

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

CRIMINAL APPEAL NO. AAU 130 of 2014
(High Court HAC 12 of 2014)

BETWEEN : TALAT MAHAMOOD

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P
Chandra JA
Goundar JA

Counsel : Ms. S Nasedra for the Appellant
Mr. S Tivao for the Respondent

Date of Hearing : 2 July, 2018

Date of Judgment : 24 August, 2018

J U D G M E N T

Calanchini P

- [1] I have read in draft the judgment of Chandra JA and agree with his reasoning and conclusion.

Chandra JA

- [2] The Appellant was charged with one count of Murder contrary to section 237 of the Crimes Act 2009.
- [3] The Appellant pleaded guilty to the charge of murder and was sentenced to life imprisonment with a non-parole period of 15 years imprisonment.
- [4] The Appellant appealed against conviction and sentence and a single Judge of the Court of Appeal refused leave to appeal against conviction but granted leave to appeal against sentence.
- [5] The ground of appeal on which leave to appeal was allowed was as follows:

The learned Trial Judge erred in law by imposing a non-parole term to be served before parole could be considered.

- [6] The Appellant had visited the deceased to discuss about her daughter. An argument had ensued and the Appellant had assaulted the deceased who had retaliated by stabbing the Appellant with a knife. The Appellant had then grabbed the knife from the deceased and repeatedly stabbed her neck, stomach and hands. The knife had got lodged in the deceased's neck and the Appellant had got another kitchen knife and repeatedly stabbed the deceased again on the stomach several times. Death was due to excessive loss of blood from several minor blood vessels of the neck due to the stab wounds.

- [7] **Kim Nam Bae v The State** (unreported AAU 15 of 1998; 26 February 1999) set out the principles on which the Court could interfere with the sentence imposed by a trial Judge:

*"It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v R** (1936) 55 CLR 499)."*

- [8] In terms of section 237 of the Crimes Act, the sentence for murder is a mandatory life sentence. The sentencing Judge has a discretion to set a minimum term before a pardon may be considered.

- [9] The manner in which section 237 should be applied was set out in detail by the Court of Appeal in **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) as follows:

"[36] 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 a discretion in two ways. The first is whether a minimum term should be set. The second is the length of the minimum terms 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 it 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 the convicted person, may recommend that the President exercise a power of mercy by, amongst others, granting a free or condition pardon to a person convicted of an offence."

[37] *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 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.*

[38] *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.*

[39] *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."*

[10] In the present case, the learned trial Judge has erred in exercising his sentencing discretion by imposing a non-parole term when the discretion conferred on him was to set a minimum term of imprisonment before a pardon may be considered when imposing a sentence of life imprisonment and this error comes within the principles in **Kim Nam Bae** (supra).

[11] The Court of Appeal is empowered to impose a sentence it considers proper in terms of the proviso to section 23 (3) of the Court of Appeal Act, 1949. Therefore the 15 year non-parole term of imprisonment imposed by the learned trial Judge is set aside and substituted with a minimum term of 15 years of imprisonment before a pardon may be considered.

Goundar JA

[12] I agree.

Orders of Court

1. *The 15 year non-parole term of imprisonment is set aside and substituted with a minimum term of 15 years of imprisonment before a pardon may be considered.*
2. *The sentence imposed on the Appellant is life imprisonment with a minimum term of 15 years of imprisonment before a pardon may be considered.*



W. Calanchini

Hon. Justice W. D. Calanchini
PRESIDENT COURT OF APPEAL

S. Chandra

Hon. Justice S. Chandra
JUSTICE OF APPEAL

D. Goundar

Hon. Justice D. Goundar
JUSTICE OF APPEAL