

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 143 of 2016

STATE

V

RAKESH NARAYAN

Counsel : Ms. Kimberly Semisi for the State
Accused appears in person

Dates of Trial : 21 July and 24-28 July 2017

Summing Up : 31 July 2017

Judgment : 1 August 2017

Sentence : 29 September 2017

SENTENCE

[1] Rakesh Narayan you were charged with the following two offences:

FIRST COUNT

Statement of offence

ATTEMPTED MURDER: Contrary to Section 44 and 237 of the Crimes Act No. 44 of 2009.

Particulars of the Offence

RAKESH NARAYAN on the 16th day of March 2016 at Nakasi, Suva, in the Central Division, attempted to cause the death of Sakindra Devi, and at the time, intended to cause her death.

SECOND COUNT

Statement of offence

ACT WITH THE INTENT TO CAUSE GRIEVOUS HARM: Contrary to Section 255(a) of the Crimes Act No. 44 of 2009.

Particulars of the Offence

RAKESH NARAYAN on the 16th day of March 2016 at Nakasi, Suva, in the Central Division, with the intent to do some grievous harm to Rakash Roashan Deo, unlawfully wounded the said Rakash Roashan Deo with a kitchen knife.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 6 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, the three Assessors unanimously found you guilty of the two charges.
- [4] Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors and found you guilty and convicted you on both charges, namely Attempted Murder and for Act with Intent to Cause Grievous Harm.
- [5] In support of their case, the prosecution led the evidence of the following witnesses:
 1. Sakindra Devi (your former wife);
 2. Rakash Roashan Deo (Sakindra Devi's present husband);
 3. Payal Preetika Narayan (your younger daughter);
 4. Rakesh Rishi Kapoor (Sakindra Devi's brother);
 5. Jason Kean Autar (who had parked and was waiting in his vehicle at the car park at Shop N Save Supermarket, Nakasi, and an eye witness to the incident);
 6. Joash Herald Prakash (a friend of yours);
 7. Dr. Amit Sewak (the Medical Officer who had attended to Sakindra Devi on her admission to CWM Hospital);
 8. Dr. Osea Volavola (the Medical Officer who testified to the medical examination conducted on Rakash Roashan Deo);

9. DC 4791 Jone Tupua (the caution interviewing officer in this case, attached to the Nakasi Police Station);
10. Detective Sergeant 1785 Sakaraia Tuberi (the witnessing officer during the recording of the accused's caution interview, attached to the Nakasi Police Station);
11. DC 4509 Mesulame Narawa (the police officer who recorded the charge statement of the accused, attached to the Nausori Police Station);
12. DC 4344 Amani Bosenawai (the witnessing officer during the recording of the charge statement of the accused, attached to the Nausori Police Station).

- [6] It has been proved during the trial that, on 16 March 2016, you attempted to cause the death of Sakindra Devi by stabbing her with a knife, and at the time you intended to cause her death.
- [7] Attempted Murder is a serious crime.
- [8] In terms of the provisions of Section 237 of the Crimes Act No. 44 of 2009 ("Crimes Act") the penalty for the offence of 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.
- [9] In terms of Section 44(1) of the Crimes Act: *"(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed."*
- [10] Accordingly, when Section 44(1) of the Crimes Act is read together with Section 237 of the Crimes Act, it is clear that the penalty to be imposed for a person who is convicted of Attempted Murder is the same as for a person who has been convicted of Murder.
- [11] Therefore, the penalty for the offence of Attempted 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.
- [12] This is a stand-alone penalty provision which is specific to sentencing upon a conviction for Murder, and in a like manner upon a conviction for Attempted Murder. As such, His

Lordship Justice W. D. Calanchini (President, Court of Appeal), held in the case of **Aziz v The State** [2015] FJCA 91 (13 July 2015) that the general provisions that apply to sentencing under the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act"), have no application.

[13] Furthermore, some very useful guidance on sentencing in cases of Murder have been provided by His Lordship Justice Calanchini in **Balekivuya v The State** [2016] FJCA 16 (26 February 2016).

[14] *"Section 237 (of the Crimes Act) provides for a mandatory sentence of life imprisonment for a person convicted of murder. It must be recalled that life imprisonment means imprisonment for life (Lord Parker CJ in **R v Foy** [1962] 2 All ER 246). The trial Judge when sentencing a person convicted of murder is required to exercise a discretion in two ways. The first is whether a minimum term should be set. The second is the length of the minimum term that should be served before a pardon may be considered. The use of the word "pardon" in the penalty provision is not the same as what is sometimes referred to as an "early release" provision. The word "pardon" is not defined in the Crimes Decree nor is it defined in the Sentencing Decree. The only reference to the word "pardon" that is relevant to sentencing is to be found in section 119 of the Constitution. Under section 119(3) the Prerogative of Mercy Commission (the Mercy Commission), on the petition of a convicted person, may recommend that the President exercise a power of mercy by, amongst others, granting a free or conditional pardon to a person convicted of an offence.*

In my judgment the effect of section 237 when read with section 119(3) of the Constitution is that a convicted murderer may not petition the Mercy Commission to recommend a pardon until that person has served the minimum term set by the trial Judge. The reference to minimum term in section 237 has nothing to do with early release. The Mercy Commission may or may not make the necessary recommendation to the President. Furthermore, the matters that the Mercy Commission takes into account in deciding whether to recommend a pardon may or may not be the same as the matters that are taken into account by the trial judge when he sets the minimum term.

It should be noted that under section 119(3) of the Constitution any convicted person may petition at any time the Mercy Commission to recommend (a) a pardon, (b)

postponement of punishment or (c) remission of punishment. However it would be reasonable to conclude that the Mercy Commission would take into account the sentencing judgment and the actual sentence imposed during the course of its deliberations.

Finally and importantly, it is abundantly clear from the observations made above that the discretion to set a minimum term under section 237 of the Decree is not the same as the mandatory requirement to set a non-parole term under section 18 of the Sentencing Decree.

The non-parole period is determined after the trial judge has arrived at what is referred to as the head sentence. The head sentence is premised on the existence of a prescribed maximum (not mandatory) penalty from which a tariff is identified, a starting point determined, aggravating and mitigating factors considered, any early plea of guilty credited and finally, under section 24 of the Sentencing Decree, a deduction made for time spent in remand as time already served. **However the position is different when the head sentence is a mandatory sentence of life imprisonment. There is no basis for undertaking the approach described above when the head sentence is fixed by law.** Furthermore there is no basis for proceeding to determine a non-parole period for a person sentenced to the mandatory life sentence for murder since the specific sentence provision of section 237 of the Decree displaces the general sentencing arrangements set out in section 18 of the Sentencing Decree. In my judgment the reference to the court sentencing a person to imprisonment for life in section 18 of the Sentencing Decree is a reference to a life sentence that has been imposed as a maximum penalty, as distinct from a mandatory penalty. Examples of prescribed maximum penalties can be found for the offences of rape and aggravated robbery under the Decree.

For all of the reasons stated above I have concluded that there is no requirement for a trial judge to consider the time spent in remand when he has imposed the mandatory head sentence of life imprisonment upon a conviction for murder under section 237 of the Decree. Further given that the minimum term, if one is set, does no more than entitle the convicted person to petition the Mercy Commission to recommend a pardon in my judgment there is no requirement for the trial judge to consider the time spent in remand when setting the minimum term under section 237 of the Decree. In my view

section 24 of the Sentencing Decree has no application to the specific sentencing provisions in section 237 of the Decree.

..... As I observed earlier, there is no guidance as to what matters should be considered by the judge in deciding whether to set a minimum term. There are also no guidelines as to what matters should be considered when determining the length of the minimum term.

He should however give reasons when exercising the discretion not to impose a minimum term. He should also give reasons when setting the length of the minimum term. Some guidance may be found in the decision of R v Jones [2005] EWCA Crim. 3115, [2006] 2 Cr. App. R (S) 19 for the purpose of deciding whether a minimum term ought to be set. The Court of Appeal observed at paragraph 10:

"A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life."

In determining what the length of the minimum term should be a trial judge should consider the personal circumstances of the convicted murderer and his previous history.

*..... It is clear that the sentencing practices that were being applied prior to the coming into effect of the Crimes Decree, the Sentencing Decree and the Constitution no longer apply. Whatever matters a trial judge should consider when determining whether to set a minimum term and the length of that term under section 237, the process is not the same as arriving at a head sentence and a non-parole period. **In my judgment the decision whether to set a minimum term and its length are at the discretion of the trial judge on the facts of the case.**"[All emphasis is mine].*

- [15] As I have stated earlier, the same principles will be applicable when deciding on the sentence to be imposed on a person who is convicted of Attempted Murder.
- [16] In this case you had stabbed Sakindra Devi on her head, upper left hand/elbow and on the left side of the neck. She has been left scarred for life, and as such received permanent injuries, as a result of the stabbing. Sakindra Devi testified in Court that her

jaw had shifted to one side permanently and when it is cold she still feels a lot of pain in the place where the injuries were caused.

- [17] Sakindra Devi is your former wife. You and Sakindra Devi have two daughters together. She had got married to Rakash Roashan Deo just three days prior to the date of this incident.
- [18] You were well aware of the fact that Sakindra Devi had remarried and you planned to kill her. A few minutes prior to the incident you had met your daughter, Payal Preetika Narayan, and told her that you had heard that her mother had got married. You had also stated that you are going to kill her mother and the whole family.
- [19] Therefore, there is no doubt that this incident was pre-planned and premeditated by you and not an incident which took place at the spur of the moment. You had caused the stabbing by the use of a kitchen knife. You had brought the knife from home with the intention of stabbing Sakindra Devi.
- [20] At the time of the incident, which took place around 8.45 in the night, Sakindra Devi was totally defenceless and vulnerable.
- [21] In the Victim Impact Statement of Sakindra Devi it is stated that she is still suffering from emotional and psychological effects as a result of the incident. It is reported that she has "Fear and stress of the events that happened re-occurring when she encounters people that have the same features as the offender. When getting dressed looking in the mirror, it triggers memories from that fateful day."
- [22] It is also stated in the said Victim Impact Statement that Sakindra Devi's lifestyle has changed as she has to spend money on medication. She cannot go to work during cold weather as a result of the pain. Most people look at the scars and ask her what happened without thinking or knowing of what happened.
- [23] As per the previous Convictions Report filed in this Court, there are seven previous convictions reported against you that have been committed over the past ten years. Five of these convictions are for similar offences (Act with Intent to Cause Grievous Harm and Assault Occasioning Actual Bodily Harm).
- [24] You have submitted to Court as follows:
1. That you are 47 years old.
 2. That you are a Public Service driver for the past 18 years.
 3. That you are the only one supporting your family of a mother and younger brother.

4. That your mother is aged seventy eight years, and younger brother aged forty years.
5. That your mother is sickly and under medication to whom you are the only one who is there for her expenses.
6. That your younger brother is crippled and still single who is also is in need of caring.
7. That as you do not have any house of your own, paying rent, putting food on table and caring for her younger son has become a burden for your aged mother, as she is only supporting herself and a younger son by selling pounded Kava from home.
8. That there are no immediate family members who are willing to take care of your mother and brother.
9. That you have spent more than seventeen months in remand in custody.

[25] The penalty for the offence of Attempted Murder is a mandatory sentence of imprisonment for life. Accordingly, I sentence you to a mandatory sentence of imprisonment for life. Taking into consideration all the facts and circumstances in this case, and also your personal circumstances and your previous history, I set a minimum term of 12 years to be served by you before pardon may be considered.

[26] I now turn to the second count. It has been proved during the trial that, on 16 March 2016, you unlawfully wounded Rakash Roashan Deo with a kitchen knife, with the intent to do some grievous harm to the said Rakash Roashan Deo.

[27] The offence of Act with Intent to Cause Grievous Harm, contrary to Section 255(a) of the Crimes Act carries a maximum penalty of imprisonment for life.

[28] As stipulated in the cases of *Felix Patel v State* [2011] FJHC 669 (27 October 2011); *The State v Pauliasi Yasa* [2013] FJHC 101 (8 March 2013); *State v Masicola* [2015] FJHC 411 (5 June 2015); and *State v Semi Vucui* [2017] FJHC 493 (7 July 2017), the acceptable tariff for the offence of Act with Intent to Cause Grievous Harm is between two (2) to six (6) years imprisonment.

[29] In this case you had punched Rakash Roashan Deo and stabbed him above his left eye.

[30] As per his Victim Impact Statement it is noted that Rakash Roashan Deo is still suffering from emotional and psychological effects as a result of the incident. It is reported that

he has "the fear that the same thing might happen again out of the blue. I keep picturing it over and over and can't seem to get it out of my head. I also fear for my life, my family, wife and kids."

- [31] In light of the above guiding principles and having considered the nature of the injury, level of culpability and the seriousness of the offending, I select 3 years as the starting point of your sentence.
- [32] The aggravating factors in this case are as follows:
- (i) The said Rakash Roashan Deo was defenceless and vulnerable.
 - (ii) There was pre-planning and pre-meditation prior to this incident.
 - (iii) Rakash Roashan Deo has received a permanent scarring on his face.
- [33] The factors you have stated as mitigating factors cannot be considered as so. It is the opinion of this Court that these are personal circumstances and, as such, cannot be considered as mitigating circumstances.
- [34] You are not a first offender. As stated before, as per the previous Convictions Report filed in this Court, there are seven previous convictions reported against you that have been committed over the past ten years. Five of these convictions are for similar offences (Act with Intent to Cause Grievous Harm and Assault Occasioning Actual Bodily Harm).
- [35] Considering the aforementioned aggravating factors, I increase your sentence by a further 2 years. Now your sentence is 5 years. As I have stated above, there are no mitigating circumstances in your favour so as to grant you any concession or deduction in your sentence.
- [36] Accordingly, I sentence you to a term of imprisonment of 5 years for count 2. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 3 years of that sentence.
- [37] Section 24 of the Sentencing and Penalties Act reads thus:
- "If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*
- [38] You have been in remand custody for this case since 16 March 2016. Accordingly, you have been in remand custody for more than 1 year and 6 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 1 year and 6 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[39] In the result, you are sentenced to a term of imprisonment of 5 years with a non-parole period of 3 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 3 years and 6 months.

Non-parole period - 1 year and 6 months.

[40] I order that this sentence for count 2 will run concurrently with the sentence imposed for count 1.

[41] In this case the learned State Counsel has made an application for you to be declared as a habitual offender in terms of Sections 10 and 11 of the Sentencing and Penalties Act.

[42] Section 10 and 11 of the Sentencing and Penalties Act are reproduced below:

10. This Part applies to a court when sentencing a person determined under section 11 to be a habitual offender for —

(a) a sexual offence;

(b) offences involving violence;

(c) offences involving robbery or housebreaking;

(d) a serious drug offence; or

(e) an arson offence.

11. — (1) A judge may determine that an offender is a habitual offender for the purposes of this Part—

(a) when sentencing the offender for an offence or offences of the nature described in section 10;

(b) having regard to the offender's previous convictions for offences of a like nature committed inside or outside Fiji; and

(c) if the court is satisfied that the offender constitutes a threat to the community.

(2) The powers under this Part may be exercised by the Court of Appeal and the Supreme Court when hearing an appeal against sentence.

[43] Considering your previous convictions for offences of a like nature (offences involving violence), this Court is satisfied that you constitute a threat to the community. Accordingly I determine that you are a habitual offender in terms of Section 11 of the Sentencing and Penalties Act. However, since you are being sentenced to a mandatory sentence of imprisonment for life, I make no further orders in terms of Section 12 of the Sentencing and Penalties Act.

[44] FINAL ORDERS

1. Count One- I sentence you to a mandatory sentence of imprisonment for life. I set a minimum term of 12 years to be served by you before pardon may be considered.

2. Count Two- You are sentenced to a term of imprisonment of 5 years with a non-parole period of 3 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

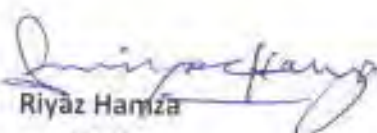
Head Sentence - 3 years and 6 months.

Non-parole period - 1 year and 6 months.

3. I order that the sentence imposed for count 2 will run concurrently with the sentence imposed for count 1.

[45] You have 30 days to appeal to the Court of Appeal if you so wish.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 29th Day of September 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the Accused : Accused appears in person.