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

CRIMINAL APPEAL NO. AAU 0011 of 2022
[In the High Court at Lautoka Criminal Case No. HAC 161 of 2019]

BETWEEN	:	**MUHAMMED RAHEESH ISOOF**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. I. Khan for the Appellant** **Mr. L. Burney for the Respondent**
Date of Hearing	:	**24 August 2023**
Date of Ruling	:	**02 February 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Lautoka for having committed the murder of 05 persons and attempted murder of one person on 25 August 2019 at Nadi in the Western Division contrary to section 237 of the Crimes Act 2009.

> *'**FIRST COUNT***
> ***Statement of Offence***
>
> ***MURDER**: Contrary to section 237 of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***MUHAMMAD RAHEESH ISOOF** on the 25th day of August 2019 at Nadi in the Western Division murdered **NIRMAL KUMAR**.*
>
> ***SECOND COUNT***
> ***Statement of Offence***
>
> ***MURDER**: Contrary to section 237 of the Crimes Act 2009.*

Particulars of Offence

MUHAMMAD RAHEESH ISOOF *on the 25th day of August 2019 at Nadi in the Western Division murdered* ***USHA DEVI.***

THIRD COUNT
Statement of Offence

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

Particulars of Offence

MUHAMMAD RAHEESH ISOOF *on the 25th day of August 2019 at Nadi in the Western Division murdered* ***NILESHNI KAJAL.***

FOURTH COUNT
Statement of Offence

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

Particulars of Offence

MUHAMMAD RAHEESH ISOOF *on the 25th day of August 2019 at Nadi in the Western Division murdered* ***SANAH SINGH.***

FIFTH COUNT
Statement of Offence

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

Particulars of Offence

MUHAMMAD RAHEESH ISOOF *on the 25th day of August 2019 at Nadi in the Western Division murdered* ***SAMARAH SINGH.***

SIXTH COUNT
Statement of Offence

ATTEMPTED MURDER*: Contrary to section 44 and 237 of the Crimes Act 2009.*

Particulars of Offence

MUHAMMAD RAHEESH ISOOF *on the 25th day of August 2019 at Nadi in the Western Division attempted to murder* ***SAMAIRA KUMAR****.'*

[2] After trial, the learned High Court judge had convicted the appellant and sentenced him on 21 January 2022 to mandatory life imprisonment with a minimum serving period of 20 years.

[3] The appellant's appeal against conviction and sentence is timely.

[4] In terms of section 21(1) (a) and (b) 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 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].

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

> ***'Conviction***
>
> ***Ground 1:***
>
> *THAT the Learned Trial Judge erred in law in continuing with the trial despite the fact it was brought to his attention by the Counsel of the appellant that the prosecution has failed to serve photographic and video evidence given to the*

police by the witnesses which may have exonerate the appellant on all the charges against him.

Ground 2:

THAT the Learned Trial Judge erred in law and in fact in failing to adequately and/or sufficiently analyze all the evidence in its totality in convicting the appellant.

Ground 3:

THAT the Learned Trial Judge erred in law and in fact by not giving adequate time and facilities to the appellant to prepare give proper instruction to his Solicitors in his defence and therefore was denied a fair trial.

Ground 4:

THAT the Learned Trial Judge erred in law and in fact in convicting the appellant when the evidence adduced in court does not support the charges laid against the appellant for the offence of multiple Murder and Attempted murder.

The appellant was wrongfully charged for the alleged offences which occurred on the 25th day of August, 2019, however as per the Post Mortem Report and the Death Certificates, all the deceased died on the 26th day of August, 2019, at 11.40am, and as such caused substantial miscarriage of justice.

Ground 5:

THAT the Learned Trial Judge erred in law and in fact in convicting the appellant despite the fact there was no evidence that the appellant fed them with pesticide and neither was there any evidence before the court that the gastric contents has traces of pesticides.

Ground 6:

THAT the Learned Trial Judge erred in law and in fact in stopping the Counsel for the accused to cross-examine witnesses and instead directing to submit those issues and in doing so such conduct obstructed the appellant's Counsel in rendering his professional service to his client, the appellant. In doing so the Learned Trial Judge's conduct lead to an unfair trial and caused a substantial miscarriage of justice.

Ground 7:

THAT the Learned Trial Judge erred in law and in fact by excessively interfering with examination in chief and cross-examining the State witnesses, which led to the appellant not having a fair trial and hence a substantial miscarriage of justice.

THAT the Learned Trial Judge's conduct in assisting the State in the conduct of the trial and filling the gaps of the Prosecution case showed actual bias and/or reasonable apprehension of bias and/or perception of bias that caused substantial miscarriage of justice.

Ground 8:

THAT the Learned Trial Judge erred in law and in fact by excessively interfering with examination in chief and cross-examining the State witnesses, thereby showing bias against the appellant and as such the appellant did not have a fair trial in accordance of Section 15(1) of the Constitution of Fiji.

Ground 9:

THAT the Learned Trial Judge erred in law and in fact in not ruling on an application for Mistral despite hearing and participating in the hearing of such application as a result of which the appellant was denied a fair trial and as such there was a substantial miscarriage of justice.

Ground 10:

THAT the Learned Trial Judge erred in law and in fact in finding that the appellant had a case to answer and failed to give reasons for ruling that there was a case to answer and as such there was a substantial miscarriage of justice.

Ground 11:

THAT the Learned Trial Judge misdirected himself when he considered and relied on hearsay evidence by the State Witnesses and as such there was a substantial miscarriage of justice.

Ground 12:

THAT the Learned Trial Judge erred in law and in fact in admitting the hearsay evidences of the several State Witnesses under the principles of ***res gestae*** *without directing his mind to its exception(s) evidence of which was before the Court.*

Ground 13:

THAT the Learned Trial Judge erred in law and in fact in misdirecting himself of the principles of previous inconsistent statement and reliability and credibility of such evidence by witnesses.

Ground 14:

THAT the Learned Trial Judge erred in law and in fact in not dealing adequately and/or properly and/or sufficiently on circumstantial evidence. The Learned Trial Judge also erred in accepting unproved facts which exonerate the appellant for any offence.

THAT the Learned Trial Judge's findings against the appellant were contrary to circumstantial evidences and in the circumstances his findings were a travesty of justice.

Ground 15:

*THAT the Learned Trial Judge erred in law and in fact in not dealing adequately and/or properly and/or sufficiently on "**Laws as to last person seen theory**" in particular,*

a) every aspects of the circumstances that leaves to the guilt of the appellant should be proved beyond reasonable doubt by the Prosecution;

b) and all the circumstances should cogently depict the guilt of the accused.

*In the appellant's case there were several incongruities and suspicions and the guilt was not established beyond reasonable doubt and due to the Learned Trial Judge inadequately directing himself on the "**Laws of Last Person Rule**" caused a substantial miscarriage of justice.*

Ground 16:

THAT the Learned Trial Judge erred in law and in fact in admitting the DNA report despite the fact the Prosecutions own witnesses contradicted each other.

Alternatively, the Learned Trial Judge erred in law in failing to exercise his discretion judicially, not to admit the said report since the prejudicial value outweighed the probative value of DNA Analysis Report.

Ground 17:

THAT the Learned Trial Judge erred in law and in fact in not dealing adequately and/or directing himself and/or properly and/or sufficiently the DNA Report whereby the appellant's DNA was part of samples comprising DNA from two to three unknown and unidentified persons. It would be impossible for the Prosecution to satisfy that the appellant was the person who caused the death of the deceased persons and as such it raised serious reasonable doubts in the Prosecution Case and caused a substantial miscarriage of justice.

Ground 18:

THAT the Learned Trial Judge erred in law and in fact by not directing himself adequately that the DNA Report Samples were obtained by deception and/or conditionally and as such there has been a substantial miscarriage of justice.

Ground 19:

THAT the Learned Trial Judge erred in law and in fact in not directing himself the unreliable post mortem report which was based on hearsay and not on the scientific findings of the Doctor who conducted the post mortem and as such there has been a miscarriage of justice.

Ground 20:

THAT the Learned Trial Judge erred in law and in fact in not directing himself the possible defence on evidences and as such by his failure there was a substantial miscarriage of justice.

Ground 21:

THAT the Learned Trial Judge erred in law and in fact in not adequately directing that the Prosecution evidence before the Court did not proved beyond reasonable doubt, that the appellant was guilty. There were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the appellant.

Ground 22:

THAT the Learned Trial Judge erred in law and in fact in not directing himself adequately and/or taking into consideration the defence case before finding that the prosecution has established each and every elements of the offence and as such caused a substantial miscarriage of justice.

Ground 23:

THAT the Learned Trial Judge erred in law and in fact in not directing himself the evidence against each count separately against the appellant and as such failure to do so caused substantial miscarriage of justice.

Ground 24:

THAT the Learned Trial Judge erred in law and in fact that after finding that there was no direct evidence to establish what had actually happened at Nausori Highlands or establish or point out what the appellant had done at Nausori Highlands to cause the death of the deceased by poisoning or to establish how and who administered the poison and to establish the identity of the pesticide found in the bodies of the five individuals and thereafter contradicted himself by finding that the Prosecution has proven beyond reasonable doubt that the appellant was guilty of five counts of murder and one count of attempted murder, which caused substantial miscarriage of justice.

Sentence

Ground 25:

(1) THAT the appellant relies on Grounds 1 to 24 stated hereinabove.

(2) THAT the Learned Trial Judge erred in law and in fact in not taking the relevant consideration the time the appellant had spent in custody.

[7] According to the judgment the trial judge found the prosecution to have proved the following facts:

> *116. In conclusion, I find the Prosecution has successfully proven beyond reasonable doubt that the;*
>
> *i) The death of Nirmal Kumar, Usha Devi, Kajal Nileshni, Sanah Singh and Samarah Singh is a crime of murdering them by poisoning,*
>
> *ii) The close and long relationship between the Accused and Nirmal and his family based on respect and care,*
>
> *iii) The Accused had gone to the Gounder Hardware sometime after the 21st of August 2019 but before the 25th of August 2019 and inquired about chemical "Lannate", a highly toxic pesticide.*
>
> *iv) Nirmal and his family, including Usha Devi, Kajal Nileshni, Sanah Singh, Samarah Singh and Samaira Kumar, had gone to Nausori Highlands in the morning of 25th of August 2019 with the Accused to perform a ritual at Nausori Highlands,*
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> *v) The Accused had brought ritual items that were later found at the bottom of the cliff by the Crime Scene Investigators.*
>
> *vi) The Accused was seen with the deceased family at the same remote and isolated location in the Nausori Highlands where the five bodies of the family were found the following morning, that was nearly 24 hours after the accused was seen with them,*
>
> *vii) The Accused had spent at least nearly one and a half an hour at Nausori Highlands with the deceased family,*
>
> *viii) The Accused failed to offer a reasonable explanation as to how and when he parted his company with the deceased family or the circumstances of the transaction which led to the death of these five individuals.*
>
> *ix) The Prosecution has successfully discharged their onus of disproving the explanation offered by the Accused,*
>
> *x) The Accused had not revealed to Ms Tokalau, Mr Parveen Singh and Ms Sangeetha Devi that he took Nirmal and his family to*

Nausori Highlands in his car the previous morning. The Accused's explanation that he, too, was not aware of Nirmal and his family at that point in time is untrue.

xi) The Accused knew that Ms Sangeetha Devi was aware of the fact that he had taken the family to Nausori highland when he told Sgt Vuniwai that he had taken the deceased family to Nausori Highlands,

xii) The Accused looked frightened when Mr Sofeed gave him Nirmal's phone,

xiii) The Accused had lied about how Nirmal's phone got into his car and concealed his trip to Nausori Highlands with the deceased family.

xiv) The Accused had once again opted to approach Sgt Vuniwai, the corrupt police officer as he claimed, to inform about this phone instead of the police officers who were already at Nirmal's place.

xv) The Accused was unaware of the two photographs in Nirmal's phone when it was found in his car.

xvi) The Accused had no option but to inform the Police when the identity of the phone was revealed in front of concerned neighbours,

xvii) The Accused did not want to inform the Police about Nirmal and his family when Ms Tokalau proposed him to do so,

xviii) The Accused responded to Mr Reddy, saying that the child was not killed because she could not talk,

117. If the above stated proven facts, incidents, acts, state of minds and affairs and circumstances are taken together, it will lead to a certain, indisputable and undeniable only inference that it was the Accused who had administered poison (an unidentified pesticide) to Nirmal Kumar, Usha Devi, Kajal Nileshni, Sanah Singh and Samarah Singh on the 25th of August 2019 with the intention to cause their death or was reckless of causing their deaths. Moreover, I find that these above stated proven circumstantial evidence, if taken together, do not lead to any other inferences or hypotheses consistent with the Accused's innocence.

118. Accordingly, I hold that the Prosecution has successfully proven beyond reasonable doubt that the accused had committed these five offences of murder as charged in the information.'

[8] The trial judge had also adverted the appellant's evidence as follows:

> *69. The Prosecution presented evidence to establish that the Accused was present with the deceased family at Nausori Highlands on the morning of the 25th of August 2019. The Accused did not dispute that he went to Nausori Highlands, taking the family in his car. He then dropped them at the location, returned home alone as he was expecting some visitors in the afternoon.*
>
> *70. The Accused, in his evidence, said that he received a missed call from Nirmal on his mobile phone when he returned home from Medisure Pharmacy. As he received the call from Nirmal, the battery of his mobile phone went off. He just left his mobile phone in the car and went to Aerotown, where he met Nirmal and his family in their car. Nirmal had told him to go to the New World Supermarket car park at Votualevu. He then followed Nirmal's car and parked beside his car. Nirmal then loaded boxes and some bottles into his vehicle. They all then boarded into his car and asked him to go. According to the Accused, a few days before the 25th, Nirmal and Kajal came and arranged this trip. However, Nirmal did not disclose any details of this trip, including the destination and the purpose. As planned, the Accused went to Aerotown when he received the missed call from Nirmal.*
>
> *71. Once he drove out of the car park and reached the roundabout, Nirmal had asked him to turn left. Usha Devi then told Nirmal to tell the Accused where they were going instead of telling him to turn right and left. Then only Nirmal said to the Accused that he had to take them to Nausori Highlands. According to the Accused, they left New World Supermarket after 10 am. They reached the destination at the highlands at around 11 am. They then unloaded the box and water gallons. The Accused helped Nirmal to clean the baby who had vomited. He poured water from the red tomato sauce bottle for Nirmal to clean the baby. The Accused then drank some water from the same bottle. While the ladies were sitting under a tree, the Accused and Nirmal went down to slop. Nirmal was taking photos of the area. Once they took the photos of the scenery, they both came up to the car. The Accused rested while in the car as it was very hot, while Nirmal was sitting in the front passenger seat. Nirmal had told him that they were waiting for a person to make a deal. After that, they would come back with the same person. The Accused had to go back as he was expecting some visitors in the afternoon. When the accused was parting his company with Nirmal and his family, he asked Nirmal whether he was sure about the person coming to pick them up because it was a Sunday and no transport was available for them to come back.*
>
> *72. The Accused stated that they left the New World Supermarket car park after 10 am. He called Mr Jithendra Sharma, a taxi driver, to establish that Mr Sharma saw Nirmal and his family around 10 am on the 25th of August*

2019 at the New World supermarket Car park. The accused did not dispute the CCTV footage obtained from the New World Supermarket and only disputed the time of the footage. (vide: Paragraph 12 (iv) of the Amended Admitted Facts).

73. *According to the CCTV footage, Nirmal's car entered and parked at 9.24.04 am. The Accused's car followed soon after and parked at 9.24.14 am. The accused's car left the car park at 9.26 44 am after Nirmal and his family got into it. During that time; a light colour taxi entered the park from the main gate at 9.25.40 am, but it did not stop near the accused's car.*

74. *According to Mr Sharma, he was driving a grey colour taxi and entered the car park from the main gate. He had seen Nirmal was loading stuff. He had spoken a few words to Nirmal and then went away. This evidence of Mr Sharma contradicts the above admission made by the accused in the Amended Admitted Facts. The CCTV footage dose not show any grey colour taxi entering from the main gate and stopped beside Nirmal's car. I accordingly do not accept Mr Sharma's evidence as being truthful.*

75. *In his evidence, the Manager of the supermarket said that the time could be fluctuated by 5 to 10 minutes. The learned counsel for the Defence never questioned or invited the Manager of the Super Market or S.P. Ayiaz Ali, who had gathered the CCTV footage of the New World Supermarket to comment about this time difference.*

76. *The accused's timing of the events in the morning of the 25th is mainly based on the time as shown in the CCTV footage of Medisure Pharmacy. However, SP Ali, in his evidence, specifically stated that the time indicated in the CCTV footage of Medisure Pharmacy was not accurate as the time was 45 minutes ahead of the correct time. The learned counsel for the defence did not question or invite SP Ali to comment about the contrary version brought by the accused in his evidence.*

77. *Sgt Savenaca Siwatibau had conducted a digital forensic examination on the mobile phones of Nirmal, Kajal Nileshni, Sangeetha Devi, the accused and Mr Kupshamy. According to Savenaca, the last two photographs taken from Nirmal's phone were taken at 10.23.33 am. Kajal Nileshni had sent her last message to Mr Kupshamy via Viber, stating that "we are here" at 10.14 am. The first photograph taken from Nirmal's phone was 10.09.58 am. The accused, in his evidence, merely stated the timing of those photographs were wrong. Once again, the learned counsel for the defence did not cross-examine Sgt Savenace regarding the time of those photographs, presenting him an opportunity to comment about the defence's version.*

78. *It is a rule of evidence based on the principle of fairness of the trial that if a party intends to bring a different or contradicting version of the evidence, it is a duty of that party to give an opportunity to the witnesses of the opposing party to make comments on it. This rule was established by* ***Brown v Dunn. (1893) 6 R. 67, H.L)*** *The rule is based on the principle that it is unfair to deny a witness the opportunity of explaining a point that will later be used to invite criticism or disbelief in the evidence. If a party fails to follow this rule, the Court could take into account that the contradictory evidence was not put to the witness and accords it less weight than it may otherwise receive.*

79. *Accordingly, I find the evidence given by the accused stating that he left New World Supermarket after 10 am and reached the destination at the highland after 11 am is not true. Moreover, I find that this evidence has failed to create any reasonable doubt about the prosecution's evidence in relation to the time the accused leaving New World Super Market with deceased family and the time he reached the destination.*

80. *In view of the reasons discussed above, it is safe to make an undeniable and indisputable inference that the accused and the deceased family reached Nausori Highlands before 10.09.58 am. I can safely make a further inference that the accused had returned to Nadi around 12.15 pm to 12.35 pm. These proven facts establish another fact that the accused had spent at least nearly one and a half an hour at Nausori Highlands.*

81. *The Accused, himself, in his evidence, stated that usually, people do not go to the location where the bodies were found. He had been visiting this location since 1977. Mr Sitareki Nagala, the villager who found these dead bodies, stated that no one goes to this place as it is steep and far away from the main road. No one could see the location from the main road. Mr Mohammed Javed, a driver who had been driving along this mountain for the last fourteen years, has not seen anyone going to this location. Evidence of IP Jitoko, Sgt Seteraki, Sgt Bibi and Sgt Anil Kumar confirm that it was tough for a person to go down to this location at the tip of the cliff as the slope is very steep and dangerous. The 3D video confirms the remoteness and the isolated nature of this location at the tip of the cliff.*

82. *Hence, I find that the Prosecution has established beyond reasonable doubt that the Accused was seen with the deceased family at the exact remote and isolated location in the Nausori Highlands where the five bodies of the family were found in the following morning, that was nearly 24 hours after the accused was seen with them.*

83. *As I discussed above, the burden now shifts on the Accused to offer a reasonable explanation of how and when he parted his company with the deceased family or the circumstances of the transaction that led to these five individuals' death. This does not mean the onus of the Prosecution to*

prove the charges against the Accused beyond reasonable doubt has shifted to the Accused. He is still not required to prove his innocence. He is only needed to offer a reasonable explanation. The burden of discharging this onus of the Accused is the evidential burden, which means adducing or pointing to evidence that suggests a reasonable explanation (vide; Section 59 of the Crimes Act). The Prosecution still holds the burden of disproving the reasonable explanation provided by the Accused. If the Court satisfies the explanation offered by the Accused may reasonably be true, although the Court is not convinced that it is true (vide; Abramovitch (1914) 84 L.J.K.B 397), the Accused has successfully discharged his onus of offering an explanation.

84. *The Accused did not dispute that he brought the deceased family to Nausori Highlands in his car but denies the allegation of murdering them, stating that he parted his company without causing any harm to them. Nirmal and Kajal had arranged this trip with the Accused a few days before the 25th of August 2019. The Accused was only asked to come to Aerotown on the morning of the 25th of August 2019. The Accused had gone to Aerotown when he received a missed call from Nirmal. According to the Accused, he was not aware of the details of this trip, including the destination and the purpose. Nirmal told him the destination only after they embarked on their journey to the highlands.*

85. *Considering the nature of the close relationship the Accused had with Nirmal based on respect and care, it is highly improbable that a man in this mature age as of the Accused had blindly followed the request of his best friend without inquiring about the details of the trip. Especially, they were close neighbours; their houses are located within just meters apart. Under these circumstances, I am not in a position to accept or believe that the Accused had agreed to pick them at a distant location, instead of at their home, with certain boxes, items and bottles, and then go to a place which he was not aware of. Hence, I do not find this as a reasonable explanation offered by the Accused.*

86. *The Accused explained that he had just walked down to the steep slope with Nirmal to see the scenery while Nirmal was taking photographs. Having carefully considered and compared the location in the two photographs in which the Accused appeared carrying a bag on his shoulder, with the 3D version of the mountain tendered in evidence, it is clear that he was standing just near the location where the bodies were found. The two photographs that took by Nirmal immediately before the above-said two photographs show the edges and steep drop of the cliff, indicating that they had come down all the way to the edge of the cliff.*

87. *I do not accept the explanation given by the Accused of carrying a bag on his shoulder when he went down to the edge of the cliff. Supposedly, he had taken back the bag from Kajal which she had taken from him a few days*

ago. In that case, he could have easily left it in his car and walked down this steep and dangerous slop conveniently and safely, without taking the trouble of carrying an empty bag as he claimed, on his shoulders.

88. *I have already discussed and found that the Prosecution has proven beyond reasonable doubt that Nirmal and his family came to Nausori Highlands with the Accused on that fateful morning to perform a ritual. Hence, I am satisfied that the Prosecution has successfully discharged their onus of disproving the explanation offered by the Accused (vide; Section 57 (2) of the Crimes Act).*

89. *Having considered the reasons discussed above, it is my considered opinion that the Accused has failed to offer a reasonable explanation as to how and when he parted his company with the deceased family or the circumstances of the transaction which led to the death of these five individuals.*

01st ground of appeal

[9] The appellant's contention is based on alleged non-disclosure of 'photographic and video evidence' to the defense by the prosecution which, according to him, if given would have exonerated the appellant or raised a reasonable doubt in the prosecution case.

[10] This presupposes that the appellant was aware of the alleged non-disclosed material. However, his written submissions has failed to specify them in any detail at all. On the other hand, had he or his trial counsel been aware of them, the same would have been requested before or at least during the trial. There is no mention that such a request was ever made.

[11] Therefore, this court at this stage cannot decide what effect the said non-disclosed material would have had on the outcome of the trial or if indeed there had been such non-disclosure or whether the failure has caused material prejudice to the appellant's defense or resulted in depriving him of a fair trial.

[12] On the other hand the trail judge had dealt with the duty of disclosure in the order dated 19 December 2022 on the recusal application and concluded that the

prosecution had correctly and sufficiently disclosed the statements of those individuals to the defence at the beginning of the proceedings and there had not been any breach of section 290 (1) (b) and (c) of the Criminal Procedure Act and the counsel for the defence had made no application under section 290 (1) of the Criminal Procedure Act seeking an order of the court against the prosecution to disclose those items.

02nd ground of appeal

[13] The appellant's compliant is on the trial judge's alleged failure to analyze the accuracy of timings recorded in video recordings and telephone recordings in the deceased's mobile phone and call logs.

[14] The appellant submits that there was no evidence to show that the time recorded on CCTV were accurate and his version of timings should have been accepted. However, the appellant has not demonstrated any basis to doubt the accuracy of times recorded on CCTV cameras. Neither has he submitted that he challenged their accuracy at the trial.

[15] The appellant challenges his photo on the deceased's mobile phone taken around 9.10am on the basis that DW2 had seen the deceased and his family around 10.00am at Nadi. However, he admits that the defense had not challenged as per ***Browne and Dunn*** rule the prosecution witness who testified to the time where the deceased's phone had captured the appellant's photo in the morning. The appellant has not suggested any rational basis to doubt the photo on the deceased's mobile phone in the morning except DW2's doubtful evidence.

[16] While admitting that the incoming calls recorded on the 01st deceased's mobile phone at 9.18am and 2.25pm had originated from his phone, the appellant submits that he did not take those calls as during that time he was not at home but had left his phone at home. Therefore, he argues that his wife could have initiated the two calls from his phone. However, if his phone was not with him but at home with his wife, she should

have been able to testify to that fact and provided an explanation for the two calls at 9.18am and 2.25pm.

[17] As against the above contentions, the evidence reveals that the appellant had admitted having taken the 01st deceased and his family to Nausori Highlands (where the dead bodies were found) in his rental car on the morning of 25 August 2019 and his DNA among two unidentified DNAs were found on the ritual items from the bottom of the cliff. Camera timings had shown the appellant at the scene of crime at 10.09.58 am and 10.23.33am. He had admitted at the trial that he left Nirmal (01st deceased) and his family alone at a remote location in the Nausori Highlands at 11.40 am. His arguments do not seem to hold much water in the light of the totality of prosecution evidence showing that the appellant was at the crime scene for a substantial period of time sufficient to poison the victims.

03rd ground of appeal

[18] The appellant has submitted that he was not given adequate time and facilities to instruct his trial counsel to prepare his defense thus depriving him of a fair trial. He says that his trial counsel had only 03 days to prepare his defense on over 1000 pages of prosecution disclosures.

[19] The respondent has submitted that the appellant's trial counsel was involved in the case since 2019. I find that the same counsel had conducted the trial from 15 December 2021 to 07 January 2022 during which the *voir dire* inquiry was held on 23 December 2021. I also find that the same counsel had made an application for the trial judge to recuse himself on several grounds none of which include the trial judge not giving him sufficient time to prepare for the trial. On the contrary the order dated 19 December 2022 on the recusal application reveals that the trial judge had even vacated the first two days of the hearing on 13 and 14 of December 2021 allowing the counsel for the defence to have a final consultation with the appellant at the courthouse from 09 am to 4.30 pm and the counsel for the defence had been directed to attend those consultations to be facilitated by the court, with all the disclosures disclosed to him by the prosecution. In the same order the trial judge had stated that

the defence counsel had witness statements for the 'last two years'. In the circumstances, it appears that this complaint is only part of 'scatter gun' approach in drafting grounds of appeal.

04th and 19th grounds of appeal

[20] The appellant argues that the charges in the information are defective in as much as the post-mortem had revealed the date of death as 26 August 2019 whereas the charges have stated that the appellant committed the murders on 25 August 2019.

[21] It should have been clear to the appellant from the inception that the investigation and the prosecution proceeded on the basis that the deceased were last seen alive with the appellant on 25 August 2019 and therefore he was responsible for the deaths though pathologically their deaths may have occurred on 26 August 2019. I do not see the appellant having raised any concern of this matter at any stage of the legal proceedings. Nor had he taken up any objection to the information based on the clinical date of death.

05th ground of appeal

[22] The appellant's argument is based on the evidence of PW50 (principle scientific officer at the Fiji Police Forensic Laboratory) that she could not identify the exact type of pesticide found in the stomachs of the deceased. The appellant submits that there was no evidence that the appellant had fed the deceased with pesticide.

[23] PW50 was, however, clear in her evidence that she found some pesticide residue in the stomachs though she could not give the exact name of the pesticide. The evidence showed that the appellant had gone to the Gounder Hardware sometime after the 21 August 2019 but before the 25 August 2019 and inquired about chemical 'Lannate', a highly toxic pesticide. The case against the appellant was circumstantial and the trial judge concluded that the totality of evidence had led to a certain, indisputable and undeniable only inference that it was the appellant who had administered poison (an unidentified pesticide) to Nirmal Kumar, Usha Devi, Kajal Nileshni, Sanah Singh and

Samarah Singh on the 25 August 2019 with the intention to cause their death or was reckless of causing their deaths. It was completely unnecessary for the prosecution to prove the exact name of the pesticide so administered by the appellant.

06th, 07th and 08th grounds of appeal

[24] The appellant complains of alleged excessive and undue interference by the trial judge in the examination of prosecution witnesses in examination-in-chief and cross-examination thus leading to an unfair trial and bias or perception of bias on the part of the trial judge amounting to a miscarriage of justice. The appellant also adverts to the trial judge having had a discussion with both counsel about his concerns of perjury on the part of Mr Jitendra Sharma (DW2).

[25] The ruling dated 19 January 2022 by the trial judge had dealt with (i) the issue of bias or perception of bias based on alleged intervention/questions asked by him from some of the prosecution witnesses (ii) the discussion between the learned Judge and the counsel for the prosecution and the defence regarding defence witness Mr Jitendra Sharma who were to say that he had seen Kajal and her daughters at the supermarket at 10 am on the 25 August 2019, to clarify whether the appellant was calling Mr Sharma to contradict the appellant's own admission of the CCTV footage of the New World Supermarket and its contents made under Section 135 of the Criminal Procedure Act and (iii) the trial judge having stopped the defence counsel from asking further questions from Sgt Anil Kumar regarding the non-disclosure of certain items.

[26] The ruling is self-explanatory and the trial judge had dealt with adequately on all the issues raised by the appellant under these grounds of appeal.

09th and 10th grounds of appeal

[27] The appellant contends that the trial judge had not ruled on his application for a mistrial and not given any reasons for finding that there was a case to answer.

[28] The appellant has not demonstrated in his written submissions on what grounds the trial judge should have declared a mistrial. In the same ruling dated 19 December 2021 the trial judge had refused the suggestion of a mistrial by trial counsel while also rejecting the application for recusal.

[29] As for reasons for deciding that there was a case to answer, section 231(2) of the Criminal Procedure Act 2009 does not compel the judge as a matter of law to give elaborate reasons before calling for a defense as long as he ***considers*** at the close of the prosecution case that there is evidence the accused committed the offence. As long as the evidence touched on each element of the charged offences, which it in this case did, the trial judge was obliged to find that the appellant had a case to answer. The test for no case to answer is whether there is some evidence on each element of the charged offence and it does not permit the trial judge to carry out any assessment of the credibility or reliability of evidence [**Tamanalevu v State** [2015] FJCA 127; AAU0078.2012 (30 September 2015)]. If a trial judge does that he runs the risk of being accused of having made up his mind already against the accused. In this case, it cannot be reasonably argued that the trial judge was wrong to have called for a defense from the appellant for reasons which were plainly on record for everyone to see by the time the prosecution closed its case.

11th and 12th grounds of appeal

[30] The appellant objects to the evidence of PW6, PW7, PW25, PW29, PW49, PW52 and PW55 as hearsay evidence which should not have been admitted.

[31] The trial judge states that he would not consider the evidence of Bijma Wati (PW7), Daya Ram (PW6) and Sangeeta Devi (PW25) regarding their conversations with Usha Devi (and Kajal) treating them as hearsay and inadmissible. However, the trial judge had stated that the truthfulness of the facts contained in the statements made by Usha Devi and Kajal were admissible under the principle of *res gestae*, which is an exception to the rule against hearsay because they were connected with the facts of the central issue of the case and explained the circumstances and the reasons for the

trip the deceased family made to Nausori Highlands with the appellant thus assisting the Court to comprehend the events that took place on that day properly.

[32] In any event, as the trial judge had stated the appellant had admitted in his evidence that Nirmal and himself arranged the journey a few days before 25 August 2019 though he was not aware of the destination or the purpose of the trip. Moreover, the appellant had admitted that he took Nirmal and his family to Nausori Highlands in his rental car on the morning of 25 August 2019. The trial judge had treated these admissions of the appellant as corroborating the facts contained in the statements made by Usha Devi and Kajal Nileshni to the witnesses. Thus, the alleged evidence challenged by the appellant as being hearsay had in fact become part of the appellant's evidence. The respondent had submitted that in any event the appellant did not challenge the impugned evidence on the basis of being hearsay at the trial but the weight to be attached to them was a matter for the trial judge as the sole trier of facts.

13th ground of appeal

[33] The appellant criticizes the trial judge for having misdirected himself with regard to inconsistencies in the evidence of PW6, PW7 and PW25. However, he has failed to highlight what those inconsistencies were. What he has highlighted about Raya Ram's (01st deceased's father-in-law) evidence on what he was told by his daughter is not an inconsistency but goes to the weight and credibility.

14th, 15th and 24th grounds of appeal

[34] The gist of the appellant's complaint is that the trial judge had not adequately dealt with circumstantial evidence and in particular principles of law relating to the 'last person seen theory'.

[35] The trial judge had dealt with legal parameters of and principles of law governing a case based on circumstantial evidence at length at paragraphs 15-20 of the judgment, then whether the death of 05 persons was a crime at paragraphs 21-43 & 44-47 and

concluded that indeed the deaths were the result of a crime in that they were murders by fatal acute pesticide poisoning. Then the trial judge had engaged in a long analysis and evaluation of the available circumstantial evidence to determine whether the appellant was responsible for the 05 deaths at paragraphs 48 onwards and in the process considered the 'last person seen theory' with relevant legal authorities at paragraph 49-57. Having undertaken a thorough examination of the circumstantial evidence at paragraphs 58 onwards to determine the most vital issue as to whether it was the appellant who had administered the poison either with the intention to cause the death or was reckless as to causing the death. Upon his long and arduous analysis, the judge had concluded at paragraph 82 that the prosecution had established beyond reasonable doubt that the appellant was seen with the deceased family at the exact remote and isolated location in the Nausori Highlands where their bodies were found on the following morning nearly 24 hours after the appellant was seen with them. At that stage the trial judge held that the evidential burden of adducing or pointing to evidence that suggests a reasonable explanation shifted to the appellant. From paragraph 84 onwards the trial judge had searched an answer to that question by analyzing the appellant's evidence and concluded at paragraph 89 that in his considered opinion the appellant had failed to offer a reasonable explanation as to how and when he parted his company with the deceased family or the circumstances of the transaction which led to the death of these five individuals. Thereafter, the trial judge had continued to examine the circumstantial evidence and concluded *inter alia* at paragraph 116 that in any event the prosecution had successfully discharged their onus of disproving the explanation offered by the appellant. Accordingly, the trial judge had finally determined at paragraph 117 that:

> *'If the above stated proven facts, incidents, acts, state of minds and affairs and circumstances are taken together, it will lead to a certain, indisputable and undeniable only inference that it was the Accused who had administered poison (an unidentified pesticide) to Nirmal Kumar, Usha Devi, Kajal Nileshni, Sanah Singh and Samarah Singh on the 25th of August 2019 with the intention to cause their death or was reckless of causing their deaths. Moreover, I find that these above stated proven circumstantial evidence, if taken together, do not lead to any other inferences or hypotheses consistent with the Accused's innocence.'*

[36] The appellant's argument that the mixed DNA found on 05 ritual items points to the presence of two unknown persons (not any of the deceased) at the crime scene (other than him) who may have administered the poison itself, would not affect the trial judge's finding on his criminal liability based on so many other strands of circumstantial evidence in as much as ritual items obviously may have been touched or handled by others at some stage leading up to the death of the deceased. DNA report had, however, firmly put the deceased at the crime scene.

16th, 17th and 18th grounds of appeal

[37] The appellant complains of the admission of the DNA report as he had consented to his sample on the basis that it will not be used to incriminate him but only to assist the investigation. At the same time he also highlights that the DNA report points to the presence of DNA of two unknown persons on the ritual items recovered at the bottom of the cliff where the dead bodies were found and seems to argue that therefore, two other unknown persons may have been present and committed the murders.

[38] In the first place, according to the trial judge the defense had not challenged the chain of custody and integrity of the items found at the bottom of the cliff and the correctness of the DNA report. Thus, the appellant's first argument is devoid of merit. In any event, *voir dire* ruling on 29 December 2021 has dealt with all issues raised by the defense with regard to the admissibility of the DNA report. Secondly, as per the trial judge the one of the main planks of the defense had been based on the DNA report itself in that two other unknown individuals had also contributed to the DNA found on the ritual items who may have been responsible for the deaths of the deceased. The appellant cannot challenge and rely on the DNA at the same time. The presence of DNA of two unknown persons on ritual items does not mean or necessarily leads to the conclusion that two unknown persons were present at the crime scene. The ritual items could have been contaminated with other DNAs at any stage. In fact it was the appellant's evidence that the ritual items were purchased by him at the request of the 01st deceased for prayers. The presence of the appellant's DNA on the ritual items is only another item of circumstantial evidence pointing to his presence at the crime scene which he himself had admitted.

20th and 22nd grounds of appeal

[39] The appellant has not demonstrated in his written submissions in what respects the trial judge had not considered the defense evidence of himself and DW2 Jitendra Sharma. On a plain reading of the judgment, it appears that the trial judge had indeed considered the evidence of the appellant and his witness while discussing many aspects of the case.

21st ground of appeal

[40] The main plank of the appellant's argument seems to be that the prosecution should have proved that the chemical ingested by the deceased was a pesticide.

[41] However, it is clear that the medical finding was that the deaths were due to poisoning and the toxicologist/principal scientific officer had confirmed that gastric contents had been tested positive for pesticides residues which, the appellant argues, is not a conclusive finding but only a presumptive one. The principal scientific officer had clarified that what was used was a presumptive method of testing (quality form of testing) and it could identify possible presence of pesticide residues. This finding had not been challenged by any other expert opinion.

23rd ground of appeal

[42] The appellant argues that the trial judge had failed to consider the evidence on each count separately leading to a miscarriage of justice.

[43] It is apparent that the evidence on all counts relating to murder and one count of attempted murder is based on the same circumstantial evidence. They cannot be logically and legally separated. They either had to stand or fall together.

[44] The appellant had also referred to ***Browne v Dunn*** rule under this ground of appeal but not elaborated in what connection he was making use of it to advance his appeal point.

[45] The respondent has submitted that where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a trial judge to rely on lack of puttage to impugn the credit of an accused. The respondent has examined possible instances where the trial judge had erroneously concluded that he was entitled to accord less weight to the appellant's testimony or rely on lack of puttage to impugn his credibility. The respondent has identified such instances at paragraphs 75-77, 94, 96, 108 and 109 of the judgment and submits that, however, only 05 strands out of 18 instances listed at paragraph 116 are potentially tainted by such flawed reasoning. They are at paragraphs 116 (vii), (x), (xiii), (xvii) and (xviii). The respondent submits that the manner in which the trial judge had dealt with these instances of lack of puttage by defense counsel arguably constitutes an irregularity in the conduct of the trial but it is not reasonably arguable that this irregularity constitutes a miscarriage of justice within section 23(1)(a) of the Court of Appeal Act and could not have affected the result of the trial in the light of overwhelming strength of the circumstantial case.

[46] **Browne v Dunn** [(1893) 6 R 67 at 70, 76 – originally a civil case) rule is a rule of practice that requires the counsel to put the substance of the contradictory evidence to the opposing witness during cross-examination, so that the witness might comment on it. This rule of practice ensures that a witness has the opportunity to explain a matter of substance if the opposing party intends to later contradict or discredit the witness in relation to it. This failure is known as 'lack of puttage' in Australia.

[47] In **HKSAR v CHAN Hing Kai** CACC 65/2017/[2019] HKCA 172 (24 January 2020) Zervos JA in the Court of Appeal in Hong Kong examined the application of ***Browne v Dunn*** rule in criminal cases and said that there are two aspects to this rule namely (i) it is a rule of practice or procedure designed to achieve fairness to witnesses and a fair trial between the parties (ii) it is a rule relating to weight or cogency of evidence and summarized the relevant principles as as follows:

> *1. The rule in Browne v Dunn is a rule of professional practice and of fairness designed to allow witnesses to confront and respond to any proposed challenges to their evidence.*

2. *The rule does not apply to criminal proceedings in the same way or with the same consequences as it does in civil proceedings, due to the accusatorial nature of criminal trials and the different obligations placed on the prosecution and defence.*

3. *The rule admits to flexibility and requires considerable care and circumspection in it application.*

4. *The extent of the obligations that arise under the rule in a particular case will be informed by the nature of the defence case and the forensic context of the trial. A cross-examiner must not only disclose that the evidence of the witness is to be challenged, but also how it is to be challenged.*

5. *Where counsel does not comply with the rule, the trial judge has a discretion as to how to remedy any unfairness that may result and the actions he takes will depend on the circumstances of the case.*

6. *Measures should be employed to avoid having to direct the jury about a breach of the rule, such as, drawing the attention of counsel to the need to put matters to the witness, and permitting a witness to be recalled to be cross-examined and questioned on the matters omitted. Other measures may also be available depending upon the nature of the breach of the rule and the circumstances of the case.*

7. *Where an apparent failure to comply with the rule is followed by judicial comment to the jury, it is important to consider the substance of the comment, the purpose of which may differ depending on the circumstances.*

8. *Where the trial judge considers that it is necessary to direct the jury about the effect that failure to comply with the rule may have on their assessment of the contradictory evidence, the judge should:*

    i. *outline the rule in Browne v Dunn and its purpose;*

    ii. *tell the jury that, under the rule, the witness should have been challenged about the relevant matters, so that he or she had an opportunity to deal with the challenge;*
    iii. *tell the jury that the witness was not challenged, and thus was denied the opportunity to respond to the challenge; and*

    iv. *tell the jury that they have therefore been deprived of the opportunity of hearing his or her evidence in response.*

9. *Only in exceptional cases should the trial judge consider directing the jury that an adverse inference as to credibility may be drawn against the accused in consequence of a breach. It is one thing to remark upon the fact that a witness or a party appears to have been treated unfairly, but it is another thing all together to comment that the evidence of a person*

should be disbelieved, perhaps as a recent invention, because it raises matters that were not put in cross-examination to other witnesses by that person's counsel. Such a direction will only be appropriate where the circumstances surrounding the failure to put the allegation to the witness raise a "prominent hypothesis" that the contradictory evidence is a recent invention or is otherwise a fabrication.

10. Such a direction is fraught with difficulty and should only be given with considerable care and circumspection and must be accompanied with an explanation that other inferences may be drawn on why a party failed to comply with the rule with examples of those inferences.

[48] Trial judges must be careful not to embark on impermissible reasoning founded upon lack of puttage (see **Abourizk v The State** CAV 012 of 2019 (28 April 2022). An examination of an accused person which proceeds by reference to there being but one reason why a mater has not been put to a witness is 'fraught with peril' (per King CJ in **R v Manunta** (1989) 54 SASR 17]. King CJ observed that there may be many explanations for the omission which do not reflect upon the credibility of the accused, for example the defence counsel misunderstanding the accused's instructions or forensic pressure resulting in looseness in framing questions or not advancing certain matters deliberately upon which he had instructions but they were unlikely to assist the defence.

[49] The appeal court should put to one side and disregard those irregularities which plainly could not, either singly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages. A miscarriage is more than an inconsequential or immaterial mistake or irregularity (vide **R v Matenga** [2009] 3 NZLR 145]. An error or irregularity which could not have affected the result of the trial will not amount to a miscarriage of justice and inconsequential error, including an inconsequential error of law, is not a miscarriage (vide **Hoffer v The Queen** [2021] HCA 36 (10 November 2021).

25th ground of appeal (sentence)

[50] The appellant has not substantiated at all his allegation that the trial judge had not counted the time in remand which in any event may be relevant only in relation to the minimum period to be served and not on the mandatory life imprisonment.

[51] Thus, the main plank of the appellant's grievance appears to be on the minimum serving period of 20 years. **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) has very pertinent observations with regard to setting the minimum period. The Court of Appeal said that there is no guidance or guidelines as to what matters should be considered by the sentencing judge in deciding whether to set a minimum term and as to what matters should be considered when determining the length of the minimum term, however the trial judge should give reasons when exercising the discretion not to impose a minimum term and he should also give reasons when setting the length of the minimum term.

[52] The trial judge had given his own reasons for the decision to set a minimum serving period in the sentencing order and the trial judge seems to have relied on the same reasons for fixing the length of the period at 20 years.

> 4. *This crime is a sorrowful tragedy of betrayal and breach of trust. You, being the best and trusted friend of Nirmal Kumar, had taken five lives of your best friend's family, including your best friend, by poisoning with the intention to cause their death or was reckless of causing their deaths. In the same transaction, you had attempted to murder baby Samira Kumar by abandoning her at a remote, isolated location with no food, water or protection. As the learned counsel for the Prosecution stated in the Sentencing Submissions, you have taken the lives of three generations of Nirmal's family.*
>
> 5. *The learned counsel for the Defence submitted in your mitigation submissions that you are 65 years old and suffering from several health issues. As stated by the learned counsel for the Defence, several Prosecution witnesses testified, saying that you are a good person with a good character. You have two previous convictions recorded in 1984 and 1992; that was probably when you were in your youth ages. It appears that you have matured in your life since then with a stable and unblemished character until you are found guilty of this crime.*

What matters should be considered whether to set a minimum period and if so, in deciding the length of that period? Some helpful guidance from UK

[53] 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:

01st category

- *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.*

02nd category

- *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.*

03rd category

- *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.*

04th category

- *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.*

[54] 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.

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

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

(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) Cases that (if not falling within paragraph 2(1)) would normally fall within sub-paragraph (1)(a) include—

(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.

[56] Section 2(1) states that if—

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when the offence was committed, the appropriate starting point is a whole life order.

[57] It is important to note that what is stated under the four categories 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.

[58] Given the facts of the case, it appears to me that the starting point for the appellant could have been taken as whole life as his case falls into the first category and then after adjusting for many aggravating factors and mitigating factors, the minimum serving period of 20 years seems generous.

[59] Accordingly, I see no reasonable prospect of success of the appellant's appeal against conviction on any of the grounds of appeal and find no sentencing error or a real prospect of success in the appellant's sentence appeal on the minimum serving period.

Law on bail pending appeal

[60] The legal position is that the appellants have the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellants have to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, appellants can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon**

John Macartney v. The State Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[61] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[62] If the appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[63] As I have already held there is no reasonable prospect of success in his appellant's against conviction or sentence. Therefore, his appeal cannot reach the higher threshold of 'very high likelihood of success' to succeed in his application for bail pending appeal.

[64] Thus, the appellant's application for bail pending appeal should be refused.

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.
3. Bail pending appeal is refused.

COURT OF APPEAL FIJI

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

Solicitors:

Iqbal Khan Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent