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

CRIMINAL APPEAL NO. AAU 118 OF 2022
High Court HAC 008 of 2006

BETWEEN : **SOLOMONE QURAI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in person**
Ms S. Shameem for Respondent [DPP]

Date of Hearing : **19 January, 2024**

Date of Ruling : **31 January, 2024**

RULING

[1] In this Leave to Appeal hearing, the appellant is appealing against sentence. His appeal against conviction was considered by the Supreme Court and in a judgement[1] dated 29 January 2016, wherein the conviction in the High Court was affirmed.

[2] The appellant was jointly charged with a co-accused on 1 count of murder and charge alone on 1 count of robbery and 1 count of Larceny. After a trial in the High Court and before assessors, the appellant was found guilty of the 3 charges he was charged with and convicted. On 12 March 2007, the appellant and his co-accused was sentenced as follows;

> *"There is a mandatory life imprisonment for murder and I sentence both accused to life imprisonment. The state has not asked for a minimum term recommendation and I do not recommend a minimum time of imprisonment."*

[3] It should be pointed out that the appellant is, not appealing against the imposition of life imprisonment as the court sentence. His appeal is against the narrower issues of the court not recommending minimum period of imprisonment. Before the court consider these narrow issues, it will necessary to review the evidence in the light of legal principles governing enlargement of time to appeal and factors the court must evaluate when there is an appeal against sentence.

[4] This appeal was untimely by 18 years, an inordinate delay indeed. Should the court allow leave to appeal in such circumstances? To answer this question, I need to review the sentencing ruling case in its entirety, and not limit myself only to the technical legal issue raised by the parties to the appeal. The latter is to ensure that no miscarriage of justice was perpetrated on the appellant at the sentencing.

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[1] Sakiusa Vasuitoga & Solomone Qurai v State [2016] FJSC 2 (CAV 001/2013)

[5] The factors that this court must consider when considering enlargement of time, were canvassed by the Supreme Court in **Rasaku v State**[2] and in **Kumar v State; Sinu v State**[3]**.** These factors are: (1) the reason for the failure to file within time, (ii) the length of the delay; (iii) where there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed? and (iv) if time is enlarged will the respondent be unfairly prejudiced.

[6] In assessing factors 1 and 2, I conclude that the explanation given by the appellant for such a long and inordinate delay was inadequate and would likely give sufficient basis for the court to dismiss the appeal. Despite this, I still need to see whether there is real prospect of success for the belated grounds of appeal against sentence in terms of merit. At the hearing of the appeal, counsel for the respondent conceded on the narrow issue of the trial judge's not recommending a minimum period of imprisonment it may raise an arguable point for further consideration. In that regard it is evident that they are prejudiced if enlargement of time is granted.

[7] Despite the inordinate delay and the lack reasons for it, the issue of law raised by the sentencing judge raise issues that should be considered further in this appeal against sentence.

Appeal Against Sentence

[8] Further guidelines to be followed when a sentence is challenged on appeal as in this case, are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide his decision; (iii) mistook the facts and (iv) failed to take into account some of the relevant considerations: **Naisua v State**[4] and **Kim Nam Bae v State.**[5]

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[2] [2013] FJSC 4; (CAV 0009)
[3] [2012] 17; (CAV 001/2009)
[4] [2013]FJSC 14 (CAV 0010 of 2023)
[5] [1999] FJCA 252 (AAU 15/98)

[9] I will consider both issues of the enlargement of time for leave to appeal and also the leave for appeal assessment together in this ruling.

Grounds of Appeal

[10] The appellant advance 2 grounds of appeal, namely:

(i) The learned trial Judges erred in law in not on directing the assessors of the alternative count of Manslaughter, which is crucial to every person in trial for murder, and has caused serious miscarriage of justice to the appellant.

(ii) the sentence imposed by the trial judge failed to set a minimum term which is required by law, causing grave injustice to the appellant

Considerations of the grounds of the Appeal

[11] The ground of appeal set out in paragraph 7(i) is addressed against the conviction of the appellant. The appellant's appeal against conviction is already settled by the Court of Appeal[6] and the Supreme Court[7] and this court will not look at it again.

[12] In this ruling, the court will only focus on the second ground of appeal, which is against sentence and assess it from the standpoint of satisfying the principles set out by the Supreme Court in **Rasaku v State** (supra) and in **Kumar v State**; **Sinu v State** [supra] given that the application now considered, is for enlargement of time to seek leave to appeal.

[13] The 4 factors outlined in paragraph 4 above, I assessed them as follows: there are no reasons given by the appellant that is adequate to explain the delay except to lamely blame it on the alleged incompetence of the trial counsel and the delay is inordinate. On the third factor, that is, that despite the inordinate delay in the filing of sentence appeal, specific point raised by the appellant is attractive to me. I will further consider it below. On the fourth factor, I asked Counsel for the Respondent during the hearing that it was proper for the trial judge to say that she did not recommend a minimum term because

[6] Solomone Qurai v State [2016] FJCA (AAU No: 0036/2007)
[7] Solomone v Qurai [2016] FJSC 2 (CAV No: 001/2013)

the state did not make a recommendation. The trial judge said "the State have not asked for a minimum term recommendation and I do not recommend a minimum term'. I observed to Counsel of the respondent at the hearing that I found this statement by the trial judge as avoiding the issue. She conceded that point.

[14] It should be noted that section 33 of the Crimes Act 2003 which was the operative law at the time of the sentencing of the appellant, states:

> *'Whenever a sentence of imprisonment of life is imposed on any convicted person the judge who impose the sentence may recommend the minimum period which he considers the convicted person should serve.'*

[15] In my view, section 33 of the Crimes Act 2003 quoted above, positively requires the sentencing judge to consider recommending a minimum period or not and set out the reasons for his decision. The important issue from the standpoint of the appellant is that he has a right in law to appeal the decision of the judge to set a sentence that has no minimum period of imprisonment recommended. In this case the judicial discretion given to the sentencing judge under section 33 of the Crimes Act 2003, to recommend or not a minimum period, must be supported by objective reasons. By not providing any reasons or as in this case relying on the lack of recommendation for a minimum period, from the prosecution, the sentencing Judge have made an error which have resulted in miscarriage of justice to the appellant's right to be informed of the basis of the trial court's not recommending a minimum period. This is an issue that the full court may consider, with the advantage of the full court records at the trial.

[16] In **Bala v State** [2023] FJCA 279 (AAU No: 2022) the court adopted this statement of law from the Supreme Court of New South Wales, Australia, as regards the need for trial judges to give sufficient reasons in support of its decision. In **Zaeit v Insurance Australia Limited t/as NRMA Insurance** [2016] NSWSC 587, the court stated:

> *"It is trite law that if a court fails to give sufficient reasons for its decision, it constitute an error of law."*

[17] Further in **Bala v State** [supra] the Court of Appeal adopted the decision of Supreme Court of Canada in **R v. Sheppard** [2002] SCC 26; [2002] 1 SCR 869, which set out the duty of a trial judge to give reasons as follows:

> *"The trial judge erred in law for failing to provide reasons that were sufficiently intelligible to permit appellate review of the correctness of his decision*
>
> *'Held: ..... The trial judge erred in law in failing to provide reasons that were sufficiently intelligible to permit appellate review of the correctness of his decision.*
>
> *The requirement of reasons is tied to their purpose and the purpose varies with the context. The present state of the law on the duty of a trial judge to give reasons, in the context of appellate intervention in a criminal case, can be summarized in the following helpful but not exhaustive propositions:*
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> *1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.*
>
> *2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.*
>
> *3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record*
>
> *4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.*
>
> *5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.*
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> *6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve*

confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.
8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial. Such an error of law at the trial level, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

In the circumstances of this case, the majority of the Court of Appeal correctly concluded that the reasoning of the trial judge was unintelligible and therefore incapable of proper judicial scrutiny on appeal. There were significant inconsistencies or conflicts in the evidence. The trial judge's reasons were so "generic" as to be no reasons at all. The absence of reasons prevented the Court of Appeal from properly reviewing the correctness of the unknown, unexpressed pathway taken by the trial judge in reaching his conclusion and from properly assessing whether he had properly addressed the principal issues in the case. The trial judge's failure to deliver meaningful reasons for his decision was an error of law within the meaning of s. 686(1)(a)(ii) of the Criminal Code.'

[18] On the basis of the above review of the applicable law and the ruling by the sentencing judge, the interest of justice is best served in this case, if the full court is given an opportunity to consider this narrow matter of sentencing. The appellant is urging the court to review the sentence and recommend a minimum period of imprisonment. I conclude that a minimum period of imprisonment should have been made by the sentencing judge. The sentencing Judge erred in law in basing the court's decision on

the fact that the prosecution did not make any recommendation. That is an irrelevant consideration for the court to base its decision on.

[19] In light of the above, enlargement of time application is granted and leave to appeal on the narrow issue of whether the trial judge under section 33 of the Crime Act 2003 is required to give reasons when considering whether to recommend a minimum period of imprisonment or not. In addition the full court should also consider whether in the interest of justice, a minimum period of imprisonment should have been made and to substitute this aspect of the sentence order with a minimum period of imprisonment to be effective from the date of the current sentencing ruling..

ORDERS:

1. Enlargement of time to file leave to appeal out of time against sentence only is granted.

2. Leave to Appeal to the Court of Appeal under Section 35(2) of the Court of Appeal Act is granted to consider the issue referenced in the ruling above.

Isikeli U Mataitoga
Resident Justice of Appeal

COURT OF APPEAL
FIJI