IN THE SUPREME COURT OF FIJI
AT SUVA

PETITION NO. CAV 0008 OF 2011
(On an appeal from the Court of Appeal
Criminal Appeal No.ABU0008 of 2001)

BETWEEN: **MOHAMMED YUNUS and**
MOHAMMED SAHEJAD KHAN

PETITIONERS-APPELLANTS

AND: **THE STATE**

RESPONDENT

Coram:

Hon. Chief Justice Anthony Gates, President of the Supreme Court
Hon. Justice Saleem Marsoof, Justice of the Supreme Court
Hon. Justice Sathyaa Hettige, Justice of the Supreme Court

Date of Hearing: Wednesday, 10th April and 17th April, 2013, Suva

Counsel: Mr. Sunil Sharma for the Petitioners - Appellants

Ms. S Puamau for the Respondent

Date of Judgment: Wednesday, 24th April 2013, Suva

JUDGMENT OF THE COURT

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[1] The only question on which special leave to appeal has been granted in this case is whether the Court of Appeal (Marshall, JA., Sriskanandarajah, JA., and Wikramanayake, JA.,) erred in its decision dated 2nd November 2011 to substitute for the *recommendation* of a minimum term of imprisonment made by the trial judge, who convicted the Appellants Petitioners-Appellants (hereinafter referred to as "the Appellants") for murder and sentenced them to life imprisonment, sentences of life imprisonment with *fixed* minimum terms which were higher than the minimum term recommended by the trial judge.

[2] More specifically, the question is whether, when passing sentence on appeal, the Court of Appeal was entitled to apply retrospectively, any subsequent amendment to the statutory law that was in force at the time the alleged offences were committed. The question on which

special leave to appeal was granted by this Court by its order of Thursday, 18th of October 2012, is as follows:-

> Whether the Court of Appeal could pass a sentence, [the fixing of the minimum term of the sentence to be served before release could be considered by the Corrections Department] which was not a sentence provided for at the time of the commission of the offence.

The Factual Matrix

[3] For the purposes of this appeal it is material to note that both Appellants were charged with the murder of one Ami Chand Sharma, alleged to have been committed between 7th March 2000 and 11th March 2000, contrary to sections 199 and 200 of Penal Code Cap.17. After trial before the High Court of Lautoka (Govind J.) with three asseessors, who unanimously found them guilty as charged for murder, the learned High Court Judge agreed with the assessors and convicted the Appellants on 10th February 2004.

[4] On 20th February 2004, both Appellants were sentenced to a term of imprisonment for life with *a recommendation* by the trial judge that each serve a minimum term of imprisonment of 17 years as contemplated by section 33 of the Penal Code [Cap.17].

[5] The applications of the Appellants to the Court of Appeal for leave to appeal against the conviction and sentence pursuant to section 21 of the Court of Appeal Act, Cap 12, were denied by Ward P on 24th June 2005.

[6] Pursuant to section 35 of the Court of Appeal Act, the matter then came up before the Court of Appeal (Marshall, JA., Sriskanandarajah, JA., and Wikramanayake, JA.,) on 2nd November 2011, which in paragraph 42(1) of its judgment dated 25th November 2011 refused leave to appeal against conviction and sentence.

[7] Having thus refused leave to appeal, in paragraph 42(2) of the said judgment, the Court of Appeal went on to declare that the recommendation made by the learned trial judge that the Appellants serve a minimum term of 17 years in prison is null and void, and should be

quashed. The Court proceeded in paragraph 42(3) of its judgment, to fix the minimum period of imprisonment the Appellants must serve as 18 years from 20th February 2004. It is this order that is sought to be challenged by the Appellants in this appeal.

The Legal Background

[8] Section 33 of the Penal Code, as it stood in March 2000, at the time the offence was alleged to have been committed, read as follows:

> Whenever a sentence of imprisonment for life is imposed on any convicted person, the judge who imposes the sentence may recommend the minimum period which he considers the convicted person should serve.

[9] The said provision was amended by section 2 of the Penal Code (Penalties) (Amendment) Act 2003 (hereinafter sometimes referred to as the "Amendment Act"). It is not in dispute that the Amendment Act was published in the Gazette on 6 June 2003, and came into force on that date.

[10] By Section 2 of the Amendment Act, section 33 of the Penal Code was repealed, and substituted with the following:-

> Where an offence in any written law prescribes a maximum term of imprisonment of ten years or more, including life imprisonment, any court passing sentence for such offence may fix the minimum period which the court considers the convicted person must serve.

[11] It will be noted that the significant difference between the two sections is that, under the former, the judge may *'recommend'* the minimum period whereas, under the latter, the judge may *'fix'* the period. It is apparent that in *recommending* the minimum period in relation to the sentences passed on the two Appellants, the trial judge purported to act under section 33 of the Penal Code as it stood prior to the Amendment Act, while in *seeking to fix* the minimum term, the Court of Appeal purported to apply the 2003 amendment to the Code. At paragraph 7 of its judgment, the Court of Appeal observed *inter alia* as follows:-

> …. By 20th February 2004 the legislation had been changed. At that date "recommending" minimum periods had been replaced by the Penal Code (Penalties) (Amendment) Act No.7 of 2003 which now required the High Court Judge sentencing for murder to sentence each accused to life imprisonment and order that each accused shall serve a fixed minimum term of years in prison.

[12] It is also relevant to note that in its impugned judgment dated 2nd November 2011, the Court of Appeal sought to revise the life sentence imposed by the High Court by substituting for the recommendation of the trial judge that the Appellants serve a *minimum term of 17 years* each in prison, a minimum period of imprisonment *fixed at 18 years* for each of the Appellants. The question on which this Court has granted special leave to appeal, is whether the Court of Appeal had the jurisdiction and power to pass such a sentence when dealing with the Appellant's application for special leave to appeal against the conviction entered, and sentence imposed, by the trial judge, which application it eventually dismissed.

The Question of Jurisdiction of Court

[13] During the hearing of the appeal before the Supreme Court, a question of fundamental importance pertaining to the jurisdiction of the Court of Appeal to pass the sentence with a fixed minimum term was highlighted by this Court. The question was, whether *the recommendation* made by the trial judge when sentencing the Appellants to a life sentence, that each of them should serve a minimum term of 17 years in prison, *constituted an appellable part of the sentence* imposed by the trial judge. Simply put, is the recommendation of the trial judge, appellable?

[14] In answering this question, it will be necessary to examine sections 21 and 23 of the Court of Appeal Act which deal with appeals to the Court of Appeal from conviction and sentence imposed by a High Court.

[15] Section 21(a) of the Court of Appeal Act provides for an appeal against a conviction without leave where it is grounded on a pure question of law, and section 21(b)

contemplates an appeal against conviction upon the certificate of the judge who tried the case that it is a fit case for appeal against conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal. Where the appeal is against the sentence passed by the High Court, Section 21(c) of the Court of Appeal Act provides for an appeal with the leave of the Court of Appeal, unless "the sentence is one fixed by law."

[16] In the instant case, the applications of the Appellants to the Court of Appeal for leave to appeal against the conviction and sentence pursuant to section 21 of the Court of Appeal Act, Cap 12, were denied by Ward P on 24th June 2005, and thereafter the matter came up for consideration before the Court of Appeal (Marshall, JA., Sriskanandarajah, JA., and Wikramanayake, JA.,) on 2nd November 2011, and that Court, by its judgment dated 25th November 2011 refused leave to appeal against conviction and sentence. In the same judgment, having refused leave to appeal, the Court proceeded to substitute for the recommendation of a minimum period of 17 years to be served by the Appellant, a fixed minimum term of imprisonment of 18 years.

[17] First and foremost, the question arises whether the Court of Appeal had jurisdiction to entertain an application for leave to appeal against the conviction, given that the sentence was one of life imprisonment, which is one "fixed by law" within the meaning of that phrase in section 21(c) of the Court of Appeal Act, the minimum period of 17 years recommended by the trial judge in terms of section 33 of the Penal Code as it existed prior to the Amendment Act of 2003, being a mere recommendation. Secondly, the question arises as to whether the Court of Appeal acted within the ambit of its jurisdiction as contained in section 21(c) of the Court of Appeal Act, when it purported to substitute a fixed minimum period of 18 years in place of the 17 years that had been recommended by the trial judge as the minimum period to be served by the Appellants, before they become eligible for remission.

[18] Responding to these questions, Mr. Sunil Sharma, who appeared for the Appellants, submitted that the Court of Appeal has been established under the Court of Appeal Act, Cap. 12, and that the said Act has defined the parameters within which it is required to

perform its functions. He stressed that since an administrative recommendation made by the sentencing judge is not part of the "sentence" passed by him, the Court of Appeal erred in invoking the provisions of section 23(3) of the Court of Appeal Act to quash it, and substitute it with a fixed term. The essence of his submission, as we see it, is that a recommendation made by a trial judge is not a "sentence" which can be varied by an appellate court on appeal.

[19] While the submission of Mr. Sharma finds support in the decision of the Court of Appeal in *Suruj Lal v The State*, Criminal Appeal No. 61 of 1986 (15th September 1987) in which that Court clearly took the view that a recommendation of minimum term in terms of section 33 of the Penal Code, was not a constituent part of a sentence, it is necessary to consider Mr. Sharma's submission in the light of the definition of "sentence" found in Section 2 of the Court of Appeal Act, which is quoted below:-

> In this Act, unless the context otherwise requires, "sentence" includes any order of the Court made on conviction with reference to the person convicted, and any disqualification, penalty, punishment or *recommendation* made or imposed by the Court.

[20] On the face of it, the definition of "sentence" in section 2 of the Court of Appeal Act would encapsulate any recommendation made or imposed by a trial judge pursuant to section 33 of the Penal Code prior to the coming into force of the Penal Code (Penalties) (Amendment) Act No.7 of 2003.

[21] However, that is not a constituent part of the sentence imposed by the trial judge in this case, as in this case, the said sentence was purported to be imposed under section 33 of the Penal Code, which provided that whenever "*a sentence of imprisonment for life* is imposed on any convicted person, *the judge who imposes the sentence may recommend the minimum period* which he considers the convicted person should serve." In our view, the legislature has clearly seen the life sentence as the essence of the "sentence" that a trial judge is called upon to impose for murder, and the trial judge's recommendation relating to the minimum term of imprisonment as something that *may or may not* accompany the sentence, but was not an inherent or indispensible part of it.

[22] Ms. S. Puamau, who appeared for the Respondent, has submitted that the recommendation was part of the sentence imposed by the trial judge, but we find that the decision of the Court of Appeal of Victoria in *Ludeman v The Queen* [2010] VSCA 333, is clearly distinguishable from the instant case, as the five judge bench of that Court was interpreting and applying sections 278 and 280 of the Victorian Criminal Procedure Act read with the definition of 'sentence' contained in section 11(1) of the Sentencing Act, which were structured very differently from section 33 of the Penal Code of Fiji.

[23] In our opinion, under section 33 of the Penal Code as it stood prior to the 2003 Amendment Act, the trial judge had discretion as to whether or not he would make a recommendation as to the minimum period a convict should serve in prison, and in any case where he chose not to make such a recommendation, the question of the remission of the life sentence would be governed by Part XIII of the Prison Act, Cap. 86. The Prison Act has now been repealed and replaced by the Prisons and Corrections Act, 2006, which was brought into operation from 27th June 2008, by an order dated 18th March 2011 made by the Minster under section 1(2) of the said Act, and published in the Gazette dated 25th March 2011. At the time the Appellants committed the offence, as well as at the time of the trial, conviction and sentencing of the Appellants, it was the Prison Act that was in force.

[24] In the instant case, as we have seen, the trial judge did exercise his discretion to make a recommendation, but it would appear from the provisions of the Prison Act, particularly section 63 thereof, that the said recommendation was not intended to be legally binding on the Commissioner or the Minister, who were vested with certain functions and powers in regard to remission of sentence, though in practice such recommendation would not be disregarded lightly by the executive. In fact, the executive too was conferred certain discretionary powers of remission by Part XIII of the Prison Act, Cap. 86.

[25] As Lord Bingham of Cornhill noted in *R v The Secretary of State for the Home Department, ex parte Anderson,* [2001] EWCA Civ 1698 paragraph 2, "judges have never in modern times enjoyed any discretion in passing sentence on a convicted murderer" as

until 1965 in UK and until 1979 in Fiji, the sentence was one of death, and thereafter in both countries, it remains as one of imprisonment for life. The only discretion that was enjoyed by the trial judge in both jurisdictions was to make a recommendation to the executive as regards the minimum term the convict should serve before any remission is granted by the executive.

[26] It is interesting to mention here that the discretion vested in the executive in the United Kingdom to consider the early release of persons undergoing life sentences, was the subject matter of the opinion of the House of Lords in *R v The Secretary of State for the Home Department, ex parte Anderson*, supra, which focused on the provisions of section 61(1) of the Criminal Justice Act 1967, section 35(2) and (3) of the Criminal Justice Act 1991 and section 29 of the Crime (Sentences) Act 1997 which sought to regulate the exercise of the said executive discretion.

[27] The House of Lords in its opinion, considered the matter in the context of the European Convention on Human Rights. The House of Lords ruled in the light of the extensive jurisprudence that has been developed by the courts of the United Kingdom as well as the European Court of Human Rights, that the exercise of the said discretion by the Home Secretary, violated Article 6 of the European Convention on Human Rights and a declaration of incompatibility in terms of section 4(2) of the Human Rights Act of 1998 should be made.

[28] The aftermath of this decision was that in the United Kingdom the discretion hitherto vested in the executive began to be exercised exclusively by the judiciary, and it was the trial judge, who was more conversant with the facts of the case and the conduct of the convict than the executive, who determined the non-parole period of such convict when he or she is sentenced to life imprisonment for murder. The UK Criminal Justice Act of 2003, set out guidelines for how long such offenders should spend in prison before being considered for parole, but judges are not obliged to follow the guidelines, but must give reasons if they depart from them.

[29] These developments in the turn of the new millennium no doubt had their influence in shaping up the law in other common law countries, and Fiji was no exception, and not

only Section 3 of the Penal Code (Penalties) (Amendment) Act of 2003, which amended section 33 of the Penal Code to introduce a system of fixing by the trial judge of the minimum term a convict has to serve before he is considered for remission, but also the Prisons and Corrections Act, 2006 and the Sentencing and Penalties Decree of 2009, have brought a more rational and liberal regime to handle convicted persons sentenced to imprisonment.

[30] Coming back to the question whether the Court of Appeal had the jurisdiction to substitute its own sentence for the recommendation made by the trial judge, Ms. Puamau, who appeared for the Respondent, has submitted that the Court of Appeal has purported to make its order in terms of Section 33 of the Penal as amended by the 2003 Amendment Act, on the basis that a procedural amendment would apply retrospectively. She has relied on the following *dictum* of Lord Wright in *Re Lord Athlumney* [1898] 2 Q.B 547, 551:-

> "No rule of construction is more firmly established than this; that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards *matters of procedure*, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."(*Emphasis added*)

[31] This argument would take us to the main question on which special leave to appeal was granted in this case, in regard to which Mr. Sharma has submitted firstly, that the amendment of section 33 of the Penal Code by section 2 of the Penal Code (Penalties) (Amendment) Act No.7 of 2003, was substantive and not procedural in nature, and secondly, that in seeking to apply the said Amendment Act with retrospective effect, the Court of Appeal not only applied the wrong law, but it also acted in excess of its jurisdiction conferred by section 23(3) of the Court of Appeal Act [Cap 12]. He also contended that the retrospective application of the said Act by the Court of Appeal, was in any event, inconsistent with Article 28 (1) (j) of the Constitution of Fiji Islands, 1997, and was therefore a nullity.

[32] However, for the moment, focusing on the question of jurisdiction, it is necessary to consider, whether as submitted by Mr. Sharma, the Court of Appeal has in seeking to apply section 2 of the Penal Code (Penalties) (Amendment) Act No.7 of 2003 to the sentence imposed by the trial judge and making a declaration in paragraph 42(3) of its judgment that the recommendation regarding minimum term of 17 years the Appellant should serve in prison is null and void, and should be quashed, exceeded its jurisdiction conferred by section 23(3) of the Court of Appeal Act.

[33] Section 23(3) of the Court of Appeal Act, Cap. 12, as amended by section 3 of the Count of Appeal Act (Amendment) Decree, No. 7 of 1990, provides that -

> *On an appeal against sentence*, the Court of Appeal shall, if they think that a different sentence should have been passed, *quash the sentence passed at the trial*, and pass such other *sentence warranted by law* by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just. (*Emphasis added*)

[34] It is clear from the above quoted provision, that the Court of Appeal has totally exceeded its jurisdiction in seeking to substitute for the recommendation of the trial judge a fixed minimum period sentence. In our view, there was no jurisdiction for the Court of Appeal to entertain an application for leave to appeal against a sentence that is one "fixed by law" within the meaning of that phrase in section 21(c) of the Court of Appeal Act and was not appellable. In any event, the purported "appeal against sentence" lodged by the Appellants was only directed at the recommendation of the trial judge, which was in any event not appealable as it was administrative and not judicial in character, and not binding on a court of law or even on the executive.

[35] Furthermore, the purported application for leave to appeal had been dismissed by the Court of Appeal, and there was no jurisdiction remaining to declare the sentence imposed by the High Court null and void and to quash the same. The purported quashing of the sentence imposed by the High Court being a nullity, the Court of Appeal lacked jurisdiction to substitute its own sentence purportedly under the Amendment Act. Paragraph 42(2) and 42(3) of the impugned judgment of the Court of Appeal did not

contain a "sentence warranted by law" within the meaning of section 23(3) of the Court of Appeal Act.

The Question of Retrospectivity

[36] In view of our finding that the Court of Appeal had acted without jurisdiction in making the orders it did in paragraphs 42(2) and 42(3) of the impugned judgment of the Court of Appeal dated 2nd November 2011, it is strictly unnecessary to deal with the other matters raised by Mr. Sharma. However, in view of the fundamental importance of these questions, and the extensive submissions made before this Court by learned Counsel for both parties, we propose to express our views in regard to these questions as well.

[37] Mr. Sharma and Ms. Puamau were at variance on the question whether the amendment of section 33 of the Penal Code by section 2 of the Penal Code (Penalties) (Amendment) Act No.7 of 2003, was substantive or procedural in nature, as it is generally accepted that in the absence of clear language to the contrary in the amending legislation, a procedural amendment would apply retrospectively, but a substantive amendment would only operate prospectively.

[38] There can be no doubt that where an amending legislation related to procedure only, as in *The King v Chandra Dharma* (1905) 2 K. B. 335 it would have retrospective effect, unless some clear language in the legislation excludes that possibility, but the situation will be very different where its retrospective application would in effect take away a vested right, as in *Colonial Sugar Refining Company Ltd. v* Irving, (1905) A.C. 369, or as Lord Alverstone C.J., put it in *The King v Chandra Dharma*, supra at page 338, where a "new disability or obligation has been created by the statute."

[39] However, the issue has been put at rest, as far as section 2 of the Penal Code (Penalties) (Amendment) Act No.7 of 2003 is concerned by the decision of the Fiji Court of Appeal in *Silatolu v The State* [2006] FJCA 13; AAU0024.2003S (10 March 2006), in which the effect of the identical amendment came up for consideration. After a useful survey of the case law on the subject, the Court of Appeal concluded that the 2003

Amendment Act will not have retrospective effect, as the prior law was more favourable to the accused.

[40] It is instructive to note that at paragraph 155 of the judgment in *Silatolu v The State*, supra, the Court expressed itself in the following terms;-

> To apply it in the present case, the section prior to the 2003 amendment was more favourable to the appellants than the section in the amendment. If a minimum period be recommended, it is, obviously, *only a recommendation which the authorities may adopt or may not adopt* so the Commission on the Prerogative of Mercy has the jurisdiction to advise, if the legal requirements and circumstances otherwise justify, that a prisoner be released before the recommended minimum period has elapsed. *No such discretion can exist under the 2003 amendment. Once a minimum period has been fixed, the Commission has no jurisdiction to recommend the release of an appellant before the fixed minimum period has elapsed*. (*Emphasis added*)

[41] We see no reason in the case at hand to differ from the conclusion reached by the Court of Appeal in *Silatolu*, not only for the reason embedded in the passage quoted above, but also for the additional reason that in the instant case, the Court of Appeal has compounded the situation by substituting for the recommendation of a minimum period of 17 years made by the trial judge, a more onerous fixed minimum period of 18 years to be served by the Appellants in prison. This in effect deprived the Appellants of the opportunity of early release prior to the expiry of the said 18 years.

The Constitutional Issue

[42] The only other matter on which this Court had heard submissions involves the Constitutional protections the Appellants have claimed they are entitled to, particularly against the retrospective application of section 2 of the Penal Code (Penalties) (Amendment) Act No.7 of 2003. Mr. Sharma has contended that the retrospective application of the said Act by the Court of Appeal was inconsistent with Article 28 (1) (j)

of the Constitution of Fiji Islands, 1997, which he alleges was in force at the time the Appellants committed the offence for which they have been convicted.

[43] As noted in paragraph 3 above, the Appellants were convicted of having committed the murder of Ami Chand Sharma between 7th March 2000 and 11th March 2000. The Fiji Constitution Amendment Act 1997 Revocation Decree 2000 "wholly removed" the Constitution of Fiji Islands, 1997 with effect from 29th May 2000, and hence the said Constitution was in force at the time the offence was committed.

[44] Article 28 (1) of the Constitution of Fiji Islands, 1997 provided that-

> Every person charged with an offence has the right:
>
> (j) not to be found guilty in respect of an act or omission unless that act or omission constituted an offence at the time it occurred, and *not to be sentenced to a more severe punishment than was applicable when the offence was committed*; (*Emphasis added*)

[45] It will be seen at once that the principle embodied in the said Constitutional provision is the same as the common law rule enunciated in the judicial decisions discussed in paragraphs 38 and 39 of this judgment. Not surprisingly, similar provisions were also included in section 10(4) of the 1970 Constitution of Fiji and section 11(4) of the Constitution of 1990.

[46] We have no doubt that the retrospective application of section 2 of the Penal Code (Penalties) (Amendment) Act No.7 of 2003 was repugnant to the provisions of Article 28(1)(j) of the Constitution of Fiji Islands, 1997 in that as pointed out by the Court of Appeal in *Silatolu v The State,* supra, section 33 of the Penal Code as it stood prior to the 2003 amendment was more favourable to the Appellants than the section in the amendment. This is because the recommendation of the trial judge did not by itself prevent early release by the executive if the conduct of the Appellants justified such release, whereas the fixed minimum period of 18 years had the effect of taking away the discretion the executive has to consider early release of the Appellants, if so advised. We

are indeed surprised that the Court of Appeal did not give its mind to this important constitutional safeguard at the time it decided to substitute for the recommendation of the trial judge, a fixed minimum period exceeding the period recommended by the trial judge.

Conclusions

[47] We are persuaded that for these reasons, paragraphs 42(2) and 42(3) of the impugned judgment of the Court of Appeal dated 2nd November 2011 should be quashed, and we hereby make order that the said paragraphs should stand quashed. The order dismissing the application for leave to appeal lodged by the Appellants found in paragraph 42(1) of the said judgment would, however, stand.

Hon. Chief Justice, Mr. Justice Anthony Gates
President of the Supreme Court

Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

Hon. Mr. Justice Sathyaa Hettige
Judge of the Supreme Court

Solicitors:

Mr. Sunil Sharma for the Petitioners – Appellants.

Office of the Director of Public Prosecutions for the Respondent.