

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

CRIMINAL APPEAL NO. AAU 140 OF 2020
[Labasa Case Number HAC 46 of 2019]

BETWEEN : **YOGESH ROHIT LAL**
Appellant

AND : **THE STATE**
Respondent

Coram : **Mataitoga, RJA**
Qetaki, JA
Dobson, JA

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

Date of Hearing : **04 July 2024**

Date of Judgment : **26 July 2024**

JUDGMENT

Mataitoga, RJA

[1] I concur with judgment of Dobson, JA.

Qetaki, JA

[2] I agree with the judgment of Hon. Dobson, JA, the reasons and the orders.

Dobson, JA

Position at the appeal hearing

[3] This is an appeal with leave from a minimum period of imprisonment (MPI) of 24 years' imprisonment imposed on a conviction after guilty plea for murder.

[4] On 25 June 2024, the Court Registry received a Form 3, completed by the appellant, recording his intention not to pursue the appeal. At the outset of the hearing, counsel for the appellant maintained the position that the appeal was to be abandoned. However, the appellant indicated through the court interpreter, that he still wished the Court to consider his appeal.

[5] He said that he had pleaded guilty to his wife's murder on the basis of indications from friends that he would get an MPI between 15 and 18 years' imprisonment, that he was very unhappy in prison, that his children needed him and missed him, and that he missed them. He expressed his sincere wish to be back in his village. He told the Court that his parents are looking after his children. He repeated comments made on sentencing that he could not accept his wife could leave him and that he had provided everything for her.

[6] No further submissions had been filed since those relied on for the application for leave. Since then, in May 2024, the Court has issued a guideline judgment in **Vuniwai v State** on matters to be taken into account when sentencing judges are imposing an MPI in respect of mandatory life sentences for murder.¹ In part because the sentencing judge had not taken into account time spent in custody before sentencing, the Court considered it appropriate to assess the appellant's plea for a reduction in the MPI in

¹ *Vuniwai v State* AAU176/2019 (30 May 2024).

light of the guidelines in *Vuniwai*. In oral submissions, both counsel addressed their analyses as to how those guidelines should apply in this case.

The offending

[7] Some two months before her murder, the victim had left the appellant and gone to live with her parents. She had taken their two-year-old daughter with her but left two older children to live with the appellant.

[8] The couple had been married for some 18 years, having three children. The victim was 34 years old at the time of her murder.

[9] On the day of the murder, the victim was at her parents' home with her mother and her daughter. The appellant left his home at 6.30pm on a bus and arrived at the victim's parents' home at around 7.00pm when it was dark. He disconnected the electricity to the house and hid out at the back of it. When the victim came out to check the electricity switchboard, the appellant struck her from behind in the head with a cane knife he had brought with him. The initial injuries were to the victim's hand and head. Her mother rushed to her rescue, but the appellant pushed the mother away and the attack continued in the house, in the presence of their two-year-old daughter. The victim was struck numerous times in the neck and head with the cane knife. Her mother continued attempts to stop the appellant but to no avail. The victim died at the scene having sustained multiple deep slash wounds to her head, neck, upper left limb and posterior trunk. Her skull and facial bones were exposed due to the extent of the slash injuries.

[10] After the killing, the appellant left the house and returned to his own home, taking the cane knife with him. On returning home, he called his immediate family and friends, telling them of the killing and waited for the Police. He was arrested the same night and pleaded guilty at the first opportunity. His incomplete statement to the Police was that he was involved in a maintenance dispute with his wife and that she should not be going to settle down with another person in Suva. He claimed that she was of a promiscuous character.

The sentencing

[11] The Judge saw domestic violence, where men refuse to accept their partner's wish for autonomy, as a serious problem in the community. That required those convicted of killing a partner to pay a heavy price to punish them, to denounce the crime, and to deter others.

[12] The Judge cited the following aggravating factors:

- (a) extreme violence inflicted on the victim in her own home where she was entitled to safety and security;
- (b) her position in a rural community with little support;
- (c) the attack was pre-meditated and planned;
- (d) the attack occurred at night;
- (e) the execution-type killing was carried out in the presence of their two-year-old daughter.

[13] The Judge treated the following as mitigating factors:

- (a) the offender was a 40-year-old with a previously unblemished record and of apparent good standing in his community;
- (b) he had pleaded guilty at the first opportunity, thereby allowing discount "for the utilitarian value of his guilty plea but not for remorse".

Vuniwai

[14] The guidelines in *Vuniwai* propose two steps in the process of deciding an MPI where the mandatory sentence of life imprisonment for murder applies. They are:

- [91] In cases of murder (or the combination of murder and one or more offences associated with it), as the first step the courts should use the following

Table to set the minimum term. For the purposes of setting the starting point for the minimum term, the Table sets out three categories *i.e* Extremely High, High and Low.

Categories of Seriousness	
Extremely High	
Starting point	25 years' imprisonment
Minimum term range	20 – 30 years' imprisonment
High	
Starting point	20 years' imprisonment
Minimum term range	15 – 25 years' imprisonment
Low	
Starting point	8 years' imprisonment
Minimum term range	05 – 15 years' imprisonment

[92] The court may consider that the seriousness of the murder (or the combination of murder and one or more offences associated with it) is Extremely High, High or Low in the following cases but this is not an exhaustive list.

Extremely High

1. *The murder of two or more persons, where each murder involves a substantial degree of premeditation or planning or the abduction or kidnapping of the victim, or sexual or sadistic conduct.*
2. *The murder of a child if involving the abduction of the child or sexual or sadistic motivation.*
3. *The murder of a judicial officer, court officer, police officer, prison/correctional officer, any other law enforcement officer, civil servant, security guard/officer or any other worker (health, teaching etc.) exercising public or community functions in the course of his or her duty.*
4. *A murder done for the purpose of advancing a political, religious, racial or ideological cause or terrorist act or in furtherance of a coup (military or otherwise) involving overthrowing a democratically elected government or involving ethnic cleansing or in the course of ethnic riots or killing of a political figure for political ends.*

5. *A murder by an offender previously convicted of murder or the offender is convicted of two or more counts of murder whether or not arising from the same transaction.*
6. *A murder committed with extreme brutality, cruelty, depravity or callousness or cold-blooded execution.*
7. *A murder committed in any other exceptional circumstance including instances amounting to crimes under international criminal law.*

High

1. *A murder involving unlawful entry into, or unlawful presence in a dwelling house or commercial or public establishment or place or the use of a firearm, other weapon, explosive or poison.*
2. *A murder done for or in furtherance of payment, ransom or gain (such as a murder done in the course of contract killing or in furtherance of extortion, robbery or burglary or done in the expectation of property- moveable or immoveable or intangible gain as a result of the death).*
3. *A murder intended to conceal another offence or avoid the detection, prosecution or conviction of any person or in any other way to obstruct or interfere with the course of justice.*
4. *A murder involving sexual or sadistic conduct.*
5. *The murder of two or more persons.*
6. *A murder that is aggravated by racial or religious hostility or by hostility related to sexual orientation.*
7. *A murder that is aggravated by hostility related to disability or transgender identity.*
8. *If the offender took a knife, other weapon or poison to the scene intending to commit any offence or have it available to use as a weapon and used that knife, other weapon or poison in committing the murder.*
9. *A murder committed in the course of arson, treason, espionage, sabotage, piracy, escaping or rescuing from prison, lawful custody or detention or in the course of any other serious offence.*
10. *A murder committed in sight of deceased's children.*
11. *A murder committed in domestic-violence context.*

Low

1. *Those cases in which, in the judge's opinion, the seriousness does not fall within Extremely High or High.*

02nd step

[93] Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for

them in its choice of starting point. In this exercise, double counting should be avoided. The aggravating and mitigating factors identified in other comparable jurisdictions provide helpful checklists. However, the weight to be given to those factors is obviously a matter for the judgment of the sentencing court having appropriate regard to the local societal context. As pointed by Lord Phillips in **R v Bouhaddaou** [2006] EWCA Crim 3190; [2007] 2 Cr App R (S) 23, at [18] that it may be appropriate to move a long way from the starting point to reflect aggravation or mitigation in any given case.

[94] Aggravating factors (additional to those within Extremely High, High and Low categories) that may be relevant to the offence of murder include (not exhaustive):

- (a) *Significant degree of planning or premeditation.*
- (b) *The fact that the victim was particularly vulnerable because of age, health, or any other disability.*
- (c) *The fact that the offender had repeatedly or continuously engaged in behaviour towards the victim that was controlling or coercive and at the time of the behaviour, the offender and the victim were personally connected.*
- (d) *Mental or physical suffering such as torture inflicted on the victim before death.*
- (e) *The abuse of a position of trust.*
- (f) *The use of duress or threats against another person to facilitate the commission of the offence.*
- (g) *The fact that victim was providing a public service (such as taxi driver) or performing a public duty.*
- (h) *The use of sustained and excessive violence towards the victim.*
- (i) *Concealment, destruction of the murder weapon or other means used in murder or concealment, destruction or dismemberment of the body.*
- (j) *Murder committed whilst on bail.*

(h) *Substantial harm, damage or loss caused to the deceased's family.*

[95] Mitigating factors (not considered as part of the initial starting point) that may be relevant to the offence of murder include (not exhaustive):

(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 mental impairment under section 28(1) or diminished responsibility under section 243 of the Crimes Act) lowered the offender's degree of culpability.*

(d) *The fact that the offender was provoked (for example, by prolonged stress) but, in a way not amounting to provocation under section 242 of the Crimes Act.*

(e) *The fact that the offender acted to any extent in self-defense (although not falling within self-defense under section 42(1) of the Crimes Act) or, in the case of a murder committed 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.*

[15] That judgment contained extensive summaries of murder sentencings and the length of MPI's in light of the nature of the offending and the offender. The judgment commented:²

This empirical data too suggests that for the majority of cases of murder in Fiji, the starting point of 20 years within "high" category with a sentencing range of 15-25 years is most appropriate.

² *Vuniwai v State*, above n 1, at [90].

- [16] This offending is not in the extremely high category of the *Vuniwai* guidelines. It does reflect the features listed in 1, 8, 10 and 11 of the list for high category murders. In applying such guidelines, sentencing courts need to be mindful that the guidelines are just that. They are not to be slavishly followed, or computed into a sentence by arithmetic calculation.
- [17] In cases where a significant number of the features are present to a serious extent, it may be that they are only appropriately recognised by treating the offending as if “extremely high”, by settling on a starting point higher than that nominated as the norm for murders of this category.
- [18] The relative seriousness of the aggravating features in this case, do require a substantial uplift from a 20-year starting point. Without any double-counting, the pre-meditation, planning, home invasion, level of violence, and the additional harm caused by committing the murder in the presence of a two-year-old, pushed this case over the top of the 15-25 year starting range. We would set it at 26 years and six months.
- [19] As to mitigating factors, the sentencing Judge cannot be faulted for distinguishing the credit that might be given for an early guilty plea into utilitarian and remorse. The former recognises the avoidance for all involved of the trauma, time, expense and commitment of court resources if a trial has to ensue. The latter reflects the importance of an offender beginning the process of rehabilitation. If there is no remorse, the offender will have much more work to do before appreciating why the community condemns his conduct and requires a lengthy term of imprisonment.
- [20] Submissions in support of the leave application criticised the sentencing Judge for having regard to a psychological report on the appellant that the Judge referred to in his sentencing. Neither State nor defence counsel had referred to it, and it was submitted that reference to it was improper. The Judge did refer to the report when commenting on the appellant’s lack of remorse. However, that lack of remorse was apparent from the appellant’s continued attempts to justify the killing. There is

therefore no valid concern that reference to the psychological report led the Judge into error.

[21] The appellant was a first offender, being 40 years old at the time. He was hard-working and, before this horrific lapse, apparently well-liked in his community. Given the nature of the crime, we would not be inclined to see his love for his family and theirs for him, and their apparent wish to have him back looking after them, as a mitigating factor justifying a reduction.

[22] In oral submissions on the application of the guidelines in *Vuniwai*, Ms Kean submitted in support of the appeal that the starting point adopted was high, relative to the new guideline, and could have been 20 years. She acknowledged serious aggravating factors that might justify uplifts of seven or eight years, less nearly that same length of time deducted for the mitigating circumstances of early guilty plea and previous good record. That would suggest an MPI of around 20 years.

[23] For the State, Mr Vosawale submitted that this was a ghastly murder, well up towards the top of those fitting in the “High” category from the guidelines. While conceding it was a high MPI, he submitted it was in range, and ought not to be disturbed.

[24] Relative to the uplift for aggravating factors of six and a half years, the appropriate credit for the mitigating factors is four years. That leaves an MPI of 22 and a half years, which we are satisfied falls appropriately within the range for high-level murder convictions.

[25] There was no mention by anyone involved in the appeal hearing of a period on remand in custody prior to sentencing. The offending occurred on 21 August 2019 and the sentencing was on 13 February 2020. The Judge noted in his sentencing that the appellant had been in custody on remand since the date of his arrest but made no adjustment for that. The remand was for a period of approximately six months, which

is the appropriate extent of credit that should be added for time served prior to sentencing.


[26] Accordingly, the appeal against the MPI imposed on sentencing is allowed.


Orders


[27] *We make the following orders:*

1. *The minimum period of imprisonment imposed on sentencing is quashed.*
2. *It is replaced with a minimum period of imprisonment of 22 and a half years, less credit for time served prior to sentencing of six months, making a final minimum period of 22 years imprisonment.*




Hon. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL


Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL


Hon. Justice Robert Dobson
JUSTICE OF APPEAL

Solicitors

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent