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

CRIMINAL APPEAL NO. AAU 002 OF 2020
[Suva High Court Case Number HAC 352 of 2018]

BETWEEN	**:**	**RAJIV KRISHAN PADYACHI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Mataitoga, AP** **Andrews, JA** **Winter, JA**
Counsel	**:**	**Mr. S Stanton and Mr. V Naidu, on behalf of the Appellant** **Mr. R Kumar, on behalf of the Respondent**
Date of Hearing	**:**	**6 November 2024**
Date of Judgment	**:**	**28 November 2024**

JUDGMENT

Mataitoga, AP

[1] I agree with the reasons and conclusions in Andrews, JA's judgment.

Andrews, JA

Introduction

[2] On 29 November 2019, the appellant was convicted by his Honour Justice Morais in the High Court at Suva on a charge of attempted murder.[1] He was found to have attempted to murder his victim (to whom I shall refer as "Ms A") on 15 September 2018. Pursuant to ss 237 and 44(1) of the Crimes Act 2009 the penalty for attempted murder is the same as that for murder, that is, a mandatory sentence of life imprisonment. The sentencing Judge has a discretion to fix a minimum term to be served by the offender. On 11 December 2019, the appellant was sentenced to life imprisonment and ordered to serve a minimum term of 15 years.[2]

[3] The appellant applied for leave to appeal against conviction and sentence. His application for leave to appeal against conviction was refused, and his application for leave to appeal against sentence was allowed.[3]

Background

[4] The appellant was in a relationship with Ms A. While there was a dispute at trial as to the exact nature of the relationship, Ms A had lent the appellant substantial sums of money, totalling in the order of $80,000. She was anxious to be repaid, and had asked the appellant many times to repay the loans. Despite promises to do so, the appellant had not repaid her, and had asked for more time to pay.

[5] Early in the morning of 15 September 2018, at his insistence, the appellant took Ms A to the Colo-i-Suva pools in a forest reserve near Suva, for a swim. They had been to the pools on two previous occasions, but the appellant had not swum, but just stood on the bank

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1 *State v Padyachi* [2019] FJHC 1113; HAC352.2018 (29 November 2019).
2 *State v Padyachi* [2019] FJHC 1140; HAC352.2018 (11 December 2019) ("the sentencing judgment").
3 *Padyachi v State* [2021] FJCA 227; AAU0002.2020 (23 July 2021).

staring at the water, not talking to Ms A. Ms A was reluctant to go: she could not swim and it was boring with the appellant staring at the water not talking to her. Ms A said the appellant got angry at her but said they would go to the bank afterwards at 10.00 am. They arrived at the carpark for the pools before the track to the pools opened, but the appellant got the forest guard to open the gate. They drove to the carpark then walked to the lower pool. The appellant stood by the bank of the pool and asked Ms A to stand beside him. She refused as it was drizzling and she was scared of the pool. Ms A said that the appellant knew she could not swim.

[6] The appellant then walked to the other side of the pool, where there are steps, and sat on the step closest to the water. He called Ms A to come and sit beside him, assuring her that she was safe with him. After some conversation on the step, the appellant stood up, pulled her right hand to be in front of him, then pushed her into the water. She landed about 1 ½ to 2 metres away from the bank. She went under the water then managed to come up and get her head above water. She got herself near to the bank and asked the appellant to pull her out but he said nothing and kept staring at her.

[7] Ms A then realised that the appellant did not intend to help her and she panicked. She struggled to reach the bank, but before she could reach it the appellant jumped into the pool, took hold of her hair, dragged her to the centre of the pool, then left her there. He went about 2 metres away and was watching her while she struggled to keep her head above water. After a while she managed to keep her head above water, but the appellant came up to her and tried to push her under the water. She fought with the appellant and grabbed hold of his shirt and screamed for help. The appellant then held her hair and covered her mouth with his hand, and pushed her back into the water. He tried to keep Ms A under the water by using his feet to thump her back and neck area.

[8] Ms A's cries for help were heard by members of a Police boxing team who had decided to go to the pools after a training exercise. When they heard a woman's cries they ran to the pool to assist. They first saw the appellant who appeared to be just standing there, then he called for help (although he did not appear to them to need help). Then they saw Ms A's

head coming up and going down near the appellant. They rescued Ms A, and called for Police assistance.

[9] At trial, the appellant admitted that he had pushed Ms A into the pool, but said he had done so to take the lead, then followed her into the pool. He denied having tried to kill Ms A by drowning her, and claimed that he was trying to save her when the boxing team arrived. The assessors were unanimous in finding the appellant guilty of attempted murder, and the trial Judge agreed with them and convicted the appellant of attempted murder.

The sentencing judgment

[10] Having referred to the background facts, and the discretion to fix a minimum term, the High Court Judge decided to set a minimum term. He noted that he was required to consider the level of the appellant's culpability, the level of harm inflicted, and the presence of any aggravating and mitigating factors.[4] He set out his consideration of these matters as follows:

> *The act was pre-planned and the culpability was high. The level of harm was moderate as for the Victim Impact Statement.*[5] *The relationship between the [appellant] and [Ms A] falls within the ambit of the Domestic Violence Act of 2009. Breach of trust committed by the [appellant] is an aggravating factor.*
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> *The [appellant] was only 28 years at the time of the incident. He bears a clean character up to then. Submitted character certificates substantiate the same. The learned counsel submits that the [appellant] is remorseful. The [appellant] has paid 50% of the money borrowed. He has been in remand for a period of about 5 weeks altogether.*

[11] The High Court Judge then set the minimum term to be served by the appellant, before he could be considered for pardon, at 15 years.

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4 Referring to *State v Fuata* [2019] FJHC 1038; HAC249.2019 (31 October 2019).

5 It was common ground at the appeal hearing that there was no Victim Impact Statement in the High Court Record. Counsel were not able to inform the Court whether a statement was provided to the High Court.

Appeal grounds

[12] The crux of the appeal against sentence was that the minimum term imposed was, in the circumstances, too severe: that the imposition of a minimum term of 15 years was overwhelmingly harsh, unjust, and severe. It was also contended (in the appellant's application for leave to appeal) that the High Court Judge erred in imposing a sentence of life imprisonment. As recorded earlier, s 44(1) of the Crimes Act provides that the penalty on conviction for an attempt to commit an offence is the penalty that applies if the offence attempted had been committed – in the present case, a mandatory sentence of life imprisonment.

[13] Therefore, in this appeal this Court is required to consider only the minimum term imposed by the High Court Judge, pursuant to the discretion given in s 237.

Appeal submissions

[14] Mr Stanton submitted for the appellant that the High Court Judge had given no indication as to how he arrived at the minimum term of 15 years. He referred to the minimum terms fixed in other cases of attempted murder,[6] and submitted that the 15-year minimum term in the present case was in contrast to other minimum terms, which were far more lenient. He submitted that it would be appropriate for this Court to issue a guideline judgment as to what matters should be considered by a trial Judge in deciding whether to fix a minimum term, and what matters should be considered when determining the length of a minimum term.

[15] Mr Stanton submitted that the appellant should re-sentenced with regard to the guidelines, with a lower minimum term being fixed.

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6 *State v Ledua* [2004] FLR 286; *State v Prasad* [2016] FJHC 96; HAC80.2014 (15 February 2016)*; Tagiteci v State* [2013] FJCA 27; AAU075.2010 (20 March 2013).

[16] Mr Kumar, on behalf of the State, accepted that there appeared to be some merit in the appellant's appeal against sentence, as the minimum term of 15 years was at the time (and remains) one of the highest minimum terms imposed for attempted murder. However, Mr Kumar submitted, there is no need for this Court to give a guideline judgment, given that the Full Court of the Court of Appeal had issued a guideline judgment on 30 May 2024 in *Vuniwai v State*, as to the setting of minimum terms for murder and attempted murder.[7]

[17] Mr Kumar invited this Court to re-sentence the appellant, should it decide that re-sentencing is required. He further submitted that it would also be open to this Court to find that in the appellant's case, a minimum term of 15 years imprisonment was not harsh or excessive, but a just and deterrent punishment.

Discussion

[18] The High Court Judge recorded that he had not been invited to not fix a minimum term. He further recorded that it was the practice of the High Court to fix a minimum term and the exception of not fixing a minimum term is to be exercised in only extremely serious cases, bearing hardly any mitigatory circumstances. It was not suggested on appeal that this Court should take a different approach.

[19] The issue for this Court is whether the High Court Judge erred in the exercise of his discretion as to the length of the minimum term to be imposed, and whether he gave sufficient reasons for concluding that a minimum term of 15 years was appropriate.

[20] The High Court Judge's consideration, set out in paragraph [10], above, did not extend beyond listing the factors relating to the offending, aggravating factors, and personal mitigating factors that the Judge took into account in fixing the minimum term. While the sentencing judgment is transparent as to the identification of those factors, the Judge did not provide any analysis of the weight given to any particular factor, or the basis on which

[7] *Vuniwai v State* [2024] FJCA 100; AAU176.2019 (30 May 2024).

he fixed what was, at that time, the highest minimum term that had been imposed. I conclude that this was an error of principle in sentencing. As discussed below, I have also concluded that the High Court Judge may have erred in finding that the relationship between Ms A and the appellant fell within the ambit of the Domestic Violence Act 2009.

[21] I further conclude that the High Court Judge erred in principle, in fixing a minimum term that was harsh and excessive.

[22] It is therefore necessary to carry out the exercise of re-sentencing the appellant for the offence of which he was convicted: the attempted murder of Ms A.

[23] In *Vuniwai*, the Full Court gave extensive consideration the matters to be considered when fixing a minimum term following conviction on charges of murder and attempted murder, drawing "fundamental guidance" from the statement of the purposes for which sentencing may be imposed, as set out in s 4 of the Sentencing and Penalties Act 2009. The Full Court set out a five-step process which may be summarised as follows:[8]

[a] Determining and taking into account the seriousness of the offending;

[b] Taking into account any aggravating or mitigating factors;

[c] Taking into account a guilty plea (if entered);

[d] Taking into account any time spent on remand; and

[e] Considering whether the outcome of the above process followed is the right sentence.[9]

8 See *Vuniwai*, at [91] – [121].
9 See *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607, at [73].

[24] The Full Court set out a Table of "Categories of Seriousness" and a (non-exhaustive) list of factors that be considered in determining the seriousness of a murder.

[25] In respect of attempted murder, the Full Court said:[10]

> *When setting a minimum term in attempted murder cases, several specific factors come into play in addition to those considered for murder cases as already set out above. The judges need to follow the same methodology for attempted murder as elaborated above for murder. The same principles relating to the decision on the imposition of a minimum term and if so, the length of the minimum term as applicable to murder would apply to attempted murder as well. While many considerations overlap, such as culpability, harm, and aggravating/mitigating factors, there are unique aspects relevant to the nature of attempted murder.*

[26] Thus, in addition to the factors outlined for murder, the following are relevant to the minimum terms for attempted murder:[11]

[a] Degree of harm intended vs actual harm caused;

[b] Likelihood of death;

[c] Intervention and prevention (that is, the circumstances that prevented the completion of the murder);

[d] Premeditation and planning;

[e] Use if deadly weapons;

[f] Persistence and effort;

[g] Victim vulnerability;

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10 *Vuniwai*, at [124].
11 Ibid.

[h] Impact on the victim; and

[i] Offender's background and intentions.

[27] The Full Court's judgment in *Vuniwai* includes, as Appendix C, a Table of 22 sentences for attempted murder between 2015 and 2024. Each entry includes a brief summary of the relevant facts. A minimum term was imposed in each case. The final minimum terms ranged from 7 years to 15 years. I turn to consider the relevant factors in the case before us.

Seriousness of the offending

[28] Attempted murder is, by its nature, a serious offence. That is reflected in the fact that a sentence of life imprisonment is mandatory. However it is apparent from the facts of the present case, and the factors listed by the Full Court in *Vuniwai* (which include the murder of a child or a judicial or law enforcement officer, a murder for the purpose of advancing one of a number of specified purposes, a murder where the accused has a previous conviction for murder, or is convicted on more than one count of murder, and a murder committed with extreme brutality, cruelty or depravity) that it does not fit within the "extremely high" category of seriousness.

[29] One of the factors which may point to the "high" category of seriousness of murder (indeed the only factor listed by the Full Court for identifying "high" seriousness" that could apply in this case) is if the murder was "committed in domestic-violence context". Domestic violence is defined in s 3(1) of the Domestic Violence Act 2009 as follows:

> **"***Domestic violence" in relation to any person means violence against that person ("the victim") committed, directed or undertaken by a person ("the perpetrator") with whom the victim is, or has been, in a family or domestic relationship.*

[30] As noted earlier, there was a dispute at trial as to whether there was a "domestic" relationship between Ms A and the appellant. The appellant denied that the relationship

was any more than friendship, within which Ms A had lent him money. Although Ms A's evidence was that she was in love with the appellant and that he had told her that he had fallen in love with her, the appellant contended that he was in a relationship with another woman. The assessors' conclusion that the appellant was guilty of attempted murder was not dependent on their having found that Ms A and the appellant were in a "domestic" relationship. In the circumstances, the appellant's attempt to murder Ms A can be seen as being not in the context of "domestic violence", but rather in the context of Ms A's (reasonable) insistence that he should repay her the money he owed her and his inability to do so.

[31] For the above reasons, the appellant's offending falls within the "low" category of seriousness, defined by the Full Court as being "cases in which, in the Judge's opinion, the seriousness does not fall within the "extremely high" or "high" categories. It must, however, be borne in mind that attempted murder is a serious offence.

Aggravating and mitigating factors

[32] The second step identified in *Vuniwai* is to take into account aggravating and mitigating factors. As set out above, the High Court Judge referred to as aggravating factors the attempt being pre-planned, the level of harm as being moderate, the offending being within the ambit of the Domestic Violence Act 2009, and there being a breach of trust.

[33] With the exception of the reference to the Domestic Violence Act, these are all factors that were present in this case. The appellant's pre-planning can be inferred from the previous visits to the pools – not to swim but to look at the water – and his insistence they go to the pools early in the morning of 15 September, on the promise of going to the bank afterwards. The "moderate" level of harm can be inferred from the fact that (having been rescued by the Police boxing team) the appellant did not suffer any lasting physical injury. A medical report prepared on the day of the attempted murder noted that Ms A was in pain and obviously distressed, and disclosed injuries to her legs, chest and back, which were

consistent with her having been hit with "a blunt object applied with some force", but also recorded a "good" prognosis and that "no major injuries [were] sustained".[12]

[34] A breach of trust was clear: Ms A trusted the appellant to the extent of lending him a large amount of money, and going with him to the Colo-i-Suva pools early in the morning (on the promise of a later visit to the bank) sitting beside him on the lowest step, close to the water, when she was afraid of the pools and could not swim. Mr Stanton submitted for the appellant that there was a "lack of victim vulnerability", but the contrary is shown by Ms A's evidence (accepted by the assessors and the High Court Judge) that she could not swim. Ms A was vulnerable to drowning when being pushed into a deep pool, and held under water.

[35] With reference to the ten further factors that may be taken into account as aggravating or mitigating factors set out in paragraph [26], above, I further observe as set out below.

[36] The High Court Judge found that the appellant intended Ms A to die. However, as disclosed in the medical report, the injuries she sustained were not "major". Further, no "deadly weapons" were used, and there was no additional violence towards Ms A, beyond the acts of pushing her into the water, and holding her under water. The use of weapons, and the infliction of additional violence, is present in many of the cases listed where minimum terms in the order of 15 years have been imposed.

[37] Mr Stanton submitted that the "likelihood of death" was "mercifully remote". This is not, however, a factor that counts in the appellant's favour when fixing the minimum term. Ms A's evidence was that she believed she was going to die, she was mentally preparing for death: the appellant was keeping her under water, she had lost most of her energy to keep on fighting the appellant, and lost all her hope and was praying to Lord Shiva. It can reasonably be inferred that there is a high likelihood that had the Police boxing team not

[12] Fiji Police Medical Examination Form, 15 September 2018, (High Court Record, at 206).

heard Ms A's cries and come to the pools, Ms A would have drowned. It was that timely intervention that saved Ms A's life, not any action or intention on the part of the appellant.

[38] Mr Stanton also submitted that the appellant's action in pushing Ms A into the water "was done in a moment of anger". I do not accept that submission. The appellant's pre-planning (referred to above) negates the possibility that his pushing Ms A into the water was a spontaneous act (and thus leading towards a lower culpability). Furthermore, the evidence that the appellant pushed Ms A to the middle of the pool, and that he held her under water, points to the persistence of his efforts to cause her death.

[39] Although the High Court Judge referred to a Victim Impact Statement in the sentencing judgment, there was no copy of it in the High Court Record and, other than to mention the Statement, the Judge did not refer to or recite any part of it. Counsel at the appeal hearing were not able to advise the Court as to the contents of the Statement. Accordingly, there is no basis upon which we could regard anything said to have been recorded in a Victim Impact Statement as having any impact on the minimum term.

[40] The High Court Judge was clearly aware of the appellant's relatively young age (28), and the fact that he had no previous convictions. He also referred to defence counsel's submission that the appellant was remorseful, and that he had paid back 50 percent of the money he owed the appellant.

[41] In addition to that, Mr Stanton produced at the appeal hearing a reference letter from the Officer in Charge of the Custodial Facility where the appellant appears to have been held since his sentence. The author speaks of the appellant having "demonstrated qualities of kindness, integrity, and responsibility" and that he "has shown a genuine concern for the welfare of others". The author says that the appellant has "shown deep remorse for his mistakes and has taken proactive steps to address the underlying issues through consistent participation in rehabilitative programmes", and concluded by saying that the appellant had made considerable progress. This document is not formally before the Court, but I take note of the very encouraging comments regarding the appellant.

[42] Having reviewed the brief summaries of the facts of the cases listed in Appendix 3 of *Vuniwai*, it is apparent that while the appellant's attempt to murder Ms A by drowning her is clearly a serious offence, it was not accompanied by extreme violence, such as was described in *Monish Nischal Prasad v State*,[13] where the offender lay in wait for his former girlfriend at a bus stand and attempted to kill her by stabbing her stomach three times, and stabbing her neck twice in a frenzied attack before intervention by two civilians and two police officers (15 years minimum term), or *Sachindra Nand Sharma v State*,[14] where the offender stabbed the victim (who had broken off their romantic relationship) in her chest and thighs several times while she was asleep, then doused her home with kerosene and benzene and set it ablaze (14 years minimum term).

[43] I conclude that the 15 year minimum term imposed by the High Court Judge cannot be justified. In light of the reasoning set out above, I have concluded that the appropriate starting point for determining the minimum term for the appellant's offending is 8 years. I would then add 3 years to take account of the aggravating factors set out at paragraphs [33] to [38], leading to an adjusted starting point of 11 years' imprisonment. I would then decrease that by one year to recognise the appellant's age, previous clean record, and promote his rehabilitation. That results in a final minimum term of 10 years imprisonment.

[44] Finally, in accordance with the advice in *Hessell*,[15] I have concluded that, in the overall circumstances of the case, a minimum term of ten years imprisonment is the proper outcome of the appellant's sentencing.

Winter, JA

[45] I agree with the judgment of Andrews, JA.

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13 *Monish Nischal Prasad v State* [2022] FJCA 145; AAU48.2020 (1 December 2022).

14 *Sachindra Nand Sharma v State* [2015] NZCA 178; AAU48.2011 (3 December 2015) and [2016] FJSC 31; CAV0001.2016 (26 August 2016).

15 Footnote 9, above.

ORDERS

(1) The minimum term of imprisonment of 15 years imposed in the High Court is quashed.

(2) The appellant is ordered to serve a minimum term of imprisonment of ten years (as from the date of the original sentence) before being eligible to be considered for pardon.

Hon. Mr. Justice Isikeli Mataitoga
ACTING PRESIDENT COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Mr. Justice Gerard Winter
JUSTICE OF APPEAL