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

CRIMINAL APPEAL NO. AAU 113 of 2020
[In the High Court at Lautoka Criminal Case No. HAC 212 of 2016]

BETWEEN : **SERUPI BABA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. E. Moce for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **01 August 2023**

Date of Ruling : **02 August 2023**

RULING

[1] The appellant had been charged and convicted in the High Court at Lautoka for having committed the murder of Unaisi Baba on the 12 March 2016 at Nadi in the Western Division contrary to section 237 of the Crimes Act 2009. The information read as follows.

*'**Statement of Offence***

***MURDER**: contrary to section 237 of the Crimes Act 2009.*

Particulars of Offence

SERUPI BABA**, on the 12th day of March, 2016 at Nadi in the Western Division murdered **UNAISI BABA.

[2] After the assessors' majority opinion that the appellant was guilty of murder, the learned High Court judge had convicted the appellant and sentenced him on 06 August 2020 to mandatory life imprisonment and set a minimum serving period of 18 years.

[3] A timely appeal against conviction and sentence had been lodged in person by the appellant and his amended grounds of appeal had been lodged by Vosarogo Lawyers.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence 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) that will 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 (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)].

[5] Further guidelines 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 **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999), **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499). 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.

[6] The ground of appeal raised by the appellant are as follows.

Conviction:

Ground 1

THAT the learned trial Judge erred in law and fact when he failed to properly consider the possibility of the medical cause of death as septicemia and bed sores established by evidence, as required by law, the failure of which led to a judgment that was unsafe and unsatisfactory and amounts to a miscarriage of justice.

Ground 2

THAT the learned trial magistrate erred in fact and law when he failed to properly address the evidence of the lack of intent, in particular, the failure to consider and give weight to the evidence of the deceased falling and hitting her head on the floor as being unintentional at all, the failure of which resulted in a judgment which was perverse and amounts to a miscarriage of justice.

Ground 3

THAT the learned trial Judge erred in fact and law in not properly addressing the failure of the medical treatment plan including the post admission discharge and failure to conduct a post mortem to establish cause of death, which is absent in the judgment and such absence resulted in an unsafe judgment.

Ground 4

THAT the learned trial judge failed to properly consider and assess the weight of evidence that truly reflected the unintentional nature of the assault to cause death and if such evidence is accepted, the charge of murder is capable of being reduced to manslaughter, the absence of such consideration makes for an unsafe judgment

Ground 5

THAT the minimum term of 18 years is manifestly excessive.

[7] According to the sentencing order the brief facts are as follows

'2……The accused and the deceased were husband and wife and together they have three children. On 12th March, 2016 the accused heard a rumour that his wife the deceased was having an affair, without verifying this rumour the accused went to the workplace of the deceased, lied to her that their son had been involved in an accident in Suva and brought her home.

3. *At home the accused assaulted the deceased to teach her a lesson several times on her face and mouth until she fell sideways and hit her head on the floor. The accused also beat the deceased with a mango stick and an electrical wire he then left the house leaving the deceased in an unconscious state.*

4. *The deceased died at the CWM Hospital due to severe head injuries which caused a stroke on the left side of her brain and then septicemia due to bed sores. The accused was arrested, caution interviewed and charged.*

[8] The deceased had passed away on the 05 July 2016, 03 months and 03 weeks after the incident. However, unlike in **Pauliasi Nauasara** AAU 108 of 2018 (27 July 2023) the DPP had correctly given the date of the offending as 12 March 2016 and not as 05 July 2016.

01st ground of appeal

[9] At the outset it must be mentioned that under section 23 (1)(a) of the Court of Appeal Act, the test is not whether the verdict is unsafe and unsatisfactory [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)**]** but whether the verdict is unreasonable or cannot be supported having regard to the evidence or there is a wrong decision of any question of law or there is miscarriage of justice subject to the proviso.

[10] It appears from the judgment that the deceased had a head trauma and subdural haemorrhage caused by blunt force trauma as a result of the hard fall on the ground. No post-mortem had been done though admittedly it was important to do one. The medical cause of death certificate had recorded the cause of death as septicaemia due to bed sores (no mention of head injuries). According to the medical folder at CMW hospital, the cause of death was the head injury caused by the stroke in the brain and then septicaemia. However, according to Dr. Alan Biribo, given the medical context the cause of death was quite clear in that it was severe head/brain injury and the correct order of the cause of death in the medical cause of death certificate should have been septicaemia, as a consequence of bed sores as a consequence of left hemispheric infract which was a consequence of severe head injury. According to the doctor the primary cause of death was severe head trauma.

[11] The learned trial judge had also stated in the judgment that the deceased had been taken to Nadi hospital on the date of the incident and admitted to Lautoka hospital where she was stabilized with fresh frozen plasma and transferred to CWM hospital on 16 March 2016 where a surgery was performed. She had been kept at CWM hospital for about 03 months and discharged on 21 June 2016 as her chances of survival was minimal. She had been readmitted to CWM hospital on 04 July 2016 and passed away on the next day. It is not clear whether the deceased had developed bed sores whilst still at CWM hospital from 16 March to 21 June or only during her home stay during 21 June and 04 July. However, upon her readmission, the deceased was found to have been carrying bed scores. The CT scan had revealed that she had developed a stroke on the left side of the brain due to the primary injury on the left side of the brain.

[12] What is clear is that taken in isolation the immediate possible cause of death is septicaemia due to bed sores. However, the primary cause of death was severe head trauma caused by her fall on the ground due to the appellant's assault. What is not clear is, whether the deceased would have survived had she been operated upon at Lautoka hospital within a short time of the incident or whether she would have anyway died from head injuries even without bed sores leading to septicaemia which, in other words, only hastened her death. However, it appears from the notes at Lautoka hospital that such a surgical intervention was not possible within an hour due to her unstable condition. If that is the case, it is also not clear why she was kept at Lautoka hospital for almost 04 days without transferring her to CWM hospital.

[13] The appellant had argued that the deceased did not die due to his assault but due to septicaemia and bed sores and had the deceased been surgically treated without delay she would have survived. The appellant relies on **Nacagilevu v State** [2016] FJSC 19; CAV 023.2015 (22 June 2016) and submits that the trial judge had failed to direct the assessors on the application of *'novus actus interveniens'*.

[14] On the totality of medical evidence, it is clear to me that severe head trauma had led to a stroke on the left side of the brain. It is also clear that bed scores had caused septicaemia. However, it is not clear how the left hemispheric infract had led to bed scores. If the severe head trauma (being the primary cause of death) would inevitably

have resulted in the deceased's death despite the timely available treatments then there is a clear nexus between the appellant's conduct and the cause of death. If the delay in treating the deceased coupled with bed sores leading to septicaemia had actually caused her death, the question is whether the chain of causation was in danger of being breached.

[15] What is not in dispute is the factual causation which is the first step of the inquiry to narrow down the search for the possible cause of the death. The appellant's act had caused the head injuries of the deceased because if not for the appellant's assault she would not have fallen and hit her head on the ground. Thus, the facts satisfy the factual or 'but for' test of causation (*i.e.* 'the harm would not have occurred 'but for' the act of the appellant).

[16] The second step is to ask which of the 'but for' causes is the 'legal cause' or 'imputable cause' - Is the accused morally to blame for the consequences of his actions? The common law formulation for determining the legal causation is whether the accused's act was *'an operating and substantial cause'* (see **R v Smith** [1959] 2 QB 35 or a *'significant cause'* (see **R v Cheshire** [1991] 3 All ER 670). The accused's act need not be the sole cause or even the main cause of the death (see ***Cheshire*).** However, the accused's act must have a more than minimal or more than negligible contribution to the result (**R v Hennigan**, (1971) 55 Cr App R 262; **R v Cata** [1976] 1 WLR 110; ***Cheshire*)**

[17] Whether there was factual causation is a question of fact, and it is a question of law as to whether a factual causation is capable of amounting to a legal cause of an event.

[18] Where the subsequent causal act or event renders the accused's earlier conduct no longer a true cause, such an intervening cause is referred to as a *'novus actus interveniens'*. This is a principle used in common law jurisdictions to describe a situation where a new and independent event occurs, which breaks the chain of causation between the original wrongful act and the resulting harm or damage.

[19] The argument *'novus actus interveniens'* is raised in three situations; conduct on the part of the victim (see **Nga Ba Min v Emperor** AIR 1935 Rang 418, **R v Blaue** [1975] 3 All ER 446 and **Nga Moe v The King** AIR 1941 Rang 141), conduct by an unconnected third party (see **R v Jordan** (1956) 40 Cr App R 152) and occurrence of a natural event/act of God [see **Hallett v R** [1969] SASR 141]. The suitable tests to determine whether a subsequent event is a *'novus actus interveniens'* are the *'operating and substantial cause'* test and the 'foreseeability' test. In the first and third situations, the better approach to apply is considered to be the 'foreseeability' test.

[20] In ***Jordan*** and **R v Smith** (1959) 2 QB 35 the *'operating and substantial cause'* test was applied to the second situation *i.e.* a conduct by an unconnected third party namely medical treatment given by medical personal. In ***Jordan,*** the victim was recovering well from a stab wound inflicted by the accused. It had 'mainly healed' when he was given a drug to which he was allergic and in abnormal quantity and the victim died of an allergic reaction. The court held that further evidence as to the cause of death ought to have been allowed. On the other hand, in ***Smith***, the accused was held to have been rightly convicted of murder even though the victim had been dropped twice while being taken for medical treatment after he was stabbed and the resulting treatment was also incorrect and harmful, because at the time of death the original wound is still an operating cause and a substantial cause and the death can properly be said to be the result of the wound. Only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

[21] Generally, even negligent medical treatment is not considered so abnormal as to break the chain of causation. In ***Cheshire*** the question was phrased in terms of whether the treatment was so independent of the accused's acts, and in itself so potent in causing death that the contribution made by the accused's acts may be regarded as insignificant.

[22] It is difficult for me at this stage to go further into this issue as the full transcripts of the trial particularly the medical evidence are not available. On a perusal of the summing-up and the judgment, I do not foresee the defense position of *'novus actus*

interveniens' having a reasonable prospect of succeeding in this appeal. However, it is for the full court to decide whether there had been a new & independent subsequent intervening event that could be considered a *'novus actus interveniens'* which broke the chain of causation between the appellant's assault and the deceased's resulting death.

[23] On the appellant's submission on non-direction, I find that in ***Nacagilevu*** the Supreme Court had quoted Lord Robert Goff who said in **R v David Keith Pagett** (1983) 76 Cri. App. R. 279 at page 288 that:

> *"Even where it is necessary to direct the jury's mind to the question of causation It is usually enough to direct them simply that in law the accused's act need not be the sole cause , or even the main cause , of the victim's death it being enough that his act contributed significantly to that result. It is right to observe in passing, however, that even this simple direction is a direction of law relating to causation."*

[24] The trial judge had at paragraph 24 and 26 addressed the assessors substantially in line with the above direction.

02nd ground of appeal

[25] The learned trial judge had addressed the assessors on the fault element of murder at paragraphs 18 and 31-33 of the summing-up. Circumstantial evidence had been dealt with at paragraphs 42-48. Given what the appellant had admitted in the charge statement and the cautioned interview, there was no doubt that he had assaulted the deceased as a result of which she had a hard fall sustaining the head injuries. He had continued to attack her with a stick and wire. Even otherwise, it had been proved by circumstantial evidence that it was none other than the appellant who was responsible for her injuries.

[26] In **Rawat v State** [2022] FJCA 168; AAU0186.2016 (24 November 2022) the Court of Appeal said on a similar argument referring to intention and recklessness as follows

> *[39] In all the circumstances, it is difficult, if not impossible, to successfully argue that the appellant did not entertain the intention to cause the death of TT. In my view, even otherwise the evidence clearly suggests*

> *that the appellant had been absolutely reckless in causing the death of the deceased. His subsequent appalling conduct excludes any other proposition. Having examined the totality of evidence, I am unable to conclude that appellant was unaware that there was a substantial risk that the death of the deceased will occur as a result of his acts and I am fully convinced that having regard to the circumstances known to the appellant, it was totally unjustifiable for him to have taken that risk. I have no hesitation to reach this view on the totality of evidence. Accordingly, I think the finding that the appellant was guilty of murder by the majority of assessors and the learned trial judge is justified on the fault element of recklessness if not intention.*

[27] Therefore, it is for the fact finders to decide whether the appellant entertained the relevant intention or recklessness. His contention that he did not entertain intention is not decisive to the conviction.

03rd ground of appeal

[28] The submission on this ground of appeal is connected to the first ground of appeal, the gist of which is whether the deceased being discharged from hospital to be at home was a *'novus actus interveniens'* which broke the chain of causation between the appellant's assault and the deceased's resulting death. The issue whether or not the cause of death was clear enough even without a post-mortem examination could also be considered in this context.

[29] The full court may examine this aspect as part of the first ground of appeal with the benefit of the appeal records.

04th ground of appeal

[30] The trial judge had addressed the assessors on the lesser charge of manslaughter at paragraphs 37-41 and 120 of the summing-up.

05th ground of appeal

[31] The appellant's grievance is about the minimum serving period of 18 years. Having considered the observations in **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) with regard to setting the minimum period, the trial judge had given reasons for the 18 year period at paragraphs 12-14 of the sentencing order.

[32] In UK, depending on the facts of the offence the starting point for the minimum time to be served in prison for an adult ranges from 15 to 30 years. For the purposes of setting the starting point for the minimum term Schedule 21 to Sentencing Act 2020 in UK sets out four categories.

- *In cases such as a carefully planned murder of two or more people, or a murder committed by an offender who had already been convicted of murder the starting point for an offender aged 21 or over is a whole life tariff. For an offender aged 18-20 the starting point would be 30 years and for an offender aged under 18 it is 12 years.*

- *In cases such as those involving the use of a firearm or explosive the starting point is 30 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

- *In cases where the offender brings a knife to the scene and uses it to commit murder the starting point is 25 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

- *In cases that do not fall into the above categories the starting point is 15 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

[33] Schedule 21 to Sentencing Act 2020 in UK has given some aggravating and mitigating factors to be considered for the determination of minimum term in relation to mandatory life sentence for murder as follows.

> *'9. Aggravating factors (additional to those mentioned in paragraphs 2(2), 3(2) and 4(2) that may be relevant to the offence of murder include—*
>
> *(a) a significant degree of planning or premeditation,*
>
> *(b) the fact that the victim was particularly vulnerable because of age or disability,*
>
> *(c) mental or physical suffering inflicted on the victim before death,*
>
> *(d) the abuse of a position of trust,*
>
> *(e) the use of duress or threats against another person to facilitate the commission of the offence,*
>
> *(f) the fact that victim was providing a public service or performing a public duty, and*
>
> *(g) concealment, destruction or dismemberment of the body.*

10. Mitigating factors that may be relevant to the offence of murder include—

(a) an intention to cause serious bodily harm rather than to kill,

(b) lack of premeditation,

(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered the offender's degree of culpability,

(d) the fact that the offender was provoked (for example, by prolonged stress) but, in the case of a murder committed before 4 October 2010, in a way not amounting to a defence of provocation,

(e) the fact that the offender acted to any extent in self-defence or, in the case of a murder committed on or after 4 October 2010, in fear of violence,

(f) a belief by the offender that the murder was an act of mercy, and

(g) the age of the offender.'

[34] Factors mentioned in paragraphs 2(2), 3(2) and 4(2) are as follows

2(2) <u>Cases that would normally fall within sub-paragraph (1)(a) include—</u>

(a) the murder of two or more persons, where each murder involves any of the following—

(i) a substantial degree of premeditation or planning,

(ii) the abduction of the victim, or

(iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

(c) the murder of a police officer or prison officer in the course of his or her duty, where the offence was committed on or after 13 April 2015,

(d) a murder done for the purpose of advancing a political, religious, racial or ideological cause, or

(e) a murder by an offender previously convicted of murder.

3(2) <u>Cases that (if not falling within paragraph 2(1)) would normally fall within sub-paragraph (1)(a) include—</u>

(a) in the case of a offence committed before 13 April 2015, the murder of a police officer or prison officer in the course of his or her duty,

(b) a murder involving the use of a firearm or explosive,

(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),

(d) a murder intended to obstruct or interfere with the course of justice,

(e) a murder involving sexual or sadistic conduct,

(f) the murder of two or more persons,

(g) a murder that is aggravated by racial or religious hostility or by hostility related to sexual orientation,

(h) a murder that is aggravated by hostility related to disability or transgender identity, where the offence was committed on or after 3 December 2012 (or over a period, or at some time during a period, ending on or after that date),

(i) a murder falling within paragraph 2(2) committed by an offender who was aged under 21 when the offence was committed.

4(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—

(a) commit any offence, or

(b) have it available to use as a weapon,

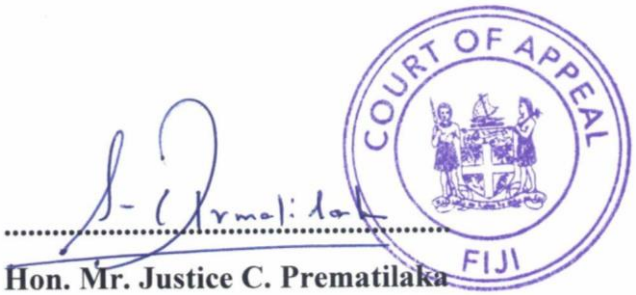
and used that knife or other weapon in committing the murder.

[35] It is important to note that what is stated at paragraph [32] above are starting points only. Having set the minimum term, the judge will then take into account any aggravating or mitigating factors that may amend the minimum term either up or down. The judge may also reduce the minimum term to take account of a guilty plea. The final minimum term will take into account all the factors of the case and can be of any length.

[36] Given the facts of the case, it appears to me that the starting point for the appellant may be taken as 15 years and then after adjusting for aggravating and mitigating factors the final minimum period could be arrived at. However, I would leave the decision on the minimum period for the full court if it thinks useful to seek some guidance from the above guidelines in the UK.

Orders

1. Leave to appeal against conviction is allowed on the 01st and 03rd grounds of appeal.
2. Leave to appeal against sentence is allowed.



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