

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 170 of 2019
[In the High Court at Lautoka Case No. HAC 220 of 2016]

BETWEEN : **VENKAT RAJU**

AND : **STATE**

Appellant

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **14 September 2021**

Date of Ruling : **17 September 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with a single count of murder contrary to section 237 of the Crimes Act, 2009 committed on 19 October 2016 at Vatulaulau, Ba in the Western Division.

[2] The information read as follows:

'Statement of Offence

MURDER: *contrary to section 237 of the Crimes Act No. 44 of 2009.*

Particulars of Offence

VENKAT RAJU, on the 19th of October, 2016 at Vatulaulau, Ba in the Western Division murdered ROSHNI LATA SHARMA.'

- [3] The appellant had been tried *in absentia*. After the summing-up, the three assessors in unanimity had opined that the appellant was not guilty of murder but guilty of manslaughter. The learned High Court judge had disagreed with the assessors and overturned their opinion and convicted the appellant for murder. He was sentenced on 21 October 2019 to mandatory life imprisonment with a minimum serving period of 18 years.
- [4] The appellant had signed his appeal against sentence out of time. I will however consider his appeal as timely since the covering letter signed by the OIC of Lautoka Corrections Centre addressed to the Court of Appeal registry is dated 29 November 2019. The CA registry had acknowledged the receipt of the said appeal on 13 December 2019. It is possible that the Corrections Centre had forwarded the appeal belatedly but the appellant should not be held responsible for that lapse. Subsequently, the appellant had tendered amended grounds of appeal against conviction (14 July 2020 & 15 October 2020) and an application for enlargement of time (27 August 2020). Thus, his appeal against conviction is 07 months and 03 weeks out of time. His final amended grounds of appeal and written submissions had been tendered on 01 December 2020 and the state had replied to the same by its written submissions filed on 11 December 2020.
- [5] At the Skype hearing the appellant indicated that he had handed over to the Correction Centre in Lautoka in July 2021 another set of amended grounds of appeal. The appellant had not obtained permission to file any fresh grounds of appeal after the matter was fixed for hearing initially on 09 July 2021. In any event, the CA registry had not received it nor had it been served on the state for it to respond. Therefore, the appellant was informed that this court would proceed to deliver a ruling on the basis of his amended grounds of appeal against conviction and written submissions filed on 01 December 2020 and the state's reply submissions filed on 11 December 2020.
- [6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC

17. Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[7] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[8] The delay of the conviction appeal (being 07 months and 03 weeks late) is substantial. The appellant in his affidavit has attributed his lack of knowledge and of legal assistance as the reason for the delay. However, he had appealed against sentence almost within time and failed to even mention that he wanted to appeal against conviction as well even without specifying grounds of appeal. Thus, there is no acceptable explanation for the delay in the conviction appeal. Nevertheless, I would see whether there is a real prospect of success for belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent had not averred any prejudice that would be caused by an enlargement of time.

[9] The appellant's amended grounds on conviction are as follows:

Ground 1

THAT the Learned Trial Judge erred in law when his Lordship wrongly admitted the entirety of the Police records of caution and charge interview statements without first holding a voir dire enquiry to determine the admissibility of the records of interview. A miscarriage of justice in circumstances of the case and to the appellant.

Ground 2

THAT the Learned Trial Judge erred in law when his Lordship did not properly adequately direct himself in judgment on the law principle and elements of provocation before disagreeing with the unanimous opinion of the assessors that the appellant was guilty of manslaughter.

Ground 3

THAT the Learned Trial Judge erred in law in not giving cogent reasons from differing from the unanimous opinion of the assessors that the appellant was not guilty of murder. Failure to do so was a miscarriage of justice in the circumstances of the case and to the appellant.

Ground 4

THAT the Learned Trial Judge erred in law in having a trial in absentia for indictable offence of murder which was procedural irregularity amounting to a miscarriage of justice.

Ground 5

THAT the Learned Trial Judge erred in law when his Lordship did not properly and adequately enquire whether Police has applied. The Constitutional procedural requirements of Section 14(2)(1) before trying the appellant in absentia. Failure to do so was a miscarriage of justice.

Ground 6

THAT the Learned Trial Judge erred in law, when his Lordship did not give proper and adequate directions to the assessors on the elements of provocation – meaning of sudden whether accused's loss of self-control must immediately follow a miscarriage of justice in the circumstances of the case and to the appellant.

- [10] The trial judge had briefly set out the summary of facts in the sentencing order as follows:

'2. The brief facts were as follows:

The accused and the deceased were living in a de facto relationship for some time before the incident both were not in talking terms. The accused continued to live in the house of the deceased despite being told by the deceased to leave her house.

- 3. On 19th October, 2016 at about 2am the accused went into the sitting room of the deceased with a pinch bar at this time the deceased was lying down on her side and watching Facebook. The accused struck the deceased on her head about 5 to 6 times and left the house.*

4. *The deceased's daughter Sheenal who was sleeping in another room in the house heard her mother call her name, Sheenal went into the sitting room and saw her mother lying injured with blood flowing from her wounds. The deceased was taken to the Ba Mission Hospital and from there she was transferred to the Lautoka Hospital.*
5. *After about two weeks the deceased died at the Lautoka Hospital. The post mortem report showed the deceased died due to blunt force trauma resulting in cerebral edema (swelling of the brain) and subarachnoid haemorrhage (bleeding of the brain). During the police investigation the accused was arrested, cautioned interviewed and charged.'*

01st ground of appeal

- [11] Under the first ground of appeal the appellant contends that the trial judge had wrongly admitted the cautioned interview and the charge statement without having a *voir dire* inquiry.
- [12] The appellant had been defended by counsel (two) from the Legal Aid Commission. He had informed his counsel of his inability to attend the hearing due to his illness and as a result he was tried *in absentia* with his counsel fully defending him (see the appellant's affidavit dated 27 August 2020). The state has submitted that indeed a *voir dire* inquiry was held on 30 September and 01 October 2019 and the appellant's complaint is ill-founded. After the cautioned interview was marked as an exhibit at the trial the defence counsel had cross-examined the interviewing officer on the lines that it was taken under threat and assault (voluntariness) and certain answers were fabricated (general ground of unfairness) - vide **Ganga Ram & Shiu Charan v R**, Criminal Appeal No. AAU0046 of 1983 (13 July 1984). The trial judge had given the necessary directions to the assessors based on the said cross-examination at paragraphs 66-68 of the summing-up regarding how they should approach the cautioned interview *vis-à-vis* its voluntariness, whether the appellant in fact made it, its truthfulness and weight.
- [13] Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to Judges and Magistrates and at a trial before assessors a *voir dire* may

be conducted prior to swearing in of the assessors but after the accused has pleaded to the information. **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) had earlier laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

[24] Whenever the court is advised that there is a challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial within a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.

[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.'

[14] In the circumstances, there is no real prospect of success in this ground of appeal.

02nd and 06th ground of appeal

[15] The appellant complains that the trial judge had not directed the assessors and himself in the judgment on the law relating to provocation before disagreeing with the assessors.

[16] A trial judge is not expected to repeat everything he had stated in the summing-up in his written decision called the judgment even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonably be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge [see section 237(5) of

the Criminal Procedure Act, 2009 & **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

- [17] The trial judge specifically addressed the assessors on provocation at paragraphs 102-115 and the directions are in line with the law on provocation as expressed recently by the Court of Appeal in **Masicola v State** [2021]; AAU 073.2015(29 April 2021). *Masicola* considered several previous decisions on provocation.
- [18] In overturning the assessors the trial judge again had given his mind to the issue of provocation at paragraphs 42 and paragraphs 48-53 of the judgment with reference to law and facts.
- [19] Therefore, there is no real prospect of success in this ground of appeal.

03rd ground of appeal

- [20] The appellant's criticism is that the trial judge had not given cogent reasons when disagreeing with the assessors.
- [21] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) and **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].
- [22] Upon a perusal of the judgment it appears that the trial judge had indeed undertaken an independent analysis of evidence and in particular looked carefully into the two

main issues in the case namely the fault element entertained by the appellant (see paragraphs 41- 46 & 54) and whether he acted under provocation (see paragraphs 42 and 48-53).

- [23] Therefore, I cannot agree with the appellant's complaint and this ground of appeal has no real prospect of success.

04th and 05th ground of appeal

- [24] The appellant's argument under both grounds is on trial *in absentia*.

- [25] The respondent submits that the appellant was granted bail on 05 January 2017 and made a number of appearances in court thereafter. However, he had then absconded and obviously decided not to appear in court. Nevertheless, according to his own affidavit dated 27 August 2020 he had informed his counsel of his inability to attend the trial due to his illness and his counsel then continued to defend him until the date of the sentence. Thus, it is clear that he had waived his right to be present during the trial and as a result he had been tried *in absentia*.

- [26] In **Lealeavono v State** [2020] FJCA 192; AAU038.2019 (9 October 2020) and **Waqa v State** [2020] FJCA 222; AAU084.2018 (6 November 2020) and **Bulubuluturaga v State** [2021] FJCA 76; AAU0173.2019 (19 March 2021) this Court discussed the law relating to trial *in absentia* in detail and stated:

[22] In the absence of any other provision in the Criminal Procedure Code, 2009 regarding an accused being tried in absentia in the High Court, section 14(2)(h)(i) of the Constitution would provide guidance to court as to the conditions that should be satisfied before an accused can be tried in his absence. Those conditions are that (i) the accused should be served with summons or similar process requiring his attendance at the trial and (ii) despite summons or similar process the accused should have chosen not to attend (waiver of the right to be present). Unless the court is satisfied that both these preconditions have been fulfilled, the right guaranteed by section 14(2)(h)(i) of the Constitution cannot be taken away and an accused cannot be tried in his absence in the High Court.

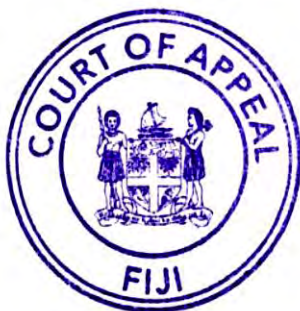
[23] The first of these conditions is an obligation on the part of the court envisaging sufficient notice on the accused that he should appear at the trial or a direction on the authority holding him to produce the accused in court for the trial while the second condition is a conscious, deliberate or voluntary decision on the part of an accused not to present himself for the trial. However, once such notice has been given to an accused, if not detained under the authority of court, it is his responsibility to make himself available to face trial on every occasion without any further notice unless prevented from doing so for reasons beyond his control. Therefore, section 14(2)(h)(i) of the Constitution is no license for an accused to evade process of court and course of justice.'

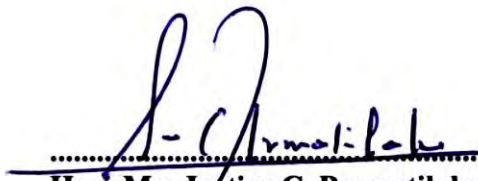
[27] It is absolutely clear that both conditions required to proceed with the trial in the absence of the appellant had been fulfilled. In addition, the trial judge had warned the assessors not to hold the fact that he was not present during the trial adversely against the appellant (see paragraphs 96 and 97).

[28] Thus, these grounds of appeal has no merits at all.

Order

1. Enlargement of time to appeal against conviction is refused.




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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL