IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Suva

CRIMINAL APPEAL AAU 0019 OF 2009
[High Court Criminal Case No: HAC 139J of 2007S]

BETWEEN **ILAISA SOUSOU CAVA**

Appellant

AND **THE STATE**

Respondent

Coram **Mataitoga, AP**
Clark, JA
Winter, JA

Counsel **Appellant in Person**
Ms. S. Shameem for the Respondent

Date of Hearing : **4th November 2024**

Date of Judgment : **28th November 2024**

JUDGMENT

[1] After his trial at Suva on 26 November 2008 the appellant, and his co-accused Mr. Nute, were found guilty and convicted. The appellant was sentenced to life imprisonment for murder with a minimum term of 16 years and concurrently 7 months for the unlawful use of a motor vehicle charge[1]. He filed a late appeal against both conviction and sentence on the 20 July 2009. This was refused by a single Judge but renewed before the full court.

[2] The Court of Appeal in a unanimous decision[2] on the 6 December 2013 dismissed his conviction appeal. However, as the sole ground for the sentence appeal was abandoned by counsel, before the hearing in his written submissions, the court, having nothing to engage with, simply recorded that fact at paragraph 30 and made no further order.

[3] The appellant thereafter filed a petition to appeal his conviction in the Supreme Court. That was dismissed on 23rd April 2015[3].

[4] More than 5 years later on 28 October 2020, the appellant filed a petition for leave to the Supreme Court wanting to appeal his sentence. That application was dismissed on the basis that as the appellant abandoned his appeal in the Court of Appeal there was no judgement of that court for the Supreme Court to determine.[4]

[5] However, the then Chief Justice advised the appellant that he could seek enlargement of time to appeal his sentence in the Court of Appeal[5]. Consequentially, some 13 years 4 months and 3 weeks late the appellant filed this leave to appeal against sentence in the Court of Appeal. A single Judge of Appeal granted leave in the absence of the full record, because of concerns:

> *"…as to whether the 'abandonment' of the sentence appeal by the appellant's counsel is valid in law and if not, whether his sentence appeal is still pending, and undecided are questions of law, and the appellant should be allowed extension of time to appeal against sentence to argue these matters fully before the full court.[6]"*

[1] *State v Nute* - Sentence [2008] FJHC 327; HAC139S.2007S (26 November 2008). Nute was the co-accused.
[2] *Nute v State* [2013] FJCA 134; AAU0110.2008; 0019.2009 (6 December 2013)
[3] *Cava v State* [2015] FJSC 3; CA0028.2014 (23 April 2015)
[4] *Cava v State* [2022] FJSC 1: CAV 0028 of 2014 (13 January 2022) at paras5-10
[5] Ibid at para 10
[6] See leave ruling(27 June 2023) at para16

[6] The State adopting a most generous view, in the light of such a lengthy delay, consents to leave and our reconsideration of the sentence. That is a responsible concession in circumstances where there are obvious errors in the earlier full Court of Appeal proceedings: a notice for abandonment of the sentence appeal under rule 39 of the Court of Appeal rules was not filed, the court did not warn the appellant about the consequences of any abandonment decision[7], and there is no record of the full court considering any abandonment decision and finally no order of dismissal of the sentence appeal. For these practical reasons I find the sentence appeal remains undetermined by the full bench and so leave being granted that sentence appeal will now be considered.

[7] I commence by briefly summarising the facts, then rehearse the well-known legal principles to determine if a sentence is manifestly excessive before discussing and then using the recent *Vuniwai* guideline judgement to aid analysis of this sentence appeal in context.[8]

The facts

[8] At Veisari, there is a wooden bridge over a stream. It is called the Bamboo. Although the men from Kadavu tie their boats up there it is a distance from the local village and cannot be easily seen. A young taxi driver, in the early hours of the morning was asked to drive the accused near to that bridge where Mr Nute and Mr Cava planned to assault and rob him. The vulnerable driver was repeatedly punched in the face and body, dragged some 27 metres over gravel ground had a rope tied around his neck, was then strangled and finally hung by the neck at the bridge. The State case was strong. The defence case was alibi. The third accused who partly described these events was acquitted of the murder.[9]

[7] *Masirewa v State* [2010] FJSC 5; CAV 14 of 2008 (17 August 2010)
[8] Vuniwai v State [2024] FJCA 100; AAU176.2019 (30 May 2024)
[9] See record pages 823 -862

What is a manifestly excessive sentence.

[9] Whether a sentence can be said to be manifestly excessive turns on the maximum sentence prescribed by law for the offence; the level of sentencing customarily observed with respect to that offence; the place which the conduct in question assumes on the scale of seriousness of offences of that type; and the personal circumstances of the offender, to the extent that they are relevant with respect to the particular kind of offending.

[10] An appeal court is not entitled to reconsider the matter afresh or substitute its own view for that of the sentencing judge. Instead, the appeal court should only intervene if the sentencing court had fallen into error. If there has been an error of principle, the appeal court can undertake the sentencing exercise afresh. A wide range of errors or irregularities may justify intervention by the appeal court. Accepted grounds generally include:

(a) the sentence was manifestly excessive or lenient.

(b) the sentence was inappropriate in a particular case.

(c) the sentence involved an error of law or principle (e.g., failing to apply or wrongly applying a statutory factor, or taking into account an irrelevant consideration).

(d) relevant facts before the sentencing court were incorrect or incorrectly assessed.

(e) there was a marked disparity with the sentence given to a co-offender that would lead a reasonable, independent observer to think that something had gone wrong with the administration of justice.

(f) facts that existed at the time of sentence but were not before the sentencing court indicate that any of (a)–(e) apply.

(g) the court had no jurisdiction to sentence the offender.

[11] The essence of this appeal against sentence is that the trial Judge failed to give proper reasons when fixing the minimum term to be served by the offender and set an excessive 16 years when imposing a minimum term. The appellant primarily submits as his role was less than that of the co-accused, Mr Nute, he therefore deserves a lesser sentence.

[12] For completeness only I note the appellant, in a thinly veiled attempt to resurrect his conviction appeal, endeavoured to lately file '*fresh evidence'* that included speculative hearsay statements possibly about similar offending at possibly the same time as this murder. The rules of procedure were not followed. The conviction appeal has long since been considered and rejected. In any event the information lacked relevance to his appeal on sentence which is the only matter for this court's consideration.

Minimum Term for murder

[13] Section 237 of the Crimes Act provides the only penalty for murder is a *mandatory* sentence of imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered. As the life sentence is mandatory this court is only required to consider the minimum term imposed. In a recent decision the full court, by way of a thorough comparison with other jurisdictions, delivered a guideline judgement for setting minimum terms of imprisonment for murder and attempted murder.[10]

[14] The prime justification and function of any guideline judgment is to promote consistency in sentencing levels nationwide. As wisely observed in *Vuniwai*[11] like cases should be treated in like manner, similar offenders should receive similar sentences.

[15] Consistency is not of course an absolute and sentencing is still an evaluative exercise. The guideline judgments are 'guidelines' and must not be applied in a mechanistic way. The categories of seriousness themselves typically allow an overlap at the margins. Sentencing outside the categories is not forbidden, although it must be justified.[12] I will not rehearse the entire *Vuniwai* judgement I completely agree with it. I would merely quote liberally from the decision. Generally, a two-step approach is best. The first step is to find the degree of seriousness of the offence as between the classifications described in the judgement:

[10] *Vuniwai* see note 8
[11] *Vuniwai* see note 8 at [128]
[12] *Vuniwai* see note 8 above at [128] and see [54] in *State v Chand* [2023] FJCA 252; AAU75.2019 (29 November 2023).

Extremely High

1. *The murder of two or more persons, where each murder involves a substantial degree of premeditation or planning or the abduction or kidnapping of the victim, or sexual or sadistic conduct.*
2. *The murder of a child if involving the abduction of the child or sexual or sadistic motivation.*
3. *The murder of a judicial officer, court officer, police officer, prison/correctional officer, any other law enforcement officer, civil servant, security guard/officer or any other worker (health, teaching etc.) exercising public or community functions during his or her duty.*
4. *A murder done for the purpose of advancing a political, religious, racial, or ideological cause or terrorist act or in furtherance of a coup (military or otherwise) involving overthrowing a democratically elected government or involving ethnic cleansing or during ethnic riots or killing of a political figure for political ends.*
5. *A murder by an offender previously convicted of murder or the offender is convicted of two or more counts of murder whether or not arising from the same transaction.*
6. *A murder committed with extreme brutality, cruelty, depravity or callousness or cold-blooded execution.*
7. *A murder committed in any other exceptional circumstance*

High

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

Low

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

[16] The court should then identify and consider the effect of any aggravating or mitigating factors of the offence, as distinct from the offender, to the extent that it has not allowed for them in its choice of the degree of seriousness of the offence. In this exercise, double counting must be avoided. The weight to be given to those factors is obviously a matter for the judgment of the sentencing court.

[17] Aggravating factors, additional to those within the Extremely High, High, and Low categories, that may be relevant to murder include:

(a) Significant degree of planning or premeditation.

(b) The fact that the victim was particularly vulnerable because of age, health, or any other disability.

(c) The fact that the offender had repeatedly or continuously engaged in behaviour towards the victim that was controlling or coercive and at the time of the behaviour, the offender and the victim were personally connected.

(d) Mental or physical suffering such as torture inflicted on the victim before death.

(e) The abuse of a position of trust.

(f) The use of duress or threats against another person to facilitate the commission of the offence.

(g) The fact that victim was providing a public service (such as taxi driver) or performing a public duty.

(h) The use of sustained and excessive violence towards the victim.

(i) Concealment, destruction of the murder weapon or other means used in murder or concealment, destruction, or dismemberment of the body.

(j) Murder committed whilst on bail.

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

[18] There should then be consideration of mitigating factors for the offence of murder such as:

(a) An intention to cause serious bodily harm rather than to kill.

(b) Lack of premeditation.

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

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

(e) A belief by the offender that the murder was an act of mercy.

[19] At the conclusion of this analysis an aggravated total minimum term for the offence will then be established. Thereafter the second step commences where the court must consider matters about the offender that might add to or deduct from that aggravated minimum term. Factors relevant to the offender might include:

(a) Previous relevant convictions

(b) The fact that the offender suffered from any mental disorder or mental disability which (although not falling within mental impairment under section 28(1) or diminished responsibility under section 243 of the Crimes Act) lowered the offender's degree of culpability.

(c) Early guilty plea and or cooperation with the police

(d) The age of the offender

(e) Health and life expectancy

(f) Humanitarian grounds

[20] *Vuniwai* then includes a table of sentences that might act as a useful cross check for a sentencing court to aid a comparison of alike sentences for similar offending. I now apply *Vuniwai.*

Discussion

Parity

[21] The co-accused's appeal against sentence was dismissed by the Supreme Court stating the aggravating circumstances of the offending make this a heinous crime that calls for

deterrent punishment and the minimum term of 16 years imprisonment, before applying for parole on the count of murder, cannot be said to be excessive[13].

[22] Parity in sentencing is the principle that co-offenders should, all things being equal, receive the same penalty. The principle of parity demands that there be no disparity between the sentences of co-offenders so as to give rise to a justifiable sense of grievance. It demands *"the treatment of like cases alike, and different cases differently*"[14].

[23] There is simply no merit in the submission that the appellant played a lesser role in the murder than his co-accused and so deserves a lesser minimum term of imprisonment than his co-accused for the same murder. The trial was prosecuted upon the clear basis of a joint enterprise between these two offenders. Their prime defence of '*alibi'* was rejected by the assessor's opinion. Implicit in that opinion and reflected not only in the verdict, sentence and various appeals is that these two co-offenders should receive the same penalty for this murder subject only to their personal aggravating or mitigating circumstances.

Seriousness of offending

[24] This murder, of the taxi driver was brutal and callous. Although not strictly abducted the taxi driver was nonetheless forced to dive a long way to a remote area where hidden from the public gaze he could be robbed. The taxi driver was providing a public service, he was entrapped punched, dragged some distance over gravel ground, had a rope tied around his neck and then hung. The pathologist reported signs of his struggles to loosen that knot around his neck and scrape marks on his buttock and back consistent with reports of his torture before being dispatched at the end of a hanging rope off Veisari bridge by two offenders. Truly a dreadful and cruel crime, as described by the trial Judge. For these reasons the appellant's offending falls at the upper end of a '*high' Vuniwai* classification of seriousness.

[13] *Nute v State* [2014] FJSC 10; CAV0004.2014 (19 August 2014)] at para 28
[14] *Green v The Queen* (2011) 244 CLR 462, at [28].

Aggravating circumstances of the offence

[27] The aggravating circumstances include premeditation, gratuitous sustained and excessive violence. The murder must have caused substantial emotional harm to the deceased's family.

Aggravating and mitigating circumstances of the offender

[28] At his sentencing the trial judge noted the appellant had 22 previous convictions some of which were offences of violence. The Judge recorded both offenders were young men with young family. Given their relative youth the judge reduced the deserved minimum term of 17-18 years to 16 years. There is no other mitigation of either the offence or the offender.

Vuniwai case comparison

[29] Having reviewed the brief case summaries from the Vuniwai appendix, unsurprisingly there is little, as yet, by way of direct comparison to make an adequate cross check. Undoubtedly that will change over time as Vuniwai is deployed in more sentencing and appeal decisions. However, by analogy the cases that start out as robbery and end up as murder bare some comparison.

[30] In *Suliasi Nasara v State*[15] the Appellant, one night in Lautoka, bludgeoned to death his hired van driver with a wheel spanner before making off with the hired van. He was convicted and sentenced after trial to a concurrent 10 years 09 months imprisonment for aggravated robbery and mandatory life imprisonment for murder, with a minimum term of 18 years. This was upheld on appeal.

[31] *Viliame Ratubukete*[16] v State the Appellant, during the early hours in Labasa, had bludgeoned to death a 33-year-old taxi driver with a piece of timber and had kicked and

[15] *Suliasi Nasara v State* [2023] FJCA 64; AAU 36 of 2018 (25 May 2023)
[16] *Viliame Ratubukete v State* [2023] FJCA 156; AAU127.2020 (15 August 2023)

stomped his face with his safety (steel tipped) boots before stealing the deceased's taxi, mobile phone and wallet. Convicted and sentenced after trial to a concurrent 01 year for theft alongside mandatory life imprisonment for murder, a minimum term of 25 years was upheld on appeal.

[32] The empirical data in *Vuniwai* extracted from extensive summaries of murder sentencings suggests that for the majority of cases of murder in Fiji, within the "*high*" category starting points range from 15 to 25 years.

[33] The relative seriousness of the aggravating features in this case, would require a substantial uplift from a 20-year starting point. Without any double counting a further 2 years would be unexceptional. I find no mitigating circumstances in the offence or offender.

[34] Ultimately of course it is the end sentence that is the proper focus of an appeal and not the way in which the sentence arrived at it. Standing back and assessing the sentence against applicable sentencing purposes and principles, as a matter of overall impression, I am not persuaded that the minimum term of 16 years imprisonment before applying for parole for the count of murder is excessive. It was generous. Appellate intervention is therefore not warranted, and the minimum term imposed at sentence must remain undisturbed.

[35] I finally consider one matter under section 237 Crimes Act. Whilst section 237 provides a separate regime for sentencing murderers, it does not follow that the provisions in Sentencing and Penalties Act is ineffectual in murder cases.

[36] Section 24 of the Sentencing and Penalties Act provides that if an offender is sentenced to a term of imprisonment, any period during which the offender was held in custody prior to the trial of the matter shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.

[37] I first find for the reasons expressed earlier in this judgment the original appeal against sentence was never abandoned.

[38] The appeal against sentence is dismissed. The 14 days the appellant served before his sentence must be deducted from the minimum term imposed

ORDERS:

(1) The sentence appeal is dismissed. The minimum term of 16 years is confirmed.

(2) Pursuant to section 24 of the Sentencing and Penalties Act 2009, the 14 days the appellant served on remand before his sentence to be deducted from his minimum term of imprisonment.

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

COURT OF APPEAL FIJI

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL

Hon. Mr Justice Gerard Winter
JUSTICE OF APPEAL