IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 231 of 2017

BETWEEN : **STATE**

AND : **SHILWAN RANDEEP LAL**

Counsel : Ms. Latu L. for the State
: Ms. Nettles A. with Mr. Kaloulasulasu T. for the Accused

Hearing on : 19th of November 2020
Sentence : 01st of December 2020

SENTENCE

1. Mr. Shilwan Randeep Lal, you were charged as follows;

Statement of Offence

MURDER: contrary to section 237 of the Crimes Act 2009.

Particulars of Offence

Shilwan Randeep Lal, on the 29th of November, 2017 at Sigatoka in the Western Division, murdered Rohan Amreet Lal.

2. Before the conclusion of the trial, Mr. Shilwan Randeep Lal, the accused, having well understood the contents of the information and the consequences of such plea, pleaded guilty to the above count.

3. Summary of Facts, were not called for as the evidence of the prosecution were already lead and the accused decided to take a progressive approach in the course of his evidence. You having understood, agreed and accepted the said evidence lead by the prosecution to be true and correct and have taken full responsibility for your actions.

4. The lead evidence by the State disclose that:

> *The accused, Shilwan Randeep Lal, was a farmer during the time material to the incident. He was running a farm together with the deceased, a cousin of his. He has two children and was leading a happy married life. He caught his wife having an affair with the deceased. His wife left him and went with the children to her parents. He went to her home and reconciled with his family. Later his wife informed him that she will not stop her illicit extra marital affair with the deceased. By that he was provoked and decided to kill the deceased.*
>
> *Accordingly, on the 29th of November, 2017 in the farm he murdered the deceased Rohan Amreet Lal by hitting him with a cane knife.*

5. I find that lead evidence support all elements of the charge in the Information, and find the charge proved on the said facts agreed by you. Accordingly, I find you guilty on your own plea and I convict you of the count of Murder contrary to 237 of the Crimes Act 2009, as charged.

6. As for Section 237, the prescribed punishment for the offence of Murder is mandatory imprisonment for life.

7. However, section 237 of the Crimes Act provides the court with a judicial discretion, to set a minimum term to be served before pardon may be considered.

8. This is a stand-alone penalty provision which is specific to sentencing upon a conviction for Murder. As such, His Lordship W. D. Calanchini J. (President, Court of

Appeal then), 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.

9. His Lordship Calanchini J. determines in **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) that;

> *"Section 237 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 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."

10. I would quote His Lordship Calanchini J. further, from **Balekivuya v State** (supra) where His Lordship determines;

"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."

11. Accordingly, firstly, I will consider whether to set a minimum period or not. None of the parties invite the court to not to set a minimum term. Furthermore, it has been the practice of our court and the exception of not setting a minimum term should be exercised only in extremely serious cases, which bear hardly any mitigatiory circumstances. Therefore, I decide to set a minimum term of imprisonment to be served by the accused, before consideration of his pardon.

12. In consideration of the appropriate term set to be served before consideration of pardon, I find some useful guidance in His Lordship Rajasinghe J.'s sentence in **State**

v Fuata - Sentence [2019] FJHC 1038; HAC249.2019 (31 October 2019), where it states;

> *"In order to set a minimum term to be served for the offence of Murder, the court is required to consider the level of culpability, level of harm, aggravating factors and mitigating circumstances of the crime."*

13. The act was preplanned and the culpability was high. Other than that I do not see any aggravating factors which were not included in the offence itself to be considered afresh.

14. Though the defence of provocation is abandoned by the accused, the circumstances of the offending warrants some consideration in mitigation. The accused was remorseful of his actions. Furthermore his plea of guilt, though at a very late stage should be given some consideration.

15. In consideration of all the material before me, inclusive of what I have mentioned above, I set the term to be served by you before being considered for pardon at 14 years.

16. In the result, the accused Mr. Shilwan Randeep Lal is sentenced to imprisonment for life, subject to him being eligible to apply for consideration of pardon after serving 14 years of imprisonment.

17. You are given thirty (30) days to appeal to the Court of Appeal, if you so desire.

Chamath S. Morais
JUDGE

Solicitors : ***Office of the Director of Public Prosecutions for the State.***
: ***Iqbal Khan & Associates, Lautoka for the Accused.***