

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

**CRIMINAL APPEAL NO.AAU 118 of 2020**  
**[In the High Court at Suva Case No. HAC 99 of 2017]**

**BETWEEN** : **TIMOCI LOLOHEA**

**Appellant**

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

**Respondent**

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
: **Mr. M. Vosawale for the Respondent**

**Date of Hearing** : **21 December 2022**

**Date of Ruling** : **23 December 2022**

**RULING**

[1] The appellant had been indicted in the High Court at Suva with one count of murder contrary to section 237 of the Crimes Act, 2009 20 day of March 2017 at Nasinu in the Central Division.

[2] The assessors' unanimous opinion was that he was guilty of both counts. The trial judge while agreeing with the assessors convicted him for murder. He had been sentenced on 08 May 2018 to mandatory life imprisonment with 18 years as the minimum term to be served.

[3] His appeal against conviction and sentence is out of time by 02 years and 03 months. The Rules of Court have to be observed and must not be disregarded or ignored [vide **Halsbury's Laws** (4th Ed) Vol 37 para 25; **Revici v Prentice Hall Inc** [1969] 1 All ER 772 (CA); **Samuels v Linzi Dresses Ltd** [1980] 1 All ER 803, 812 (CA)] and in

order to justify a court extending time there must be some material before court (vide **Ratnam v Kumarasamy** [1964] 3 All ER 933 at 935) and if no excuse is offered, no indulgence should be granted [vide **Revici v Prentice Hall Incorporated and Others** (supra)].

- [4] The discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties which means that such discretion can only be exercised upon proof on the material before court that strict compliance with the rules will work injustice to the applicant [see **Gallo v Dawson** (supra)]. In addition, the practical utility of the remedy sought on appeal, the extent of the impact on others similarly affected, any impact on the administration of justice and any floodgates considerations have to be considered relevantly in exercising the court's discretion (see **R v Knight** [1998] 1 NZLR 583 at 589).
- [5] 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? (vide **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).
- [6] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. 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. No party in breach of the relevant procedural rules and timelines has an entitlement to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100]. In practice an unrepresented appellant would usually deserve more leniency in

terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[7] The delay of this appeal is very substantial. The appellant's explanation is that he lacked legal knowledge and his mental state following the trial and time taken to recover as excuses for this inordinate delay. He was represented by counsel at the trial and the sentence order clearly states that he could appeal within 30 days. He could have obtained legal advice or filed a timely appeal in person or at least within a reasonable time after the expiry of the appealable period. Thus, the reasons for the substantial delay are not acceptable. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The sentence order sets out the evidence as follows:

2. *The facts were as follows: On the date of the murder, you were 55 years old, while the deceased, Ms Elenoa Dicovi was 23 years old. The deceased had been your defacto wife since 2012. You met her when she came to stay with you and your legal wife at Nadonumai, Suva. She was 18 years old at the time and you were 51 years old. Your legal wife was her aunty. You started a relationship with her, and the two of you had a daughter. You obviously loved the deceased. She worked for you initially in your logistic company. Then she later found work at Damodar City cinema as an usher. She began to work late at night.*
3. *You found out later that she was having an affair with a new boyfriend. You confronted her and she admitted the same. She left you as a result. She took you two's daughter to Labasa. She later moved into Lot 26 Nasilivata Street as a live in nanny. You tracked her down to Nasilivata. You pleaded with her to return to you. She refused. You were angry and jealous. You couldn't accept that she was leaving you. You planned to kill her. On 20 March 2017, you went to Lot 26 Nasilivata Street. You called her. She came to you. You then repeatedly stabbed her with two knives. You admitted you intended to stab her to death.*
4. *The matter was reported to police. An investigation was carried out. You were caution interviewed by police on 20 and 21 March 2017 at Valelevu Police Station. You admitted to police that you stabbed the deceased to death and that you intended to cause her death.....*

6. *Ms. Elenoa Dicovi, as an 18 year old, choose to go out with you. You were already married to her aunty and 51 years old at the time. You made her your defacto wife. She spent the next 5 years of her life with you. Obviously there was a lot of love during that time because you two had a daughter together. In 2016 or thereabout, she began an affair with another person. You later found this out. You began to assault her. You were angry at her for breaking you two's "matrimonial vows". She left you. You were jealous that she had gone out with another person. You pleaded with her to return to you. She refused. You then planned to kill her. On 20 March 2017, you took two knives, located her and repeatedly stabbed her to death.....'*

[9] The appellant gave evidence and had stated under cross-examination consistently with his cautioned interview *inter alia* that:

*'The victim is smaller than me. During our relationship, I do not assault the victim. I begin to assault her, when I found out she was having an affair. She ran away after I assaulted her. She found a new job while she was still with me at Damodar City. That's when the problem started. I assaulted Elenoa after I found love bites on her. These love bites occurred while she was working at Damodar Cinema. She later left me. I later started looking around for her. I found out she was at Lot 26 Nasilivat Road, Nadera. I persuaded her to return to me sometime. I called her by phone. I went to Nasilivata Road to ask her to return because she had moved on with her life. I made various phone calls to her to return to me. She refused to return to me. Because of that, I partly became jealous.*

*Because of my jealousy, I planned to kill Elenoa. On 20 March 2017, I went to Lot 26 Nasilivata Road. I was interviewed by Detective Constable Taitusi. I gave the 240 answers voluntarily.*

*On 20 March 2017, I stabbed Elenoa Dicovi with 2 kitchen knives. She received 12 stab wounds. I agree she died from the stab wounds. At the time I stabbed her, I intended to kill her.'*

[10] The appellant's counsel in his closing submissions had submitted that the appellant was provoked into killing the deceased because of what she had previously done to him and therefore, he was not guilty of murder but only of manslaughter.

[11] The appellant's grounds of appeal could be identified and summarised under the following topics as follows:

**'Conviction**

1. *Ambiguous plea.*

2. *Provocation not accepted as a defense.*
3. *The mental element as defence to murder as stipulated under statutory provisions not proved.*
4. *The Turnbull Principle for eye witnesses and identification under common law principles not followed.*
5. *The Abuse of Court Process and Procedure which was blatantly disregarded by the learned trial judge thus causing a substantial miscarriage of justice.*

**Sentence**

6. *Matters improperly taken into account or fresh evidence to corroborate substantially for the interference of sentence by learned trial judge.'*

**01<sup>st</sup> ground of appeal**

- [12] On 30 April 2018, the first day of the trial, when the information was put to the appellant in the presence of his counsel, he had pleaded not guilty to the charge. Then, the matter had proceeded to trial. If he had pleaded guilty there would not have been a trial. Thus, there is no question of an ambiguous plea.

**02<sup>nd</sup> ground of appeal**

- [13] Though, the appellant had not specifically raised provocation as a defence, the trial judge had directed the assessors on provocation at paragraphs 14, 26, 44 and 46 and left them with the lesser verdict of manslaughter to decide if they so wished and the trial judge addressed himself too on provocation at paragraph 10 of the judgment.
- [14] Given the evidence on record, I cannot see how a plea of provocation could have succeeded in this case based on the applicable principles discussed in many a previous decision including the recent judgment in **Rawat v The State** AAU0186 of 2016 (24 November 2022) at para [40] to [47].

- [15] The appellant's argument that the absence of finger prints and the DNA evidence of the deceased's blood on the two knives produced at the trial, had denied him the opportunity of showing that the murder was the result of provocation, has no merit at all.

**03<sup>rd</sup> ground of appeal**

- [16] The trial judge had summed-up to the assessors the appellant's contention that he lacked the required fault element at paragraphs 15 - 17, 26, and 47. He had directed himself on the same question at paragraph 11 of the judgment.

- [17] I do not think there is any prospect of success on the argument based on 'mental impairment' in the form of alleged 'automatism' or 'Post Traumatic Stress Syndrome' as set out in section 28(1) of the Crimes Act, 2009 given the totality of the evidence in the case. The appellant's case does not seem to come even closer to pass the threshold contemplated in section 28(1). A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may do so only to deny criminal responsibility [vide section 28(6)]. A person is presumed not to have been suffering from such a mental impairment and the presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment [vide section 28(3)]. The evidence indicates that the appellant had entertained the fault element of intention to cause death (or at least being reckless as to causing the death) as set out in the Crimes Act, 2009 in a premeditated brutal attack on the deceased causing fatal injuries leaving her with absolutely no chance of survival.

**04<sup>th</sup> ground of appeal**

- [18] This ground of appeal is totally misconceived. The appellant's identity was never in issue. Nor was the identity challenged by the appellant. On the contrary, the admitted fact No. 12 is as follows:

*‘On the same day the accused surrendered himself to Corporal Talikai Kavv at the Lami Police Station and informed Corporal Talikai Kavv that he had just killed the deceased. The accused then gave Corporal Talikai Kavv the car key.’*

- [19] The whole trial proceeded on the common ground that the appellant had caused the death of the deceased.

**05<sup>th</sup> ground of appeal**

- [20] The appellant complains that the cautioned interview was lately amended during the trial.

- [21] There is no material arising from the summing-up or the judgment to substantiate this allegation. The defence counsel does not seem to have raised any objection to such an exercise during the trial or sought any redirections on any issue relating to such amendments at the trial.

**06<sup>th</sup> ground of appeal (sentence)**

- [22] The trial judge in the sentencing order had imposed the mandatory life imprisonment on the appellant for murder and given reasons as to why he was fixing 18 years as the minimum term to be served before a pardon may be considered by His Excellency the President of the Republic of Fiji. The appellant has not demonstrated any sentencing error.

**Law on bail pending appeal**

- [23] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellants have to demonstrate the

existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, appellants can even rely only on ‘exceptional circumstances’ including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Ourai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

- [24] Out of the three factors listed under section 17(3) of the Bail Act ‘likelihood of success’ would be considered first and if the appeal has a ‘very high likelihood of success’, then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
  
- [25] If an appellant cannot reach the higher standard of ‘very high likelihood of success’ for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.
  
- [26] The appellant does not have a real prospect of success in his appeal leave aside a very high likelihood of success. Nor has he demonstrated any exceptional circumstances either.



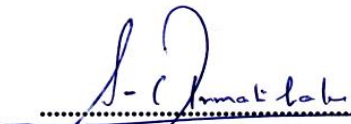
[27] I shall in any event consider the second and third limbs of section 17(3) of the Bail Act namely '*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard*' together.

[28] The appellant is serving a life imprisonment. There is no danger that the appellant is likely to serve a longer sentence than that upon the hearing of the appeal in the future. Therefore, section 17(3) (b) and (c) too cannot be considered in favour of the appellant at this stage.

**Orders of the Court:**

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.
3. Bail pending appeal is refused.



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