

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC. 08 of 2017**

**BETWEEN : STATE**

**AND : VIJAY KUMAR**

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

Hearing on : 19<sup>th</sup> of November 2020  
Sentence : 09<sup>th</sup> of December 2020

### **SENTENCE**

1. Mr. Vijay Kumar, you were charged as follows;

#### ***Statement of Offence***

**ATTEMPTED MURDER**: contrary to section 44 (1) and 237 of the Crimes Act 2009.

#### ***Particulars of Offence***

Vijay Kumar, on the 27<sup>th</sup> of December, 2016 at Nadi in the Western Division, attempted to murder Adi Ilisapeci Marama.

2. At the trial before the conclusion of the prosecution case, Mr. Vijay Kumar, 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 filed, read over and explained to you. You having understood, agreed and accepted the said summary of facts to be true and correct and have taken full responsibility for your actions.
4. The Summary of facts disclose that:

*The complainant is Adi Ilisapeci Marama (hereinafter referred to as "PW1") and she is 44 years of age.*

*The accused is Vijay Kumar, 54 years of age and he is employed as a Steel Fixer and Blender for Focus Construction Limited at Garden City in Suva. He resides at Delainavesi, Lami.*

*The accused and PW1 are husband and wife however they were not residing together at the material time.*

*PW1 is employed as a baby sitter and a house-girl at the house of Inoke Lutumailagi (hereinafter referred to as "PW2") which is situated at Lodhia Street in Nadi Town.*

*On the 23<sup>rd</sup> of December, 2016, the accused came from Suva to spend the Christmas weekend with PW1 in Nadi. During this weekend, the accused was suspicious that PW1 was having an affair with PW2.*

*On the 27<sup>th</sup> of December, 2016, the accused questioned PW1 as to why she was disrespecting him and not treating him like a husband but she ignored him. PW1 then went to the bathroom to have her shower. The accused also wanted to have a shower with PW1 but she chased him outside the bathroom. The accused then forcefully entered the bathroom and started to punch PW1 on her face and body. PW1 managed to escape from the bathroom and ran towards outside. The accused then got hold of an iron rod and ran after PW1 who was at the passage of the sitting room. The accused then struck PW1 with the iron rod several times on her face, jaw and head until she was unconscious.*

*The accused then ran away from the scene and with the assistance of the public, he was arrested by the police.*

*PW1 was taken to the Nadi Hospital and then referred to the Lautoka Hospital. She was assessed with severe head injury and multiple face and scalp laceration. She suffered from mandible and maxillary fractures. According to her medical report, PW1 required intensive care and ventilator support for 10 days. She was transferred to CWM Hospital for further dental surgical treatment.*

*[A copy of PW1's medical report is attached herein as "A"]*

*The accused was interviewed under caution and admitted the allegation in his record of interview.*

*[A copy of the accused's record of interview is attached herein as "B"]*

*The accused was subsequently charged with one count of attempted murder contrary to section 44 (1) and section 237 of the Crimes Act 2009.*

5. I find that above summary of facts 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 Attempted Murder contrary to section 44 (1) and 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. Section 44 (1) states that;  
*44.-(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.*
7. Furthermore, section 44 (2) requires the alleged act to be more than merely preparatory to be convicted of the attempt of an offence. As for the admitted

summary of facts and the admitted attachment A, the injuries suffered by the alleged victim is evident of the accused acting far beyond the mere preparation.

8. Therefore, the offence of Attempted Murder too carries the mandatory life imprisonment. 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.
9. 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.
10. 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.”*

11. 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.”*

12. 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 mitigatory circumstances. Therefore, I decide to set a minimum term of imprisonment to be served by the accused, before consideration of his pardon.

13. 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;

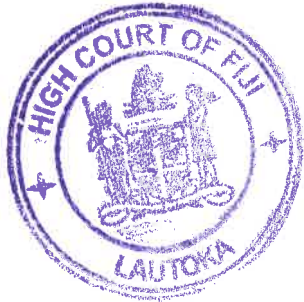
*"In order to set a minimum term to be served for the offence of Murder, the court is required to consider the level of culpability, level of harm, aggravating factors and mitigating circumstances of the crime."*

14. There was breach of trust 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.

15. 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 late stage should be given some consideration. Accused has been in remand for about 300 days altogether and that too needs to be given due consideration.

16. 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 10 years.

17. In the result, the accused Mr. Vijay Kumar is sentenced to imprisonment for life, subject to him being eligible to apply for consideration of pardon after serving 10 years of imprisonment.
18. 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.***  
: ***Legal Aid Commission, Lautoka for the Accused.***