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

CRIMINAL CASE NO: HAC. 185 of 2015

BETWEEN	:	**STATE**
AND	:	**1. PAULIASI NIUSAMA SAUKURU**
		2. RATUBULI NACEGUTUILAGI
Counsel	:	Ms. Uce R. for the State
	:	Ms. Volau L. For the 1st Accused
	:	Ms. Singh J. for the 2nd Accused
Hearing on	:	10th of December 2020
Sentence	:	05th of February 2021

SENTENCE

1. Mr. Pauliasi Niusama Saukuru and Mr. Ratubuli Nacegutuilagi, you were charged as follows;

First Count

Statement of Offence

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

Particulars of Offence

Pauliasi Niusama Saukuru and Ratubuli Nacegutuilagi, on the 06th day of November, 2015 at Nadi in the Western Division, murdered Reginald Singh.

Second Count

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act 2009.

Particulars of Offence

Pauliasi Niusama Saukuru and Ratubuli Nacegutuilagi, on the 06th day of November, 2015 at Nadi in the Western Division, dishonestly appropriated Toyota Sedan, Registration Number FC 337, valued at $6000.00, the property of Reginald Singh.

2. During the course of your trial, but before the conclusion, both of you, having well understood the contents of the information and the consequences of such plea, pleaded guilty to the above counts.

3. Summary of Facts, submitted by the prosecution state that;

The deceased is Reginal Singh, 29 years of age, mechanic of Sabeto Central.

The juvenile is Pauliasi Niusama Saukuru, 16 years of age, student of Koroyaca Village, Sabeto.

The accused is Ratubuli Nacegutuilagi, 19 years of age, student residing at Sabeto Village, Nadi.

On the 6th of November, 2015 at about 5.00 pm, the deceased left home in his vehicle registration number FC 337. Before leaving home, the deceased informed his wife namely Ranjita Devi (hereinafter referred to as "PW1") that he was going to do private job by taking passengers for hire basis from the Sabeto junction and drop them off at their various destination.

At about 8.45 pm, PW1 called the deceased on his mobile phone number 8035334 which rang for sometimes but was later switched off. PW1 continued calling the deceased on his mobile phone but the phone was switched off.

On the 7th of November, 2015 at about 12.07 pm, PW1 lodged a report at the Sabeto Police Station that the deceased had not returned home yet.

Rajnesh Singh (hereinafter referred to as "PW2") was on his way home when he saw the deceased vehicle driven by an iTaukei man along Korokoro, Valley Road in Sigatoka. With the assistance of George Francis (hereinafter referred to as "PW3"), PW2 was able to stop the deceased's vehicle and took the keys from the two iTaukei youths inside the decease's vehicle. PW2 then called the police to notify them about the deceased's vehicle. PC 2290 Penieli Siva (hereinafter referred to as "PW4") attended to the report and escorted the two iTaukei youths with the deceased's vehicle to the Sigatoka Police Station. The two iTaukei youths were identified as the juvenile and the accused. The juvenile and the accused then informed PW2 that they had stolen the deceased's vehicle after assaulting him and leaving him at Masimasi, Sabeto. The juvenile and the accused were brought under arrest to the Sabeto Police Station.

Upon investigation, the deceased's body was discovered at Masimasi, Sabeto and taken to the Nadi Hospital.

The juvenile and the accused were cautioned interviewed and both voluntarily admitted that on the day of the alleged offence, they had planned to go to Nakabuta Village to meet the juvenile's girlfriend namely Bolameke Volau

(hereinafter referred to "PW5") but they did not have any transport. They walked down from Sabeto Village to the junction of Queens Highway and Sabeto Valley Road where they hired the deceased's vehicle to drop them off at Masimasi. The juvenile sat in the front passenger's seat while the accused sat at the back seat behind the deceased. Upon arrival at Masimasi towards M. Sadoq Depot, the accused strangled the deceased with his scarf and pinned his head to the head rest of the driver's seat. The juvenile got off from the passenger seat and went to the driver's side and started searching the deceased for cash. The accused then picked up some stones and started hitting the deceased's head several times. The juvenile then got hold of the scarf and pulled the deceased head while the accused continuously punched the deceased face with a stone. They then carried the deceased out of the vehicle. At this stage, the juvenile and the accused noticed the deceased was still breathing. The juvenile then held the deceased's head and banged it on the road until the deceased was no longer breathing. Thereafter, the juvenile and the accused carried the deceased's body and dumped it in the nearby sugarcane farm.

The juvenile and the accused then boarded the deceased's vehicle and the juvenile drove them towards Sabeto Village through Naboutini and Waimalika Road where they picked up a green towel and a bottle of Fabuloso. They drove to a creek at Natalau to wash away the blood stained inside the deceased's vehicle. After cleaning the vehicle, the juvenile drove the said vehicle to Nadi Town Total Service Station and filled $10.00 worth of diesel and drove towards Sigatoka. At Sigatoka, they refill $5.00 worth of diesel at Pacific Energy Service Station using the money that was in the coin tray of the deceased's vehicle. They then followed Sigatoka Valley Road through Sigatoka Town. At about 12.30 am on the 7th of November, 2015, the juvenile and the accused arrived at Nakabuta Village where they met PW5 as they had communicated earlier through mobile phone. At the village, the villagers invited the juvenile and the accused for a bowl of grog. After drinking grog, both juvenile and the accused left with PW5 to the farm house where they all spent the night.

At about 10.00 am, the juvenile drove the vehicle back to Nakabuta Village and picked PW5 and her cousins and they went to dive for fresh water mussels. Whilst they were along Nasau Road, they were stopped by PW2 who took the vehicle keys and called the police. The juvenile and the accused were then arrested and brought to the Sigatoka Police Station with the deceased's vehicle. They were later escorted to the Sabeto Police Station.

On the 10th of November, 2015, Doctor James Kalougivaki conducted the post mortem examination of the deceased at the Lautoka Hospital. In his opinion, the cause of death was:-

(a) Disease or condition directly leading to death – Severe traumatic brain injury and subarachnoid hemorrhage.

(b) Antecedent causes –

1. *Severe traumatic head injuries*
2. *Blunt force trauma*
3. *Alleged fatal assault*
4. *Multiple traumatic injuries*

The juvenile and the accused were later charged with one count of murder contrary to Section 237 and one count of theft contrary to Section 291 (1) of the Crimes Act 2009.

4. You having understood, agreed and accepted the said summary of facts to be true and correct and have taken full responsibility for your actions.

5. I find that summary of facts support all elements of the charges in the Information, and find the charges proved on the said facts agreed by you. Accordingly, I find you guilty on your own plea and convict you of the count of Murder contrary to 237 of the Crimes Act 2009 and of count of theft contrary to section 291 (1) of the Crimes Act 2009, as charged.

6. The two offences you have committed form a series of offences and were committed during the same transaction. Therefore, it is appropriate to impose an aggregate sentence for the offences you have committed, as for the provisions of section 17 of the Sentencing and Penalties Act.

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

8. 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. Since the 1st Accused was only 16 years and was a juvenile at the time of commission of the offence slightly different sentencing principles and laws apply for the two accused. Therefore, initially I will deal with the 2nd accused who was not a juvenile but only 19 years then.

13. Accordingly, as for the aforesaid principles, 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 2nd accused before consideration of his pardon.

14. 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."

15. The act was preplanned and the culpability was high. There was no provocation and the victim was an innocent man. Other than that I do not see any aggravating factors which were not included in the offence itself to be considered afresh.

16. The 2nd accused was only 19 years at the time of the committal of the admitted offences and the accused is remorseful of his actions. Furthermore his plea of guilt, though at a very late stage should be given some consideration.

17. In consideration of all the material before me, inclusive of what I have mentioned above, I set the term to be served by the 2nd accused before being considered for pardon at 12 years.

18. In the result, the 2nd accused Mr. Ratubuli Nacegutuilagi is sentenced to imprisonment for life, subject to him being eligible to apply for consideration of pardon after serving 12 years of imprisonment.

19. Now I will turn to the 1st accused, who is 21 years old now, but only 16 years old at the time of committal of the offence.

20. As for provisions of the Juveniles Act, it is applicable to any offender who was below the age of 17 years at the time of the offence. Though the 1st Accused is married and having a child now, the law requires him to be dealt as a Juvenile. Section 31 of the Juveniles Act sets out the appropriate procedure to be dealt with.

21. In the case of **State v NT** HAC 001 of 2003s, Hon. Shameem J. (as her ladyship was then) elaborates on the methodology set out by the section 31 of the Juveniles Act, which was commended and approved by the Court of Appeal in the appeal of it. (see **Tamanivalu v State** [2004] FJCA 38; AAU0035.2003S (16 July 2004)

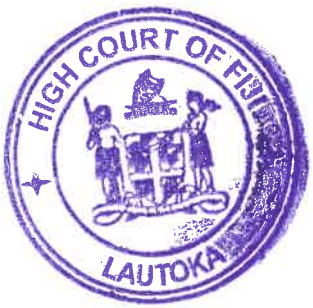
22. Though the culpability of the Juvenile be legally less, his involvement in the offences is equivalent to the 2nd accused if not more. It is sadly noted that in his undue desire to see his girlfriend then, to whom he is happily married and having a child now, this juvenile with the assistance of the 2nd accused, brutally assaulted and took away the life of an innocent man and deprived another family of a loving husband and a father.

23. I have duly considered the mitigatory factors submitted by the learned counsel on behalf of the Juvenile, inclusive of his guilty plea before the conclusion of the trial.

24. Accordingly, I sentence the Juvenile to 10 years of detention as for provisions of section 31 of the Juveniles Act. The place and the circumstances of his detention are to be decided by the Hon. Minister for Social Welfare. The Court Registry and the Prison

Authorities (both) should bring this immediately to the attention of the Hon. Minister and until appropriate arrangements are made, he is to be detained at the prison.

25. 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 juvenile & the accused.***