conclude that the appeal must be allowed, the convictions be set aside and a retrial ordered. In doing so, I have considered the decision of this court in **Laojindamaree v State** [2016] FJCA 137, where in the court provided guidance relevant to ordering retrial:

> *"[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused. the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (**Azamatula v State** unreported Cr App No AAU0060 of 2006S: 14 November 2008).*

[43] To ensure that justice is seen to be done, the trial should be presided over by a different judge.

[44] In light of the court's decision that the application to appeal against conviction is successful and that an order for retrial be made, it has become redundant for the court to consider the other grounds of appeal.

Qetaki, JA

[45] I have considered the draft judgment of Mataitoga J, and I agree with it and the reasoning.

Morgan, JA

[46] I agree with the judgment.

ORDERS

The Court orders:

1. *Appeal allowed.*
2. *Conviction set aside.*
3. *A new trial ordered before a different judge.*

Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Hon. Mr. Justice W. Morgan
JUSTICE OF APPEAL

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