

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL NO: AAU 109 OF 2014**

(High Court Criminal Case No: HAC 364/ 2011[Suva])

(Magistrate's Court at Nadi Criminal Case No: 766/09)

**BETWEEN** : **BIMLESH PRAKASH DAYAL**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Gamalath JA**  
**Prematilaka JA**  
**Fernando JA**

**Counsel** : **Mr. M. Yunus for the Appellant**  
**Mr. A. Jack for the Respondent**

**Date of Hearing** : **11 September 2018**

**Date of Judgment** : **4 October 2018**

**JUDGMENT**

**Gamalath JA**

- [1] I have read in draft the Judgment and the conclusion of Fernando JA and I agree with the reasoning therein and his conclusions.

**Prematilaka JA**

- [2] I agree with Fernando JA that the appeal should be dismissed and conviction and sentence affirmed.

**Fernando JA**

- [3] The Appellant has appealed against his conviction on three counts of murder of that of his wife Ranjiji Rekha Singh aged 29 years and his two daughters Amisha Sindhi Dayal aged at 7 years and Anisha Sindhi Dayal aged at 5 years and the sentence of life imprisonment imposed on him with a non-parole period of 20 years. All three murders had been committed sometime during the night of the 28<sup>th</sup> and the early hours of the morning of the 29<sup>th</sup> of October 2011 at Nanuku Settlement in Vatuwaqa in the Central Division by hacking the necks of the victims with a chopper as set out in the charges.
- [4] The learned Trial Judge had convicted the Appellant after accepting the unanimous guilty opinion by the Assessors.
- [5] A single Judge of this Court had by his Ruling dated 19<sup>th</sup> June 2015 granted the Appellant leave to appeal against conviction on the 10 grounds itemized in his Ruling and the non-parole period of his sentence. The learned single Judge of this Court had stated in his Ruling: *"Upon receipt of the full record, the appellant may perfect his grounds of appeal and the arguments in support of the grounds for the Full Court's consideration."*
- [6] Accordingly the Appellant had filed an Amended Notice of Appeal against Conviction and Sentence on the 17<sup>th</sup> of August 2018 on the following grounds:

**"Conviction Appeal**

- i. *The Learned Trial Judge erred in law and in fact when he completely failed to direct the assessors on the defence of provocation raised by the appellant.*
- ii. *The Learned Trial Judge erred in law and in fact by failing to give adequate direction to the Assessors in respect of the defence of self-defence.*

- iii. *The Learned Trial Judge erred in law and in fact when he completely failed to direct the Assessors on the issue of diminished responsibility.*
- iv. *The Learned Trial Judge erred in law and in fact when he completely failed to properly guide the assessors on how to approach and weigh the evidence of uncharged acts.*
- v. *The Learned Trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the evidence contained in the caution interview and the weight to be attached to the disputed confession.*
- vi. *The Learned Trial Judge erred in law and in fact by taking away the role of Assessors in determining the weight of the evidence of Roselyn, Forensic Scientific Officer and the psychiatrist.*
- vii. *The Learned Trial Judge erred in law and in fact to allow hear-say evidence to be given in the trial and failed to direct and guide the assessors on how to approach these evidence and the weight to be attached to the hear-say evidence.*
- viii. *The Learned Trial Judge erred in law and in fact by not directing the Assessors on the law of presumption of innocence.*

Sentence Appeal

- ix. *In fixing a minimum term the learned trial Judge failed to give the Appellant appropriate discount having regards to his mental health and diminished responsibility in the circumstances of the case.” (verbatim)*

[7] The Appellant’s prayer is:

- “I. *The Appeal against conviction and sentence to be granted; and*
- II. *The conviction and sentence to be set aside; and*
- III. *The Appellant to be convicted for manslaughter and sentenced accordingly; and or*
- IV. *Any other Orders the Honourable Court deems just.” (verbatim but emphasis placed by me)*

[8] In the Appellant’s Written Submissions of 22<sup>nd</sup> August 2018 the Appellant had stated that he wishes to abandon grounds (v) and (ix) of appeal referred to at paragraph 6 above. However the Appellant having abandoned his ground of appeal (ix) had informed Court in his Written Submissions of 22<sup>nd</sup> August 2018 that he intends to



pursue his ground of appeal set out in his original Notice of Appeal against sentence for which extension of time had been granted by the Single Judge of this Court. The said ground reads as follows:

*“The Learned Trial Judge erred in law and in fact when he failed to consider all the factors in mitigation as required by law and as such his sentencing exercise miscarried resulting in a manifestly excessive non-parole period”.*

- [9] In his prayer in the Amended Notice of Appeal against Conviction and Sentence filed on the 17<sup>th</sup> of August 2018 the Appellant had sought by way of relief that he be convicted for manslaughter and sentenced accordingly, without specifying in respect of which of the three counts. Therefore this has to be taken to mean that it has been in respect of all three counts of murder of which he had been convicted. But in the Appellant’s Written Submissions of 22<sup>nd</sup> August 2018, which does not displace the Amended Notice of Appeal filed on the 17<sup>th</sup> of August 2018 and thus cannot be considered as a Notice of Appeal under rule 35 of the Court of Appeal Rules, he had merely asked for a quashing of the conviction and a verdict of acquittal to be entered. When we at the hearing sought clarification from Counsel for the Appellant as to what relief he was praying for from this Court, he informed us that he was relying on the relief prayed for in his Amended Notice of Appeal, namely, a conviction for manslaughter in respect of all three counts in the indictment. I must state that it is not satisfactory when Counsel keeps changing their position, in respect of the relief prayed for.
- [10] The Appellant’s prayer that he be convicted for manslaughter is on the basis that the killings were under provocation and diminished responsibility. They are the only instances under the Crimes Act 2009 when the offence of murder may be reduced to one of manslaughter.
- [11] This necessitates an examination of the relevant provisions of the Crimes Act, 2009 in respect of the offences of murder and manslaughter and the mitigatory defences of ‘Killing with provocation’ and ‘diminished responsibility’ as set out below:

### “Murder

237. A person commits an indictable offence if—

- (a) the person engages in conduct; and
- (b) the conduct causes the death of another person; and
- (c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.

Penalty—Mandatory sentence of Imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered.

### Manslaughter

239. A person commits an indictable offence if—

- (a) the person engages in conduct; and
- (b) the conduct causes the death of another person; and
- (c) the first-mentioned person—
  - (i) intends that the conduct will cause serious harm; or
  - (ii) is reckless as to a risk that the conduct will cause serious harm to the other person

Penalty — Imprisonment for 25 years. (emphasis added by me)

### Killing with provocation

242.— (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death \*(in the heat of passion) \*(caused by sudden provocation) as defined in sub-section (2), \*(and before there is time for the passion to cool), he or she is guilty of manslaughter only.

(2) The term “provocation” means (except as stated in this definition to the contrary) any wrongful act or insult of such a nature as to be likely when—

- (a) done to an ordinary person; or
- (b) done in the presence of an ordinary person to another person—

- (i) who is under his or her immediate care; or
- (ii) who is the husband, wife, parent, brother or sister, or child of the ordinary person— \*(to deprive him or her of the power of self-control) and \*(to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered).

(3) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the



*immediate care of that other, or to whom the latter stands in any such relation as stated in sub-section (2), the former is said to give to the latter provocation for an assault.*

- (4) An act which a person does in consequence of incitement given by another person in order to induce him or her to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.*
- (5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who believes and has reasonable grounds for believing the arrest to be unlawful. (emphasis placed by me)*

#### **Diminished responsibility**

*243.—(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is \*(at the time of doing the act or making the omission which causes death) \*(in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as \*(substantially to impair—*

*(a) the person's capacity to understand what the person is doing); or  
(b) the person's capacity to control the person's actions; or  
(c) the person's capacity to know that the person ought not to do the act or make the omission— the person is guilty of manslaughter only.*

- (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.*
- (3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons."*

[12] It is to be noted that both offences of murder and manslaughter consists of a physical element, namely conduct; and a fault or mental element namely intention or recklessness. According to section 43 of the Crimes Act 2009, a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law. Thus if the conduct constituting the offence of murder can be justified or excused by or under a law, the issue of manslaughter does not arise.

- [13] According to section 42(1) of the Crimes Act 2009, a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence provided section 42(3) and (4) do not apply and the necessary elements constituting that defence as set out in section 42(2) are satisfied. A person charged with murder will either succeed in raising self defence and will be entitled to an acquittal or if he fails and is unable to come up with any other defence will be convicted of murder. It is not a mitigatory defence like provocation or diminished responsibility, and there is no in-between position. There is no ‘*Excessive Force Manslaughter*’ known to Fijian Law. This is clear from the wording in section 42(1) referred to above and sections 242 and 243 referred to at paragraph 9 above. Section 42(1) specifically states: “a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence”, whereas sections 242 and 243 uses the words: “When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder... is guilty of manslaughter only.” Thus the conduct element is absent where a person acts in self-defence. In the Privy Council case of **Palmer –v- R [1971] AC 814 Lord Morris** said: “*The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected.*” In the case of **Clegg [1995] 1 All E R 334, [1995] Crim L R 418** as reported in **Archbold 2018, 19-46** it was held that where a person kills another with the requisite intent for murder in circumstances in which he would have been entitled to an acquittal on the ground of self defence but for the use of excessive force, the defence fails altogether and he is guilty of murder, not of manslaughter. According to **Smith and Hogan’s Criminal Law 13<sup>th</sup> edition 12.6.4.8** if a defendant uses force in public or private defence, he either has a complete defence or if he uses excessive force, no defence, unless he can rely on section 55 of the Coroners and Justice Act 2009.
- [14] Under section 55 of the Coroners and Justice Act 2009 of the United Kingdom if a defendant out of fear of serious violence from the victim against him or another identified person were to lose his self-control and kills the victim, he, who would otherwise be liable to be convicted of murder, will be liable instead to be convicted of manslaughter. In Sri Lanka Culpable homicide is not murder if the offender, in the exercise of good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is



exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence (section 294 of the Penal Code of Sri Lanka). An identical provision exists in section 300 of the Indian Penal Code. The law of self-defence in Fiji and the UK is totally different to the Sri Lankan and Indian law in this regard and as stated earlier, a person charged with murder will either succeed in raising self defence and will be entitled to an acquittal or if he fails and is unable to come up with any other defence will be convicted of murder. It is not a mitigatory defence like provocation or diminished responsibility and there is no in-between position.

- [15] The Appellant's prayer in his Amended Notice of Appeal dated the 17<sup>th</sup> of August 2018 that he be convicted for manslaughter, is an acknowledgement by him that he is not relying on his defence of self-defence and thus his ground (ii) has to necessarily fail. Further at the hearing before us, the Appellant's Counsel informed Court that he is abandoning ground (ii) of appeal referred to at paragraph 6 above, relating to self defence.
- [16] In relation to ground (iii) of appeal referred to at paragraph 6, namely diminished responsibility, Counsel for the Appellant admitted that there was no evidence whatsoever in relation to diminished responsibility that could satisfy the elements set out in section 243 of the Crimes Act 2009 and therefore did not pursue that ground, but simply stated that he would rely on his Submissions of 23 August 2018. His submissions merely states that "*There was some evidence before the court on the issue of diminished responsibility*" but has not drawn the attention of this Court to any such evidence.
- [17] Section 28(3) of the Crimes Act 2009 states: "*A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was was suffering from such a mental impairment.*" In this case there was no evidence whatsoever to displace this presumption.
- [18] The Respondent's Counsel in his Written Submissions had stated that the issue of diminished responsibility was not raised at the trial and has argued that the Appellant



cannot now raise it before this Court placing reliance on Alfaaz –v- State [2018] FJCA 19, AAU0030 (8 March 2018), Raj –v- State Petition for Special Leave to Appeal No CAV0003 of 2014: 20 August 2014 [2014] FJSC 12 and Varasiko Tuwai –v- State [2016] FJSC 35 (26 August 2016) which have been referred to later in this judgment. In the case of R –v- Kooken 74 Cr. App. R. 30 as reported in Archbold 2018, 19-82, it was held that diminished responsibility being an optional defence it was left to the defence to decide whether the defence of diminished responsibility should be raised. It was said that a the judge’s knowledge of the evidence available in relation to the issue of diminished responsibility would inevitably be limited, and if he did raise it on his own, he might cause serious damage to the defence which had been put forward, without adding anything to the case. In other words a defendant may complain that he would have been acquitted had the judge not summed up on diminished responsibility. I therefore dismiss ground (iii) of appeal.

- [19] The only ground of appeal therefore to be considered by this Court is ground (i) as referred to at paragraph 6 above, namely ‘Provocation’. In this regard the Appellant’s complaint set out in detail in his Written Submissions dated 23<sup>rd</sup> August 2018, which I quote in its entirety and verbatim, excluding the legal authorities cited is: *“that despite there being evidence by him (Appellant) in his caution interview and also in Court that the deceased was involved in an extra marital affair with their landlord and his son, the learned trial judge failed to give direction on the defence of provocation”, and again “The Appellant told the Court in his evidence that he loved his wife and she loved him as well. This was a love marriage, and the relationship was very good, ...Learning that the wife whom he loved so much, had not once but twice cheated him with two different men, any ordinary person in the shoes of the Appellant is likely to snap and loose the control of his mind in such situation”, and finally “The Appellant submits his wife confessing to him that she not only cheated him by sleeping with Sonu but has also slept with Shalen, he had a sudden and temporary loss of control, and for some moment he was not master of his mind. At that time he was so furious that he only wanted to kill his family, himself and nothing else. His mind was out of his control for that spur of moment.”* Thus the basis for provocation as pleaded was one of sexual infidelity.



- [20] This would necessitate this Court to consider whether there was an evidential basis for the learned Trial Judge to direct the Assessors on provocation. The prosecution always bears the legal burden of proving every element of the offence of murder. A defendant who wishes to deny criminal responsibility for murder by relying on provocation or diminished responsibility, which are excuses provided by the Crimes Act 2009 for the killing of a person, bears an evidential burden in relation to that matter in view of **section 59 (2), (3) and (4) of the Crimes Act 2009**. However a defendant does not bear the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution itself. The question whether an evidential burden has been discharged is one of law and matter for the determination by the Trial Judge. "Evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist according to **section 59(7) of the Crimes Act**.
- [21] It has been held in Stingel –v- R [1990] 171 CLR 312 that as a preliminary matter, the trial judge has to decide as a question of law whether, on the version of events most favourable to the accused as suggested by the evidence, the jury might fail to be satisfied beyond a reasonable doubt that the killing was unprovoked. Only if the judge answers this question in the affirmative might the defence be left to the jury. Commenting on the defence of 'Loss of Control' under the Coroners and Justice Act 2009 of UK it had been said in R –v- Gurpinar, R –v- Kojo-Smith and Caton [2015] 1 Cr. App R 31, CA, as reported in Archbold 2018 19-62, under the heading 'Duty of Judge', that a judge should only leave 'loss of control' to the jury... after consideration of each components of the defence. The judge has to be satisfied that there was sufficient evidence in respect of each of the three components and he was bound to consider the weight and quality of the evidence. In the local case of Prem Chand Singh & Anor –v- Reginam [1965] 11 FLR 119 it was held that where there was no evidence establishing a reasonable possibility of act of provocation, loss of self-control both actual and reasonable, and retaliation proportionate to the provocation, it is not necessary for the trial Judge to leave the defence of provocation to the assessors. A similar view was held in Maha Narayan –v- Regina [1972] FCA Reps 72/91 AAU 1/72 6 April 1972 and Shyam Baran –v- Reginam [1978] FCA Reps 78/633 AAU 12/78 30 November 1978.



- [22] This necessitates us to examine the caution statement of the Appellant and his evidence on oath before the Trial Court, as he was the only person who could have spoken as to what happened on the night of the killings and the events leading up to the killings. The Appellant has in his Submissions of 23<sup>rd</sup> August informed Court he is abandoning ground (v) of appeal referred to at paragraph 6 above which was a challenge to the failure of the Trial Judge to direct and guide the assessors on how to approach the evidence contained in the caution interview and the weight to be attached to the disputed confession. There was no challenge to its admissibility per se.

Caution Statement of the Appellant

- [23] The Appellant had stated in his Caution Statement that on the 28<sup>th</sup> of October 2011 around noon his landlord Salen's wife, Reshma had informed him over the phone that her son Sonu was having an affair with his wife Ranjiji Rekha Singh, for some time and has had sex with her and had asked the Appellant to move out of the flat with his family, they were renting out from them. Ranjiji Rekha Singh is one of the deceased in this case and the one referred to in the first count. The Appellant had been shocked to hear that, and had called Reshma back to have that information confirmed. On reconfirmation the Appellant had told her that he too had been suspecting this.
- [24] The Appellant had also stated that prior to this phone call from Reshma that he had suspected that his wife Ranjiji was having an affair with Sonu, had questioned her about it and had slapped her when she denied and got angry, when she was questioned. Sonu was 15 years old. The reason according to the Appellant for suspecting her, was because of the way his wife and Sonu used to talk and joke with one another. The Appellant had also said that he was not in good terms with his mother since there were rumors in the village that his mother was having an affair with a Fijian boy. It appears that the Appellant was a man prone to suspicion.
- [25] The Appellant had claimed that his mind became unstable on hearing what Reshma told him over the phone on the 28<sup>th</sup> of October. He had thereafter taken early leave from his place of work and come home around 12.30 to 1.30 pm. The Appellant had said that he had controlled his anger and pretended to be normal. Having come home he had questioned his wife about what he had heard and she had admitted to it, having



first denied it. This was after he had sworn not to harm her by placing his hand over his younger daughter Anisha's head, the deceased, referred to in the 3<sup>rd</sup> count. The wife had then told him about when and how she had sex with Sonu. The Appellant had then called his wife's mother Rohini and her uncle Anil Prakash and informed them of his wife's behavior. According to the Appellant both of them had admonished his wife. Thereafter the Appellant has had a conversation with his wife and said that she should not behave like that again and that he was prepared to give her a second chance. Thereafter he had called his wife's mother and uncle again and informed them that he and his wife had settled their differences.

[26] He had then taken a shower and gone to drink grog with his landlord Salen, also the father of Sonu. Thereafter the Appellant had slept, while his wife was preparing meals. By the time he had got up it was getting dark and his two daughters were doing their studies and his wife was watching TV. He too had watched TV for a while and had gone out to cool his mind as he had been feeling uneasy. After about half an hour he had come home and watched TV with his wife and children. He had not taken his dinner as he was feeling uneasy. After some time they had switched off the TV and he and his wife had lied down on the mattress where they normally sleep. He had then questioned his wife again and asked her whether she was hiding anything from him. She had then told the Appellant that when Salen got to know about his son Sonu having had sex with her, he too had demanded that she sleeps with him on the threat of blackmailing her. Salen had told her that if she does not sleep with him he will tell the Appellant and others about her relationship with Sonu. The Appellant's wife had confessed that therefore in order to save the family she had to surrender herself to him. They had been talking normally and in a low tone and were lying side by side. This conversation had gone on for about 10-20 minutes. He had then told his wife that he will from the next day live on his own with his two children and his wife had told him that it was up to him to decide, and that she will go to her mother's place. Thereafter Appellant and his wife had sex.

[27] When he was about to sleep he had suddenly felt something on his right shoulder. He had then seen his wife with a chopper in her hand and he claims to have received a small cut on the right side of his shoulder. He had wanted to slap her but had been scared as she had the chopper in her hand. The Appellant had taken the chopper from



her hand and left it near the sink they were sleeping and told her that he would not leave her and that they have to think about their children. Again when he was about to sleep he had heard his wife pick up the chopper again from the sink. Thereafter his wife was about to strike him on his neck with the chopper while sitting on her knees. He had defended himself by pushing her hand away from him. He had received a slight cut on his right shoulder again to where she had struck previously. He had then grabbed the chopper from her hand, put it back near the sink and threatened her that he would kill her if she were to try to do that again.

- [28] Thereafter he had thought that if his wife could do what she did to him for another man she could even kill him for another man. He had then thought that if his wife were to kill him what would happen to his children. He had thought that since she had made two attempts on his life she may even poison his food or use other means to kill him. He had thought he will be separated from his children and his wife would live a happy life. He had therefore decided that if they were unable to live together, they should die together. He had therefore decided to kill his wife and two daughters and himself. By this time it had been around midnight. His wife was fast asleep by this time. He had then picked up the chopper from the sink, pressed his wife's head with his left hand against the pillow and struck his wife on the left side of her neck. He had continued to sever her neck. Having realized that she was dead he had gone into the room of his two daughters who were fast asleep and sought forgiveness from them and killed both of them. He had struck his younger daughter twice on her neck almost severing her head. He had thereafter killed his elder daughter in the same way. After killing his wife and two children he had slit his neck 3 or 4 times with the chopper. When he realized that he may not die he had reached out for the dagger to cut himself with it but had passed out thereafter. He had thereafter heard someone banging on the door and that was all he could recall, until he woke up in the hospital. He had identified the chopper in court with which he had carried out the killings.

- [29] The Appellant at the conclusion of his Caution Statement when asked whether he wished to say anything else had said: *"I want to say that whatever I have said during this interview is true and the action I carried out was to get rid of the family and myself but somehow I was saved. I carried out this action to avoid any bad name of my family in the society and to prevent our reputation being tarnished."*

- [30] This final statement of the Appellant which is not challenged in view of the abandonment of ground 5 of appeal referred to at paragraph 6 above cuts across all the Appellant's alleged defences he sought to argue before this Court and turns the killings to an '*Honour Killing*', which is no defence in law.

Evidence of the Appellant on Oath

- [31] The Appellant's testimony in Court is very much similar to his Caution statement up to the time he and his wife went to sleep. The Appellant had said prior to that he told his wife "*don't worry everyone makes mistakes. We should think about our children...*" Thereafter both of them had gone to sleep and had sex. Thereafter he had asked her if she had anything else to tell him so that they will not separate. It was then she had told him about Salen blackmailing her and her being compelled to have sex with him. Having said that his wife had told him "*forget it all and now I will live with you happily*".
- [32] The Appellant's evidence thereafter I have recorded verbatim: "*Then we fell off to sleep. Wife picked up a chopper – wooden floor and I could hear sounds. Sleep on my front, back facing up. On the mattress on the floor in sitting room. Wife going to hit my...(sic). She did hit me but I fended it off. Got a cut (points to back of neck). I took chopper and slapped her once and put chopper back on sink. Sitting room and kitchen together. There was blood but didn't tell her. We went to sleep but I didn't check the time 40 minutes or 1 hour later she went to pick up the chopper again. Wooden floor makes sound she about to hit me. I realized someone standing beside me-when she about to hit me I blocked it and her hand covered with blood-it slipped and she hit me on the neck. I stood up and took the chopper away-grabbed it from her because she attacking me-then walked to door and saw children. Saw blood in the room. Shrine lantern I could see blood. Wife ran away but she wanted to get the chopper and I just threw my hand and chopper hit her neck I am tall-threw hand out holding the chopper and it is heavy and it hit her on the neck. Didn't check. I swung out once-that's all I remember. Chopper in my hand I grabbed my wife and I didn't let her fall. I put her down beside the sink. Then went to door of bedroom. Saw one daughter lying on floor by bed and one on the bed. When I saw that my wife and I cried for 10 minutes*"



*because my family got spoilt. I love them very much and couldn't live without them. After that I thought I love them so much and I should go with them and with the same chopper I cut my neck. Then don't remember anything....."* The Appellant under cross-examination totally contrary to what he had said in his caution statement and especially what has been referred to at paragraphs 28 and 29 above, had said that it was his wife who killed his two children and he came to know about it only after his wife tried to attack him a second time and after seeing blood in the children's room. The total falsity of this statement becomes obvious as to how the Appellant who claimed to hear every time his wife walked on the wooden floor to pick up the chopper, had not heard any incident in the children's room, had his wife killed his two children as later stated by him.

- [33] There is a contradiction in the Appellant's Caution Statement as referred to at paragraph 23 - 30 above and his testimony on oath before the Trial Court as referred to at paragraph 31 – 32 above, as to the manner the Appellant came to cause injuries to his wife. In his Caution statement the Appellant had stated that 'he had then picked up the chopper from the sink, pressed his wife's head with his left hand against the pillow and struck his wife on the left side of her neck. He had continued to sever her neck'. In his testimony before the Court the Appellant he had stated that he 'just threw his hand and the chopper hit his wife on the neck as it was heavy and he had swung out only once', trying to make out it was an accident. The Post Mortem Examination Report which was produced at the trial shows that there were 3 separate deep incised wounds across the neck, 8.8cm, 11.5cm and 11 cm. All incision wounds show straight sharp edges. It is also improbable that having suffered the injuries as outlined by the doctor, the deceased Ranjiji could have cried with the Appellant for 10 minutes as stated by the Appellant in his testimony before the Trial Court as referred to at paragraph 32 above. Again according to the Appellant's Caution Statement his wife was fast asleep at the time he struck his wife on her neck, while according to his testimony on oath before the Trial Court he had attacked his wife when she tried to attack him with the chopper. It was when these matters, including what has been referred to at paragraph 14 above was drawn to the attention of the Appellant's Counsel that he informed Court that he was abandoning his ground (ii) of appeal referred to at paragraph 6 above, namely the one relating to self-defence.

[34] It is clear from the Caution interview and the Appellant's testimony in Court that the Appellant had suspicions about his wife's extra marital affair with Sonu long before Shelma told him about it and he had sorted out the matter with his wife. After Shelma had complained to him about his wife's extra marital affair with Sonu on the 28<sup>th</sup> of October the Appellant had again questioned his wife about it and not only sorted it out with her but had called his wife's mother Rohini and uncle Anil Prakash to say that the two of them had settled their differences. He had watched TV with his wife and children thereafter. After his wife had told the Appellant on the night before the killings about how Salen had on the threat of blackmail compelled her to have sex with her, the Appellant has had sex with his wife. Therefore the Appellant's contention of him losing his self-control on hearing about his wife's unfaithfulness does not hold ground.

[35] For a Trial Judge to place the issue of '*Provocation*' for the consideration of the Jury there needs to be an evidentiary basis as stated at paragraphs 20-21 above satisfying all three elements of provocation as set out in section 242 of the Crimes Act 2009, namely that the Appellant had caused the death of the person who gave him the provocation (i) in the heat of passion, (ii) caused by sudden provocation as defined in sub-section (2) of section 242 and (iii) before there was time for his passion to cool. These elements as per the decision of **Lord Devlin in Lee Chun-Chuen -v- R [1963] 1 AER 73, [1963] AC 220** are not detached. Their relationship to each other-particularly in point of time is of importance. This necessitates me to examine in detail the provisions of section 242 of the Crimes Act 2009.

- i. **'Sudden Provocation' is defined in section 242 (2) of the Crimes Act as** *"any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered".* There are several elements to be satisfied before one could claim that he or she had been provoked: The provocation must be 'sudden' as per section 242 (1). This is made clear by the words "causes the death in the heat of passion" and "before there is time for the passion to cool"



- ii. The act or insult must be 'wrongful' - In this case it was the Appellant who had asked his wife whether she was hiding anything from him (as per caution statement) or anything else to tell him (as per evidence before the court). It was therefore only at the Appellant's insistence that she had confessed to him of her infidelity. **Section 242 (4) of the Crimes Act** states: "*An act which a person does in consequence of incitement given by another person in order to induce him or her to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.*" I am therefore of the view that not only was there an absence of a wrongful act or insult on the part of the deceased Ranjiji; but it was the Appellant who himself had sort out that information from his wife to make it an excuse for the 'Honour Killing' of his wife. The Appellant in questioning his wife as to whether she was hiding anything from him gives the impression he knew what she was going to tell him. The **Privy Council** had said in **Edwards -v- R [1973] AC 648 (on appeal from Hong Kong)** that the defence is unavailable to a person who had lost self-control in the face of reasonably predictable results of his own conduct but is available where the response to his conduct was unpredictable.
- iii. The words 'any wrongful act or insult **of such a nature as to be likely when done to an ordinary person to deprive him or her of the power of self-control**' connotes, a wrongful act or insult of a serious kind and that is why the words "**of such a nature**" is used and it is judged by the standard of the 'ordinary person' who is generally not prone to be easily provoked or hot tempered and thus an objective test is applied in regard to that element. In **Turnbull -v- R [2016] NSWCCA 109** the ordinary person test was described as a 'purely objective test'. The eccentricities or peculiarities of the individual are not taken into consideration when judging the nature of the provocation given.
- iv. Although in the past sexual jealousy or infidelity was considered as a trigger for provocation, in today's context where infidelity in marriage is not uncommon it is my view that a confession by a wife of infidelity at the behest of a husband cannot be termed an insult **of such a nature as to be likely when done to an ordinary person to deprive him of the power of self-control**. **Coldrey J in Yasso [2002] 6 VR 239** succinctly expressed his concerns about

men relying on the defence of provocation in circumstances where they kill in response to breakdown of an intimate relationship when he said: *“In our modern society persons frequently leave relationships and form new ones. While this behavior may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it. What is abnormal is the reaction to this conduct in a small percentage of instances where the former partner (almost inevitably a male) loses self-control and perpetuates fatal violence with an intention to kill or cause serious bodily harm. In my view, this will rarely, if ever, be a response which might be induced in an ordinary man in the twenty-first century.”* In **Holmes –v- DPP [1946] AC 588**, **Viscount Simon, of the House of Lords** said *“...that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter and that in no case could words alone, save in circumstances of a most extreme and exceptional character so reduce the crime.”* The Appellant’s testimony before Court that his wife Ranjiji having confessed to her infidelity had told him “forget it all and now I will live with you happily” clearly shows that these words in the circumstances of this case were not of a most extreme and exceptional character to reduce the crime to manslaughter. It is interesting to note that under **section 55 (6) (c) the Coroners and Justice Act 2009 of UK** sexual infidelity is disregarded as a *“qualifying trigger”* for loss of self-control.

- v. The words ‘an assault of the kind which the person charged committed’ brings in the element of proportionality, i.e. the assault cannot be out of proportion to the provocation given, otherwise a simple provocative act, gesture or statement would be made an excuse for a killing. In this case even if the deceased Ranjiji confessed on her own without being asked to confess, her brutal slaying cannot certainly be justified.
- vi. It is only after there is clear evidence to establish that the accused was provoked as defined in section 242 (2) that the other two elements, can be considered, namely that the accused in fact caused the death of the person who gave him the provocation (a) in the heat of passion and (b) before there is time for the passion to cool. That brings in a subjective element to the mitigatory



defence of 'Killing with provocation' which means despite the fact that the provocation given was sufficient to cause an ordinary person to deprive him or her of the power of self-control so as to induce him or her to kill the one who gave the provocation, if the accused in fact was not deprived of his power of self-control he will not be entitled to the defence. In the **New South Wales Court of Criminal appeal case of R –v- Peisley [1990] 54 A Crim R 42** **Wood J** said: *“More is required than anger or loss of temper or building resentment. There must, in my view, be a loss of self-control...to the point where reason has been temporarily suspended”* . What the Appellant said at the end of his Caution Statement: “I carried out this action to avoid any bad name of my family in the society and to prevent our reputation being tarnished.”, does not give the picture of a person that fits into the category of a person described by Wood J in Peisley, but of a person bent on carrying out an 'Honour Killing'.

- [36] There was no immediate wrongful act alleged on the part of the Appellant's wife in the Defence submission of 23<sup>rd</sup> August 2018, other than the possible insult the Appellant may have suffered as a result of the wife's confession at his own instance, of having been compelled to succumb to the sexual advances of Salem on the threat of blackmail. This confession of a past incident certainly could not have made the Appellant to lose his power of self-control to the extent of inducing him to kill his wife in the manner he committed it. Certainly it could never be an excuse for the killing of his two children. It is improbable that the Appellant who engaged in having sex with his wife moments before her brutal killing could claim that he acted in the heat of passion and before there was time for his passion to cool in respect of a provocation that she gave him as a result of a confession of infidelity she made to him at his own instance and prior to their engaging in sex.
- [37] The Respondent's Counsel in his Written Submissions had stated that Counsel for the Appellant at the Trial had not sought a redirection on this issue of provocation when the Trial Judge had specifically stated at the conclusion of his Summing Up: “However before I release you I ask counsel if they wish me to add or explain anything in my summing up”. Relying on the cases of Alfaaz –v- State [2018} FJCA 19, AAU0030 (8 March 2018), Raj –v- State Petition for Special Leave to Appeal



No CAV0003 of 2014: 20 August 2014 [2014] FJSC 12 and Varasiko Tuwai –v- State [2016] FJSC 35 (26 August 2016), Counsel for the Respondent had argued that in the absence of cogent reasons for not raising the issue by way of redirection, the appellant is barred from pursuing an appeal on this ground. In Varasiko Tuwai –v- State (ibid) it was stated that “*Litigants must not wait for Trial judges to make mistakes to find a point of appeal. The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked parties to seek re-directions and they do not and subsequently raise the issue in the appellate Court then in the absence of any cogent reason, it should be held against the party as having employed a deliberate tactic to find an appeal point.*” In Raj –v- State *Petition for Special Leave to Appeal* (ibid), it was said: “*The raising of direction in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client’s interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge...*” I state that in the absence of cogent reasons for not raising the issue by way of redirection, this Court would be slow to entertain an appeal on this ground and further state that there was no evidential basis to address the assessors on provocation.

- [38] The Appellant attempted at the hearing of this appeal before us, to bring a complete new change to his defence by trying to attribute his provocation, to his wife killing his two children on the night of the incident, thus going back on the defence taken up at the trial, his own Amended Notice of Appeal dated 17<sup>th</sup> August 2018 where he had sought a conviction of the Appellant for manslaughter as stated at paragraph 5 above and confirmed to us at the hearing by his Counsel as a conviction on all three counts and more so his own Written Submissions of 23<sup>rd</sup> August 2018, wherein he had stated “The Appellant submits his wife confessing to him that she not only cheated him by sleeping with Sonu but also slept with Shalen, he had a sudden and temporary loss of control, and for some moment he was not master of his mind. At the time he was so furious that he only wanted to kill his family, himself and nothing else. His mind was out of his control for that spur of moment”. Nothing is stated therein that the provocation was due to his wife killing his two children. An Appellant cannot be changing his position as and when he so wishes and more so at the appeal stage, as



this would amount to an abuse of the court process. In this case it amounts to the desecration of the dead at the whims and fancies of the Appellant and should be frowned upon by any reasonable court. Such change of positions brings out the falsity of the Appellant's defence. I therefore dismiss this argument without going into it any further. I therefore have no hesitation in dismissing ground (i) of appeal.

[39] The Appellant's grounds (iv), and (vii) of appeal relate intrinsically to the conviction of the Appellant for his criminal conduct and thus have no relevance to this appeal in view of the Appellant's prayer that he be convicted for manslaughter. Further there is no merit whatsoever in those grounds of appeal.

[40] As regards ground (viii) I do take note that the learned Trial Judge had not directed the Assessors specifically on the '*Presumption of Innocence*.' However the Trial Judge had stated: "It is most important that I remind you of what I said to you on the first day. You can only find Bimlesh guilty of one, two or three of these murders if you are sure that he murdered them. You have to find that the State has proved the case to you beyond reasonable doubt. Remember Bimlesh doesn't have to prove anything to you. The burden of proof is on the prosecution...Bimlesh could have just sat back and said that the State hadn't proved their case to the required standard." (emphasis by me). Although this is the conventional direction on the burden of proof and the standard of proof, the underlined idea in this statement is that the Appellant is innocent and that is why he does not have to prove anything. Although this ground of appeal may be decided in favour of the Appellant, I would dismiss this ground of appeal placing reliance on the proviso to section 23 (1) of the Court of Appeal Act, since I consider that no substantial miscarriage of justice had occurred.

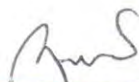
[41] As regards the revised ground (ix) of appeal which was restricted to sentence I am of the view that no arguments have been urged before us to show that the learned Sentencing Judge had erred in exercising his judicial discretion in setting the minimum term to be served before pardon may be considered. I therefore dismiss that ground of appeal.

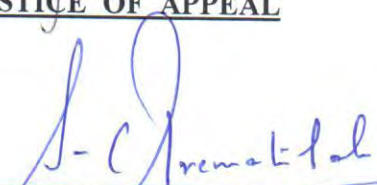
[42] For the reasons set out above I have no hesitation in dismissing the appeal and affirming the conviction and sentence passed by the High Court.


Orders of the Court:

- 1) *Appeal is dismissed.*
- 2) *Conviction and Sentence affirmed.*



  
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Hon Mr Justice S Gamalath  
**JUSTICE OF APPEAL**

  
\_\_\_\_\_  
Hon Mr Justice C Prematilaka  
**JUSTICE OF APPEAL**

  
\_\_\_\_\_  
Hon Mr Justice A Fernando  
**JUSTICE OF APPEAL**