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

CRIMINAL APPEAL NO.AAU 0008 of 2017
[In the High Court at Lautoka Case No. HAC 106 of 2016]

BETWEEN	**:**	**JOVILISI GODROVAI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
	:	**Bandara, JA**
	:	**Kulatunga, JA**
Counsel	**:**	**Appellant in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	**:**	**10 February 2023**
Date of Judgment	**:**	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Lautoka on one count of murder contrary to section 237 (1) of the Crimes Decree, 2009 and one count of aggravated robbery contrary to section 311 (1) (b) of the Crimes Decree, 2009 committed between the 19 May 2016 and 20 May 2016 at Lautoka in the Western Division.

[2] The particulars of murder was that the appellant murdered Sushila Devi and those of aggravated robbery were that he robbed Sushila Devi of $ 120 cash, 01 Sony portable radio valued at $90, 01 Nokia mobile phone valued at $ 80, 01 carry bag valued at $80, 4 tin Fish valued at $ 14, 01 torch light valued at $ 7.50, all to the total value of

$391.50, the property of Sushila Devi and at the time of the robbery used personal violence on the said Sushila Devi.

[3] On 16 September 2016 represented by his counsel, the appellant had pleaded guilty to the information. The learned trial judge, having been satisfied that the appellant had fully comprehended the legal effect of his plea of guilty and tendered it voluntarily and freely, had convicted the appellant of both charges on 14 October 2016. The trial judge had considered the summary of facts presented on 23 September 2016 which had the appellant's cautioned interview, photographs of the scene of the offences and the report of the Post-Mortem Examination as attachments marked P1-P3. He had sentenced the appellant on 14 October 2016 to mandatory life imprisonment with a minimum serving period of 20 years for murder and 12 years of imprisonment with a non-parole period of 07 years for aggravated robbery; both sentences to run concurrently.

[4] A judge of this court rejected enlargement of time to appeal against conviction and sentence on 24 July 2020. The appellant's appeal against conviction is out of time by 01 month and 01 week. Considering the fact that the appellant had filed the initial appeal in person this delay could be excused. In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 months delay might persuade a court to consider granting leave if other factors are in his or her favour and observed. As a matter of practice in the past the state has not objected to appeals filed within 03 months by an unrepresented appellant on the basis of delay.

[5] Thus, I would treat his appeal as being timely. 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)].

[6] Grounds of appeal urged on behalf of the appellant are as follows:

Conviction

1. *THAT the learned trial Judge erred in law and in fact when he failed to consider the defence of diminished responsibility as per section 243 of the Crimes Act 2009, which was available to the Appellant in light of the Appellant being a person of unsound mind thus rendering the plea equivocal."*

2. *THAT the learned trial Judge erred in law and in fact when he failed to consider from Counsel and the Appellant any opportunity of change of plea or withdrawal of the guilty plea given the defence of diminished responsibility and also after the Summary of Facts was read out thus rendering the plea equivocal.*

3. *THAT the learned trial Judge erred in law and in fact when he failed to make an inquiry as to the unsoundness of mind of the Appellant as per Section 104 of the Criminal Procedure Act 2009, thus rendering the plea equivocal.*

4. *THAT the Learned High Court Judge erred in law and in fact when he failed to independently scrutinize with absolute care the truthfulness and voluntariness of the appellant's confession to decide in the light of all other evidence and independent witness (s) evidence, thus, erred in law to admit the equivocal plea causing a great miscarriage of justice to the appellant.*

5. *THAT guilty plea was ambiguous.*

Sentence

6. *THAT the minimum term of 20 years is harsh and excessive.*

[7] The gist of the summary of facts as narrated in the sentencing order is as follows:

> *'It was revealed in the summary of fact, which you admitted in open court that you have committed these two offences between the periods of 19th of May 2016 to 20th of May 2016. On that particular day, you entered into the house of deceased Sushila Devi through the side window of the sitting room. You removed the wooden shutters and louver blades and then entered into the house,while she was sleeping in her bed room in the night. You then walked*

into her bed room, where she was sleeping. You pressed the mouth of the deceased and punched on her both thighs. She woke up and started to shout. You then gagged her mouth with a piece of cloth ripped out from the bed sheet. You then tied up her legs and hands using a rope. You used a knife to cut the ropes. You have used the rope and the knife to incapacitate the deceased before you proceed to rob the house. You then ransacked the house searching valuables. You stole FJD 120, four Angel tin Fish valued at FJD 14, one Nokia Mobile Phone valued at $ 80, and Sony Black Radio valued at $90. Before leaving the house you went and checked the deceased and found that she was dead. You then left the house.

[8] There is a vital piece of information available in the summary of facts missed out by the learned judge in the sentencing order. Before the appellant tied the mouth of the deceased with a piece of cloth torn up from the bed sheet, he had seen another piece of cloth on the floor beside the bed, picked it up and put it inside the mouth of the deceased. I have examined the appellant's cautioned interview and questions 63 and 65 and the answers thereof clearly show that the appellant had spoken to this act on his part. It is pertinent to quote all the relevant questions and answers from the cautioned interview.

'*Q58: What happened after you entered that house?*
A: I went to the bedroom and saw an old Indian lady was sleeping on the bed facing upwards.
Q59: Then what happened next?
A: I used my hands to press her mouth while she was still sleeping and I also punched both her legs……
Q63: Then what happened next?
A: I switched on the torch and saw a piece of cloth on the floor beside the bed and tore part of that cloth and placed that piece of cloth in her mouth…….
Q65……
A: Yes this is the cloth that I put in her mouth.
Q66: What happened after that?
A: I tore bed sheet and tied her mouth……..
Q68:……..
A: Yes this is the piece of bed sheet that I tore to tie that old lady's mouth.
Q69: What happened after you tied her mouth?
A: I used a rope to tie her legs and hands.
Q70: ……..
A: It was on the floor beside the bed
Q71: ……..
A: I cut the rope with a small knife and used one piece to tie her legs first and used another piece to tie her hands……..
Q75: ……
A: Yes this is the rope I used to tie that woman……..

Q90: Can you tell before leaving that house did you go and check that old lady in her room
A: Yes when I was about to leave the house I went to her bedroom and touched her neck and I could feel that there was no movement and I knew she was dead.'

[9] The report of the Post-Mortem Examination reveals that the direct cause of death had been asphyxia resulting from upper airway traumatic obstruction (antecedent cause) which was clearly due to the piece of cloth inserted inside the mouth of the deceased by the appellant coupled with gaging her mouth with another piece of cloth. There had also been a severe traumatic head injury as an antecedent cause of death.

01st ground of appeal

[10] Section 243 of the Crimes Act, 2009 is as follows:

'243. — (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair—

(a) the person's capacity to understand what the person is doing; or

(b) the person's capacity to control the person's actions; or

(c) the person's capacity to know that the person ought not to do the act or make the omission

the person is guilty of manslaughter only.

(2) on a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

(3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons.'

[11] To say the least, there was not an iota of material before the learned trial judge to have considered any defense based on diminished responsibility. Had there been any, no one would have been in a better position to know that than the appellant's trial counsel (who was from the Legal Aid Commission) and I think I can safely assume that the trial counsel would not have advised the appellant to plead guilty for murder, if there had been any evidence that at the time of committing the acts which caused the deceased's death, the appellant was in such a state of abnormality of mind substantially impairing his capacity as described in section 243(1) (a), (b) or (c). In terms of section 243(2) the burden is on the appellant to prove that he by virtue of section 243(1) is liable to be convicted of manslaughter only but not murder and without any evidence to substantiate it, the appellant could not have done so. In terms of section 60(b) of the Crimes Act, 2009 this burden of proof is a legal burden which in terms of section 61 of the Crimes Act, 2009 must be discharged on a balance of probabilities.

[12] The appellant heavily relies on the Psychiatric Evaluation report issued by St. Giles Hospital on 04 July 2016. This was not part of the summary of facts but available in the appeal record. However, to deal with the unrepresented appellant's concerns I shall examine it. Even before the DPP filed the information in court the appellant's counsel on 09 June 2016 had sought an order from the trial judge to have the appellant examined at St. Giles Hospital for a psychiatric assessment. Psychiatric evaluation had been conducted on 16 June 2016 to assess the appellant's state of mind at the time of the alleged offence and his fitness to plead in court.

[13] Dr. Jay Lincoln who conducted the psychiatric evaluation of the appellant in his lengthy report had concluded that the appellant was mentally capable of appreciating the acts he was performing as well as the consequences of his actions at the time of the alleged criminal acts. The doctor had also concluded that the appellant was fit to plead.

[14] I think, it can reasonably be assumed that the appellant's trial counsel had carefully examined the said report by Dr. Jay Lincoln which was available to the trial judge and also to his trial counsel. The trial counsel was in the best position to advise the

appellant on the guilty plea who would not have taken the course of tendering the guilty plea had he entertained any hope of taking up diminished responsibility as a partial defense on the psychiatric report.

[15] Further, the only feeling that anyone could get while reading the cautioned interview is that the appellant had described the incident with absolute clarity and answered questions with precision. Only a very rational and mentally alert person could have done it.

[16] Thus, it is clear why the trial counsel had advised the appellant to tender the plea of guilty in respect of both counts and why the trial judge had no reason to consider the defense of diminished responsibility under section 243 of the Crimes Act, 2009. The psychiatric evaluation report does not make the plea equivocal. If at all, the report has effectively ruled out the defense of diminished responsibility.

02nd ground of appeal

[17] The appellant argues that the trial judge should have inquired from the appellant and his trial counsel whether the appellant would wish to change or withdraw the plea given the defense of diminished responsibility. He again relies on his psychiatric evaluation report.

[18] In **Darshani v State** [2018] FJSC 25; CAV0015.2018 (1 November 2018) Keith, J dealt with this topic as follows:

> *'[32] Counsel for the petitioner did not spell out how the question of the petitioner's mental health was relevant to the proposed appeal against conviction. But I acknowledge that it would have been relevant to a possible defence of diminished responsibility under section 243(1) of the Crimes Decree 2009 because that defence arises when, at the time of the killing, a defendant is suffering from an abnormality of mind which impairs their faculties in various respects. The difficulty for the petitioner is that such a defence cannot get off the ground without a medical or psychiatric report addressing the state of her mental health when the killings took place. At present, no such medical report has been prepared. Her counsel merely asserts that such a report may provide a basis for arguing that her mental health at the time may have afforded her a defence to the two counts*

of murder – the defence of diminished responsibility not being available in a case of attempted murder. The evidential basis for running the defence of diminished responsibility simply does not exist at present.'

[19] In ***Darshani*** there was no medical report available on the mental health of the appellant. In this case a fully-fledged medical report was available and it unequivocally declared that the appellant was mentally capable of appreciating the acts he was performing as well as the consequences of his actions at the time of the alleged criminal acts. The medical report also stated that the appellant was fit to plead. Thus, the medical report ruled out any basis for running the defence of diminished responsibility. Therefore, the trial judge had absolutely no evidential or factual basis to inquire from appellant or his trial counsel whether the appellant wanted to change the plea of guilty. It is very pertinent to note that the appellant pleaded guilty on 16 September 2016 and the medical report had been submitted to court by 22 July 2016 and copies had been issued to the prosecution and defense. Thus, the appellant's guilty plea had been tendered after full consideration of the medical report by his counsel and there was nothing in it which should have altered the trial judge to make any inquiries from the appellant or his counsel on the guilty plea.

[20] The whole argument here is misconceived in as much as it is based on perceived or more accurately surmised defense of diminished responsibility which has no basis in the appellant's psychiatric report. However, the appellant also argues that what is in the medical report should have alerted the judge to question whether the element of intention to kill was satisfied and give the trial counsel and the appellant time to reflect on the earlier plea of guilty for murder.

[21] As I have already stated, the learned trial judge had missed out an important piece of evidence in narrating the summary of facts in the sentencing order which clearly shows the nexus or proximity between the appellant's acts and the cause of death. They clearly establish that the appellant had been reckless in causing the death of the deceased by his conduct though he may not have intended to cause her death.

[22] Section 21 of the Crimes Act, 2009 deals with recklessness and reads thus:

> *'21. — (1) A person is reckless with respect to a circumstance if —*
>
> *(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(2) A person is reckless with respect to a result if —*
>
> *(a) he or she is aware of a substantial risk that the result will occur; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(3) The question whether taking a risk is unjustifiable is one of fact.*
>
> *(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.'*

[23] Recklessness has been described in common law as the state of mind of a person who foresees the possible consequences of his conduct, but acts without any intention or desire to bring them about. A man is said to be reckless with respect to the consequences of his act, if he foresees the probability that it will occur, but does not desire it nor foresee it as certain. It may be that the doer is quite indifferent to the consequences, or that he does not care what happens. In all such cases, the doer is said to be reckless towards the consequences of the act in question. In other words, recklessness is 'an attitude of mental indifference to obvious risk'. Driving at a furious speed through a narrow and crowded street is a reckless act. The person foresees that someone in the crowd may get injured by his act, but is 'mentally indifferent' to such obvious risk. Likewise, if A throws a stone over a crowd, without caring whether it would injure someone, and the stone falls on the head of one of the persons in the crowd, A is responsible for causing injury recklessly (see ***Criminal Law: Cases and Materials Sixth Edition Reprint 2012 by KD Gaur*** *page 52*).

[24] Thus, recklessness involves subjective awareness of the *risk* of harm but a reasonable person would have regarded the risk to be unjustifiable. If a doctor performs a difficult operation and is aware that it may prove to be fatal but goes ahead because there are no other safer options, he cannot be said to be reckless as it is justifiable to take the risk.

[25] The summary of facts, the cautioned interview and the post-mortem examination report clearly show that the appellant was reckless in causing the death of the deceased. His inserting a piece of cloth inside the deceased's mouth, tying her mouth with another piece of cloth and tying her legs and hands with a rope before committing the robbery crippling all her physical movements, demonstrate nothing but recklessness in causing her death. The appellant had not left even a little window of opportunity for the deceased to free and extricate herself from the tangle to breathe some air to save her life.

[26] The entire cautioned interview and the post-mortem examination report were available to the judge, the appellant and his trial counsel. Therefore, it can be understood as to why the appellant and his trial counsel never thought of changing the plea of guilty. It is also clear why there was no reason for the learned trial judge to have entertained any thought of calling upon the appellant and his counsel to change the plea or withdraw it. In any event the appellant had time from 16 September 2016 (appellant pleaded guilty) to 14 October (appellant was sentenced) to do so, if they so wished although the discretion to allow a guilty plea to be withdrawn would be exercised sparingly [see **Ali v State** [2020] FJCA 11; AAU31.2015 (27 February 2020)].

[27] The observations in **Darshani v State** [2018] FJSC 25; CAV0015.2018 (1 November 2018) by Keith, J in the Supreme Court are relevant to the appellant's contention.

> *'[33] The basis on which the petitioner's counsel put the proposed appeal against conviction was that the trial judge should himself have raised the question of the petitioner's mental health, and then caused it to be investigated. That in effect is to argue that the judge has a duty to raise and investigate a defendant's mental health even when the defendant's legal team has not asked him to do that. As a matter of principle, I*

> *doubt that this is correct. It is inconsistent with a criminal trial being an adversarial process. In our system of criminal justice, the judge merely holds the ring, and leaves it to the parties to decide what avenues need to be investigated and what evidence should be called. Indeed, none of the materials on which the petitioner's counsel relied support the proposition she was seeking to advance. They were (i) section 104 of the Criminal Procedure Act 2009, (ii) the judgment of the Supreme Court in Bonaseva v The State [2015] FJSC 75 and (iii) the judgment of the Supreme Court in Nauru in CRI029 v The Republic [2017] NRSC 75.'*

[28] In this case, armed with the appellant's psychiatric report which did not lend any support to the defense of diminished responsibility but rather ruled out any such possibility, the trial judge and the appellant counsel did not raise any concern with the guilty plea for obvious reasons.

03rd ground of appeal

[29] The appellant argues that despite him having had a history of being a patient at St. Giles Psychiatric Hospital, the learned trial judge had failed to hold an inquiry or at least obtain a report on the unsoundness of the appellant's mind rendering the plea equivocal. Section 104 of the Criminal Procedure Act, 2009 reads:

> *'104. — (1) When, in the course of a trial at any time after a formal charge has been presented or drawn up, the court has reason to believe that the accused person may be of unsound mind so as to be incapable of making a proper defence, it shall inquire into the fact of such unsoundness and may adjourn the case under the provisions of section 223 for the purposes of —*
>
> *(a) obtaining a medical report; and*
>
> *(b) such other enquiries as it deems to be necessary.*

[30] There was indeed a medical report as already discussed following the application by the appellant's counsel which was made available to both parties. The appellant pleaded guilty nearly two months after the said report was filed of record. There was ample time for all parties, the prosecution, defense and the trial judge to consider the medical report. None of the parties, in my view quite correctly and justifiably, thought

that there was any rational basis to doubt its findings which were unequivocal that the appellant was fit to plead and he was aware of his actions at the time of the alleged criminal acts. Thus, it is clear that the trial judge would have been fully satisfied that the appellant was not of unsound mind so as to be incapable of making a proper defence and therefore quite rightly proceeded to take his plea. Simply because the appellant had obtained treatment at some point of time as disclosed in his medical report at St. Giles Hospital could not have made him unfit to plead at the time of the trial or proved that at time of doing the criminal acts which caused the death of the deceased he was in a state of abnormality of mind. Everything points unmistakably to the fact that the appellant was well aware of and deliberate in his actions at the time of the incident. He took time to check on the deceased and then found her to be dead and told the same to his friend. On the following morning he took flight to Nasouri *via* Suva to get to his father's house at Vunivivi in order to escape from the crime scene for 'safety'. Thus, not only during the robbery at the deceased's house but even thereafter the appellant acted very rationally without a trace of any abnormality in everything he did.

[31] It was held in **R v Byrne** (1960) 2 QB 396) that *"abnormality of mind" was wide enough to cover the mind's activities in all its aspects, including the ability to exercise will power to control physical acts in accordance with rational judgment. But "abnormality of mind" means a state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal.'* The appellant's actions come nowhere near abnormality. They were nothing but normal, logical and rational.

[32] Dealing with the appellant's arguments based on abnormality of his mind, I am reminded of the following sentiments expressed by Pathik J, in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009).

> *'[18] (a) The grounds advanced by the appellant are completely without merit. In fact I find that this is a frivolous and vexatious application. Further the application is an abuse of the process of the court.*
>
> *(b) …… It is a case which I should have summarily dismissed.'*

04th ground of appeal

[33] The appellant argues that the trial judge should have held a *voir dire* inquiry with regard to his cautioned statement to test its voluntariness and then assessed its truthfulness before acting on it as part of the summary of facts. He raises this issue in relation to his submission that his plea was equivocal.

[34] A *voir dire* inquiry needs to be held only if an accused disputes the voluntariness of the cautioned interview or if it is challenged on grounds of general unfairness. Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to judges and magistrates and at a trial before assessors a *voir dire* may be conducted prior to swearing in of the assessors but after the accused has pleaded to the information. **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) had earlier laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

> *'[24] Whenever the court it advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further.*
>
> *[25] 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. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.'*

[35] On the scope of the *voir dire* inquiry in **Ganga Ram & Shiu Charan v R**, Criminal Appeal No. AAU0046 of 1983 (13 July 1984), the Court of Appeal said:

> *"It will be remembered that there are two matters each of which requires consideration in this area. **First,** it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage – what has been*

picturesquely described as 'the flattery of hope or tyranny of fear.' ***Second****, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behave, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or unfair treatment."*

[36] In this case, in the first instance on 05 August 2016 the appellant pleaded not guilty and his counsel had later filed *voir dire* grounds. However, on 16 September 2016 the appellant's counsel had indicated that the appellant was willing to change his plea on his own free will and she had explained to him the charges and consequences of the guilty plea. Summary of facts had been tendered and read over on 23 September 2016 and the appellant had informed court that he could understand English. He had then admitted summary of facts on his own free will.

[37] The cautioned interview and the Post Mortem Report and the crime scene photographs were part of the summary of facts (P1-P3). The cautioned interview and the Post Mortem Report had already been served on the appellant as disclosures in July 2016. Thus, the contents of both of them were not new to the appellant and his counsel. Therefore, when the appellant admitted the summary of facts he was admitting the attachments P1-P3 as well, for the defense was free (if it so desired) to accept only the summary of facts and not the attachments in which event the prosecution would have had to and been able to file an amended summary of facts without P1-P3. The defense also could have asked for a Newton hearing limited to the disputed part of the facts, if any. Therefore, in this case there was no need to hold a *voir dire* inquiry into the voluntariness or general unfairness of the cautioned interview. As for the truthfulness of the matters stated in the cautioned interview, it is abundantly clear that what transpired at crime scene reconstructions were consistent with the appellant's confessions. The photographs taken at and exhibits collected from the crime scene prove the truthfulness of the matters stated by the appellant in the cautioned interview.

[38] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court while examining the issue whether the pleas had been equivocal asked itself the following questions:

(i) What evidence or material could be relied upon in deciding that a plea of guilty is equivocal? Put another way, how much of the prosecution case was an accused admitting to by entering a plea of guilty?

(ii) Could the Accused be held to be accepting the statements of the prosecution witnesses served on the defence as part of the disclosure procedure? This was in contradiction to the summary of facts tendered and which he himself agreed to in the presence of his counsel.

(iii) How far could an appellate court draw inferences from such statements, unsworn and untested as they were?

[39] The Supreme Court had then held that the primary source of a guilty plea is the summary of facts.

> *'[26] Where, as here, the defence counsel indicates to prosecuting counsel that his client will plead guilty, the defence will wish to see the summary of facts. If the facts are accepted by defence counsel's client, the Accused, the plea can proceed. If not, the case must proceed on a not guilty plea and a trial must take place. If there is acceptance by the prosecution of any material requested by the defence to be deleted from the summary of facts, the plea of guilty can still proceed. Another option is for there to be a Newton hearing held limited to the disputed part of the facts.'*

[40] Nevertheless, the Supreme Court had approved limited use of disclosure statements (without, however, going on a voyage of discovery looking into the case record and drawing inferences) but disapproved over reliance on them as they are, without a trial, unsworn and untested (unless an agreed fact) and also because, procedurally, upon a plea no formal evidence is taken and the plea cannot be taken as an admission of the bundle of disclosure witness statements.

> *'[27] ……..Disclosure statements can be relied on by the sentencing judge or by the appellate court, but great care must be exercised not to incorporate into the Summary of Facts, matters not necessarily accepted by the Accused when he or she entered a plea of guilty……'*

[41] In this case, the trial judge on his own did not go fishing for the cautioned interview and the Post Mortem Report and the crime scene photographs. They were simply part of the summary of facts to be considered by all parties including the trial judge without any objection or reservation by the defence.

[42] The Supreme Court also had usefully referred to the role of the defense counsel and the trial judge *vis-à-vis* a guilty plea in the matter of a plea as follows:

> *'[21] Frequently it can happen that after an offence has been committed, about which an Accused person feels deeply ashamed, that various explanations are given to the police or to the court. Subsequently an Accused can retract some or all of those explanations. It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client……'*

[43] Earlier in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter that:

> *'[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).'*

[44] In **Nalave v The State** [2008] FJCA 56; AAU 4 and 5 of 2006 (24 October 2008)] the Court of Appeal set down the basis for intervention in the case of a plea.

> *'[23] It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (**Rex v Golathan** (1915) 84 L.J.K.B 758, **R v Griffiths** (1932) 23 Cr. App. R. 153, **R v. Vent** (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (**R v Murphy** [1975] VicRp 19; [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (**Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132).'*

[45] It was stated by the High Court of Australia in **Maxwell v The Queen** [1996] HCA 46; 184 CLR 501; 135 ALR 1; 87 A Crim R 180; 70 ALJR 324:

> *'19. An accused is entitled to plead guilty to an offence with which he is charged and, if he does so, the plea will constitute an admission of all the essential elements of the offence. Of course, if the trial judge forms the view that the evidence does not support the charge or that for any other reason the charge is not supportable, he should advise the accused to withdraw his plea and plead not guilty. But he cannot compel an accused to do so and if the accused refuses, the plea must be considered final, subject only to the discretion of the judge to grant leave to change the plea to one of not guilty at any time before the matter is disposed of by sentence or otherwise (17).*
>
> *20. The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered (18)....'*

[46] In **Meissner v The Queen** [1995] HCA 41; 184 CLR132; 130 ALR 547; 80A Crim R 308 Dawson J in the High Court of Australia said:

> *"[19] It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to*

avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence (25). But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud (26)."

[47] The trial judge had said in the sentencing order that:

> *'2. You pleaded guilty for these two counts on the 16th of September 2016 on your own free will and accord. Having satisfied that you have fully comprehended the legal effect of your plea and your plea was voluntary and free from influence, I now convict you for these two counts as charged in the information.'*

[48] Thus, the trial judge was satisfied that the appellant's plea was unequivocal and it is very clear that the summary of facts alone even without the attachments P1-P3 would establish all elements of both murder and aggravated robbery.

05th ground of appeal

[49] The appellant argues that his plea was ambiguous. **Archbold Pleadings, Evidence & Practice in Criminal Cases** 39th Edition at page 157 on the strength of several authorities states that:

> *'It is important that there should be no ambiguity in the plea, and that where the defendant makes some other answer than Not Guilty or Guilty, as the case may be, care should be taken to make sure that he understands the charge and to ascertain to what the plea amounts. Where the plea is imperfect or unfinished, and the court of trial has wrongly held it to amount to a plea of guilty, on appeal the Court of Appeal may order that a plea of not guilty be entered and that the appellant be tried on the indictment … …..; or that the appellant be sent back to plead again to the indictment …. ; or may merely quash the conviction without sending the appellant back for trial …… In the*

case of an undefended defendant who pleads guilty case should be taken to see that he understands the elements of the crime to which he is pleading guilty, especially if the depositions disclose that he has a good defense….'

[50] **Blackstone's Criminal Practice 1993** at page 1173 states on ambiguous pleas as follows:

'If an accused purports to enter a plea of guilty but, either at the time he pleads or subsequently in mitigation, qualifies it with words that suggests he may have a defence (e.g., 'Guilty, but it was an accident' or 'Guilty, but I was going to give it back'), then the court must not proceed to sentence on the basis of the plea but should explain the relevant law and seek to ascertain whether he genuinely intends to plead guilty….. Should the court proceeds to sentence on a plea which is imperfect, unfinished or otherwise ambiguous, the accused will have a good ground of appeal. Since the defect in the plea will have rendered the original proceedings a mistrial, the Court of Appeal will have the options either of setting the conviction and sentence aside and ordering a retrial …… or of simply quashing the conviction……. If the former course is chosen (i.e., there is to be a retrial), the court may either then and there direct that a not guilty plea be entered or order that the accused be re-arranged in the court below……'

[51] The appellant refers to proceedings on 05 August 2016 where it had been recorded '*But, I can't understand' 'plead not guilty for both counts'* to buttress his argument on his plea of guilty being ambiguous.

[52] However, the fact of the matter is that his plea was not taken as a guilty plea on 05 August 2016 but it was recorded as a not guilty plea. His plea of guilty came much later on 16 September 2016 where it had been recorded that the appellant was willing to change his plea on his own free will and his counsel had explained the charges and consequences of the guilty plea. Thereafter, the appellant had pleaded guilty to both counts on his own free will. The trial judge had been satisfied that the appellant had pleaded on his own free will having fully comprehended the legal effect of the guilty plea and his plea was voluntary and free from influence. Thus, there is no ambiguity at all about his guilty plea tendered on 16 September 2016.

[53] The appellant also submits that his lawyer Mr. M. Fesaitu from the Legal Aid Commission was not present on 05 August 2016 when he tendered his plea of guilty but it was another lawyer namely Ms. Priya Chand from the Legal Aid Commission who appeared for him. He alleges that Ms. Priya Chand induced him to plead guilty after confiding with the prosecution and she had told him that she would bargain for a lenient sentence for the guilty plea and therefore his plea was not unequivocal.

[54] The record shows that from 09 June 2016 Mr. Fesaitu had appeared for the appellant except on a single day till 16 September 2016. Thereafter, Mr. Fesaitu had continued to appear from 21 September 2016 to 14 October 2016 (date of the sentence) except on one day. Mr. Fesaitu had filed mitigation submissions for the appellant too. If there is an iota of truth in the appellant's allegation against Ms. Priya Chand, he should and could have brought it to the notice of Mr. Fesaitu so that Mr. Fesaitu could have applied to withdraw the plea of guilty prior to the sentencing. The conduct of the appellant clearly shows that the plea of guilty was entered on16 September 2016 unequivocally and on his own free will with full understanding of consequences by the appellant and not at the instance of Ms. Priya Chand. The appellant has not raised this ground of appeal at least before the single judge. This complaint is an obvious afterthought.

[55] Toohey J said in ***Maxwell***:

> *22. The court has the power to allow a plea of guilty to be withdrawn at any time before sentence (65). This is so even where the jury has formally returned a guilty verdict by direction following a change of plea by the accused (66). A defective plea of guilty may be withdrawn and a conviction set aside (67) on various grounds (68). This is part of the inherent jurisdiction of courts to see that justice is done (69) and some, if not most, of the decisions mentioned are explicable on the footing that, in the view of the court, the accused lacked full understanding of the plea or there was some other vitiating factor. To this end the court may refuse to accept a guilty plea (70) or direct that a not guilty plea be entered (71).'*

[56] Secondly, in any event the appellant's criticism of Ms. Priya Chand cannot be considered at this stage in as much as the procedural requirement 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.

06th ground of appeal *(sentence)*

[57] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

[58] The appellant challenges the minimum serving period of 20 years. He argues that the minimum serving period of 20 years is harsh and excessive. The learned trial judge had stated in the sentencing order as follows and discussed aggravating factors in paragraphs 9, 10 and 18 which could be considered as relevant to the minimum serving period imposed.

> *'7. Justice Madigan in* ***State v Rokete [2014] FJHC 114; HAC084.2009 (4 March 2014)*** *has discussed the setting of minimum term in comparison with the sentencing guidelines of UK, where his lordship held that;*
>
> > *"In the U.K, the Criminal Justice Act, 2003 Schedule 21, makes provision for minimum terms. The schedule provides for elements of aggravation and mitigation that a Court could consider in assessing a minimum term for murder. This U.K Act does not apply in Fiji of course, nor does Fiji have similar legislation but those provisions can be of real assistance in assessing a minimum term before pardon in terms of section 237 of the Fiji Crimes Decree. Aggravating features listed in the UK schedule and which are of particular relevance to the present case include:*
> >
> > i. *Murder for gain (for example in the course of robbery or burglary),*
> > ii. *The murder of a vulnerable victim in terms of age and or vulnerability,*

iii.A murder with a view to obstruct justice,

13. You have been adversely recorded with twenty one previous convictions. Therefore, I find that you are not entitled for any discount for your previous good character. I must assure you that your previous convictions have not been considered as an aggravating factor in this sentencing.'

[59] The Sentencing and Penalties Act has no application to sentences for murder [see **Prakash v State** [2016] FJCA 114; AAU44 of 2011 (30 September 2016)]. The only discretion that is vested in the judge is setting the minimum serving period before pardon may be considered but it is not mandatory for a sentencing judge to fix such a minimum period in every case. In **Aziz v The State** [2015] FJCA 91; AAU 112 of 2011 (13 July 2015) the Court of Appeal stated:

'6……The provisions of section 18 of the Sentencing Decree will have general application to all sentences, including where life imprisonment is prescribed as a maximum sentence unless a specific sentencing provision excludes its application. In my judgment a sentencing court is not expected to select either a non-parole term or a minimum term when sentencing for murder under section 237 of the Crimes Decrees. As a result any person convicted of murder should be sentenced in compliance with section 237 of the Crimes Decree…'

[60] 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)].

[61] The appellant could be seen as a person in respect whom the consideration of rehabilitation appears to be of little relevance and meaning. With 21 previous convictions against his name, he comes across as a person who is a threat to the law abiding citizens and the community and in need to be distanced from society for a considerable period of time.

[62] The appellant has not demonstrated any sentencing error in the minimum serving period.

[63] I see no reason why the sentiments expressed in **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 by the Court of Appeal on the operation of the non-parole period may be applicable when fixing a minimum serving period in the case of death sentences. The sentencing judge would be in the best position in the particular case to decide on the minimum serving period depending on the circumstances of the case.

[64] Since there is no reasonable prospect of success with regard to the appellant's conviction and sentence appeal (there is no sentencing error either), leave to appeal should be refused. Since this court in this process has now fully considered the appellant's appeal against conviction and sentence, the appeal against conviction and sentence too should be dismissed in terms of section 23(1)(a) of the Court of Appeal Act.

Bandara, JA

[65] I have read the judgment of Prematilaka, RJA in draft and agree with his reasons and proposed orders.

Kulatunga, JA

[66] I have perused the judgment in draft of Prematilaka, RJA and is in agreement with his reasons and orders as proposed.

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.
3. Appeal against conviction is refused.
4. Appeal against sentence is refused.

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice G. Kulatunga
JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent