

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

CRIMINAL APPEAL NO. AAU 118 OF 2019
[Lautoka Criminal Action No: HAC 200 of 2018]

BETWEEN : ROZLEEN RAZIA KHAN

Appellant

AND : THE STATE

Respondent

Coram : Prematilaka, RJA
Morgan, JA
Clark, JA

Counsel : Mr M Yunus and Mr R Prasad for the Appellant
Mr A Singh for the Respondent

Date of Hearing : 10 November, 2023

Date of Judgment : 29 November, 2023

JUDGMENT

Prematilaka, RJA

1. I have read in draft the judgment of Clark, JA and agree with the reasons and orders proposed.

Morgan, JA

2. I have read and concur with the judgment of Clark, JA.

Clark, JA

Background

3. On 6 May 2018 the appellant drove from her home with her four-year old daughter. She drove off the road and down the bank of the Rewa River. After a time, the appellant tied her daughter to her body with a scarf and went into the river knowing she could not swim. The appellant was eventually rescued but her child had drowned.
4. The appellant was interviewed over two days at the Nausori Police Station. During the course of the interview the appellant said that she was thinking to kill herself and her youngest daughter by driving the car into the river.
5. The appellant was charged with murder and, following a four-day trial in July 2019, was convicted on that charge¹. She was sentenced to life imprisonment with the Judge exercising his discretion not to fix a minimum term before pardon might be considered.² On 15 August 2019 the appellant filed an application for leave to appeal against conviction and sentence. Almost 1 year later, on 24 July 2020, the appellant by her counsel filed a notice of abandonment of her sentence appeal. Accordingly, pursuant to s 39 of the Court of Appeal Act, the appeal against sentence is deemed dismissed.
6. In his Ruling delivered 7 December 2020, His Honour Prematilaka RJA refused the appellant's application for leave to appeal against conviction.³ She has renewed her application to this Court. At the hearing of the renewal application the Court raised with the appellant her abandonment of the sentence appeal. Having made inquiries of

1 Crimes Act 2009, s 237.

2 Crimes Act 2009, s 237.

3 *Khan v State* [2020] FJCA 241; AAU118.2019 (7 December 2020).

the appellant, the Court was satisfied the abandonment was voluntary and considered⁴ and dismissed her appeal against sentence.

Preliminary point

7. At the start of the hearing before us Mr Yunus, counsel for the appellant, raised an issue in regard to Prematilaka RJA sitting when earlier, as a single Judge. His Honour had refused the application for leave to appeal.
8. When asked why he had not raised the point earlier Mr Yunus said counsel only learned of the composition of the Court on the preceding Monday. Mr Yunus also emphasised he was not suggesting bias but one of the concerns raised by the appeal was the voluntariness of the Police interview. Deciding the leave application as the single Judge, His Honour had ruled that this ground of appeal had no reasonable prospect of success.
9. Prematilaka RJA made two points to counsel:
 - 9.1 His ruling on the application for leave was based on limited material and did not finally determine the appeal. The Court of Appeal was open to be persuaded that the appeal had merit on the basis of all the relevant material now before it and by the submissions of counsel.
 - 9.2 Mr Yunus advised the Court that his client wanted the issue raised, he had raised it and they were ready to proceed. In response, Justice Prematilaka asked counsel to make his position clear. Was he making, or did he propose to make, a formal application for recusal?
 - 9.3 Mr Yunus withdrew his objection.
10. I turn then to the seven grounds of appeal.

Grounds of appeal

11. Counsel submitted the first two grounds could be taken together. If the appellant succeeded on either ground then, he argued, the other grounds became unnecessary.

⁴ See *Masirewa v State* [2010] FJSC 5; CAC 0014.2008S (17/8/2010).

12. The first two grounds of appeal are:

Ground one: the learned Trial Judge erred in law and in fact when he did not hold a voir dire inquiry when there was evidence that the right to remain silent was not properly explained to the Appellant, thus the confession in the caution interview was tainted.

Ground two: the learned trial judge erred in law and in fact to admit the caution interview in evidence when there was evidence of breach of the right of the accused that is the right to remain silent enshrined in the Constitution.

Discussion

13. Section 13 of the Constitution provides:

- (1) Every person who is arrested or detained has the right —
 - (a) to be informed promptly, in a language that he or she understands, of —
 - (i) the reason for the arrest or detention and the nature of any charges that may be brought against that person;
 - (ii) the right to remain silent; and
 - (iii) the consequences of not remaining silent;
 - (b) to remain silent

14. At the beginning of the interview at the Police Station on 7 May 2018, the appellant was told she was not obliged to say anything and that she had a right to consult a lawyer. The right to silence was explained in the following terms:

Mrs Rozleen Razia Khan under the the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or you will answer to the questions?

Ans: I will answer the questions.

15. The appellant then proceeded, as she said at trial, to tell them all that she knew in response to whatever they asked of her.⁵ Her entire statement became the “caution interview” that was admitted in evidence at trial.
16. Although counsel dealt with the first two grounds together there is an essential difference between them. In the first ground the appellant argues that the trial Judge

5 Transcript of trial, p39.

erred in failing to hold a voir dire inquiry. In the second ground the appellant argues that the trial Judge erred in allowing the caution interview to be admitted in evidence.

Ground 1

17. Section 288 of the Criminal Procedure Act provides—

When necessary to determine any issue during the course of a trial in any court, a judge or magistrate may proceed to determine the issue by a voir dire. A voir dire may be conducted prior to the swearing in of the assessors but after the accused person has pleaded to the information.

18. As s 288 provides, a voir dire – a trial within a trial – may be conducted during the course of a trial. It may also be held prior to trial:⁶

[24] Whenever the court is advised that there is 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...

[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.

19. At a pre-trial conference on 12 November 2018 the appellant's then counsel advised that she intended to challenge the caution interview on the grounds of oppression. The matter was listed for mention on 26 November 2018 for "voir dire grounds".
20. On 26 November 2018, counsel advised she would be filing voir dire grounds. On 21 January 2019 counsel was given leave to withdraw and Mr O'Driscoll formally marked his appearance as counsel for the appellant. Mr O'Driscoll continued to represent the appellant through the trial and at sentencing.
21. The trial began on 8 July 2019. At the outset, and with the appellant present, the State confirmed it was relying on the caution interview. Importantly, Mr O'Driscoll advised: "the accused is not challenging the voluntariness of the caution interview".⁷

⁶ *Rokonabete v The State* [2006] FJCA 40; AAU0048.2005S (14 July 2006).

⁷ Transcript of trial, p13.

22. The first prosecution witness was the interviewing officer. When she began to read the caution interview the trial Judge stood down the assessors and sent out the prosecution witness. He was concerned about the way in which the appellant's right to silence had been administered.
23. Counsel returned that afternoon to argue the point. Counsel for the prosecution filed submissions and Mr O'Driscoll filed two authorities. The Judge delivered his ruling on admissibility the following morning, 9 July 2019.⁸ His Honour relied on the following passage in *State v Matia* emphasising the importance of the expression of the right to silence:⁹

Section 13(1) of the Constitution states that every person who is arrested or detained has the right to remain silent and that the right must be administered promptly, in a language that the accused understands. *In Fiji the constitutional right to remain silent must be administered in unqualified terms.* Otherwise, the right will become a dead letter. In the present case, the right to remain silent was qualified by an incentive to tell his side of the story to avoid being charged based on the allegation. The qualifications placed on the right to remain silent are inappropriate and objectionable. The qualifications were placed by an experienced police officer without any justification. The qualifications breached the Accused's constitutional right against self-incrimination. (My emphasis)

24. The trial Judge went on to reach the following essential conclusions:
- 24.1 The interviewing officer had not properly explained to the accused her right to remain silent: (at [8]).
- 24.2 The interviewing officer misrepresented the position by giving the accused the impression she might be prosecuted on the available evidence if she remained silent. That suggested there was a likelihood of not being prosecuted if she did not remain silent: (at [8]).
- 24.3 The appellant did not challenge the voluntariness of the caution interview. If it had been found that the answers were not given voluntarily, the statement should be ruled inadmissible. The Judge had no difficulty accepting she had given her answers voluntarily during the interview: (at [10]).

⁸ *State v Khan* HAC 200 of 2018 (9 July 2019).

⁹ *State v Matia* [2019] FJHC 188; HAC260.2018 (13 March 2019).

24.4 The issue therefore became whether the caution interview should be excluded on the grounds of unfairness. Applying *State v Kumar*¹⁰ and having considered “the facts and circumstances of this case and the public interest” the Judge decided to exercise his discretion in favour allowing the interview to be tendered in evidence: ([11] – [13]).

25. Mr Yunus submitted the appellant’s main issue was with the Judge’s “failure to hold a voir dire inquiry to determine the admissibility of the caution interview on the ground of unfairness”. Having rehearsed in some detail the process leading to the trial Judge’s “Voir Dire Ruling”, it is apparent that he did conduct an inquiry into the admissibility of the caution statement and whether it should be excluded. Therefore the first ground cannot succeed.

Ground 2

26. The second ground of appeal is that the trial Judge erred in admitting the caution statement because the statement was obtained in breach of the appellant’s right to silence.
27. Having concluded that the appellant’s right to remain silent was not properly explained to her, the issue for the trial Judge was whether or not he should exclude the statement on the ground of unfairness. The Judge referred to *Ganga Ram Shiu Charan v R* in which the Court of Appeal addressed the point:¹¹

It will be remembered that there are two matters each of which requires consideration in this area. **First**, it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage – what has been picturesquely described as “the flattery of hope or tyranny of fear”. **Second**, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behave, perhaps by breach of the Judge’s Rules falling short of overbearing the will, by trickery or unfair treatment.

28. His Honour also referred to *State v Kumar* in which the High Court declared:¹²

The effects of non-compliance with section 27(1)(c) of the Constitution, or of a finding of an ill-informed waiver, may be the exclusion of any statement obtained

10 *State v Kumar* [2002] FJHC 194; HAC0003D.2002S (11 July 2002).

11 *Ganga Ram Shiu Charan v R* Criminal Appeal No AAU0046 of 1983 (13 July 1984).

12 *State v Kumar* [2002] FJHC 194; HAC0003D.2002S (11 July 2002).

thereby (*State v Mool Chand Lal* Crim. Case 3/99 Labasa High Court). The discretion to exclude must be exercised after a balancing of the accused's rights, and public interest rights to the efficient investigation of crime. (Trial Judge's emphasis)

29. His Honour then concluded that "having considered the facts and circumstances of this case and the public interest" it was appropriate not to exclude the statement on the grounds the right to silence was not explained properly.¹³ In permitting the statement to be tendered in evidence His Honour added that whether the accused gave the answers recorded in the statement and whether her answers were true fell to be decided at trial.
30. I note that the trial Judge was not explicit about the factors that were relevant to his consideration of the public interest. I asked Mr Yunus what factors might properly be taken into account by a Judge when balancing the facts and circumstances of a case such as this against the public interest. Mr Yunus submitted one factor would be the public interest in the efficient investigation of crime. That of course reflects the frequently quoted passage set out above from *State v Kumar*.
31. But in *State v Kumar* the learned Judge's observation was made in the context of an alleged failure by the prosecution to tell the accused he had a right to consult counsel. The observation was made in the course of a discussion about the right to counsel constituting a procedural safeguard for the accused. In that context consideration of the other side of the coin namely the "public interest rights to the efficient investigation of crime" makes sense. The relevance of the public interest in the efficient investigation of crime is less obvious when the trial stage has been reached. By the commencement of trial the investigation has long concluded.
32. What public interest factors then might be relevant to a consideration of the admissibility of a caution statement when it emerges during trial that the statement was improperly obtained (because there was a breach of the accused's constitutional right to be properly informed of the right to silence)?
33. In some comparable jurisdictions the courts are required to determine whether or not the exclusion of improperly obtained evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and

¹³ *State v Khan* [2019] FJHC 1204; HAC200.2018 (9 July 2019) at p 4.

takes proper account of the need for an effective and credible system of justice. The balancing process is achieved by considering factors such as the importance of the right breached by the impropriety and the seriousness of the intrusion on the right; the nature of the impropriety (whether it was deliberate, reckless, or done in bad faith); the nature and quality of the improperly obtained evidence and the seriousness of the offence with which the accused is charged.¹⁴

34. It is not apparent what factors the trial Judge took into account when he considered the public interest but applying, for example, the factors just outlined His Honour's decision to admit the statement into evidence was justified. Without doubt the appellant's right to be properly informed of her right to silence is a fundamental, constitutionally protected right. But there was no suggestion the impropriety was deliberate or the result of bad faith or an attempt to overbear the appellant's will. In fact, the interviewing officer was cross-examined at some length about the interview process, about what happened during two-hour gaps between some questions, about the nature of many of the questions and about the answers to those questions but at no stage did counsel cross-examine the officer about the way the caution had been put to the appellant. There was no suggestion that the impropriety had been other than a careless lapse. Careless lapses in administering constitutional rights are of course to be avoided and may of themselves justify excluded improperly obtained statements from evidence.
35. In this case, when balanced against the seriousness of the charge and the nature of the appellant's statement which was both inculpatory and exculpatory, the trial Judge's conclusion that admission was in the public interest was principled and available to him.
36. It is important to add at this stage, that even if the Judge was wrong to admit the caution interview, without it, there was sufficient evidence to support the conviction. The evidence is discussed further in relation to other grounds of appeal but at this point it is sufficient to record that on her own evidence, the appellant tied her daughter

¹⁴ See for example s 30 of the New Zealand Evidence Act 2006.

to herself with a scarf and jumped into the water knowing she could not swim and in the belief that if anything went in the water at that place, "it is never found."¹⁵

37. The appellant's evidence at trial was sufficient to prove that she engaged in conduct that caused the death of her child and intended to cause death, or that she was reckless as to causing death.

Ground three

38. Under this third ground the appellant argues that the trial judge erred in allowing the post mortem report to be tendered in evidence by a Detective Corporal who was not the pathologist who conducted the post mortem.
39. The elaborate written submissions on this point overlook a key fact: there is no dispute about the cause of the child's death. Thirteen facts were admitted for the purpose of trial. The 13th addressed the cause of death:

13. THAT the Post Mortem Report of the deceased dated 8/05/18 revealed that she died from Asphyxia, Drowning.

40. This admitted fact which the parties agreed pre-trial reflected the conclusion as to the cause of death that Dr Kumar reached in his post mortem report. Dr Kumar, Senior Forensic Pathology Registrar concluded the condition "directly leading to death" was asphyxia caused by drowning.
41. The post mortem report was disclosed to the appellant pre-trial and the appellant admitted the deceased died from drowning. The appellant did not take advantage of s 133(1) of the Criminal Procedure Act and require Dr Kumar to attend as a witness nor otherwise contest the cause of death.
42. As His Honour Prematilaka RJA observed at [25] of his Ruling the tendering of the post mortem report was merely a formality. Its production through the Detective Corporal (who was attached to the crime scene investigation and produced the booklet of photographs as well as the post mortem report) was not in breach of s 133 of the Criminal Procedure Act 2009.

¹⁵ Transcript of trial p 248.

43. There is no merit in this ground of appeal.

Ground four

44. Under this head of appeal the appellant submits the trial Judge erred in law by directing the assessors that the appellant, rather than the prosecution, had the burden of proving diminished responsibility.
45. I summarise the position under the Crimes Act regarding the burden of proof in the context of a defence of diminished responsibility:

43.1 Where a person kills another in circumstances that would (but for the provisions of s 243) constitute murder but at the time of the act causing death the person was in such a state of abnormality of mind as to substantially impair the person's capacity to understand what they were doing, or control their actions or know that they ought not to do the act, that person is guilty of manslaughter only.¹⁶

43.2 It is for the person charged (ie the defendant) "to prove" they are liable to be convicted of manslaughter only.¹⁷

43.3 Where the law expressly requires a defendant to prove a matter the law imposes a legal burden which the defendant must discharge on the balance of responsibilities.¹⁸

46. The essence of the appeal on this ground is that the Judge failed to direct the assessors that the prosecution had the legal burden of disproving the appellant's defence of diminished responsibility. The appellant relies on s 57(2) which provides:

Legal burden of proof—prosecution

57 ...

- (2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged *an evidential burden of proof* imposed on the defendant. (Emphasis added)

16 Crimes Act 2009, s 243(1).

17 Crimes Act 2009, s 243(2).

18 Crimes Act 2009, ss 60(b) and 61.

47. The appellant's case on this ground misconstrues the burden of proof provisions. Under s 57(2) the prosecution is required to disprove a matter in relation to which the defendant has discharged an *evidential burden* of proof. To discharge an evidential burden in relation to a matter, the person on whom the burden rests need only adduce or point to evidence suggesting a reasonable possibility that the matter exists or does not exist. So that in this case, if the appellant had only an evidential burden of proving abnormality of mind, then the prosecution would have been required to disprove that defence beyond reasonable doubt.
48. But the appellant did not bear an evidential burden. She bore a legal burden to prove, on the balance of probabilities, abnormality of mind at the relevant time. Accordingly, s 57(2) on which the appellant relies for this ground of appeal is not relevant. It follows that the Judge was not in error in not directing the assessors along the lines of s 57(2).

Ground 5

49. Under the fifth ground of appeal the appellant argues that the Judge erred in failing to reduce the charge from murder to manslaughter when there was evidence to support a reduction in the charge.
50. The prosecution relied on a report prepared by Dr Gaikwad who was employed at St Giles Hospital as an acting Medical Superintendent. Dr Gaikwad, a psychiatrist, described his role as a psychiatrist and drew a distinction between psychiatry and psychology. Where psychologists do not have to be medical doctors Dr Gaikwad explained, a psychiatrist is a medical doctor who focuses on diagnoses, management of complex and serious mental illness, and a range of therapies including medication and electric convulsion therapy.
51. Dr Gaikwad had evaluated the appellant pursuant to a court order. Based on information received from the appellant during his interview with her, the charge, the summary of facts and court orders, information obtained from the accused's husband over the phone and the appellant's medical records, Dr Gaikwad formed the opinion that the appellant was aware of her actions at the relevant time and had no mental illness. Under cross-examination Dr Gaikwad's evidence was that from the information he obtained from the appellant at the relevant time, her actions appeared

to be impulsive when she learned her husband was taking steps to gain custody of their children.

52. The appellant takes no issue with the Judge's directions to the assessors about Dr Gaikwad's evidence. Counsel submitted that "rightly, the learned Judge has directed the Assessors that his evidence is of medical opinion and must be scrutinised like any other evidence for its strengths and weaknesses".
53. The appellant criticises, however, the Judge's "failure" to guide the assessors on how to approach the evidence of Ms Vuru, the Senior Psychologist who prepared a report which the appellant relied on to support her defence of diminished responsibility.
54. In her report Ms Vuru canvassed the appellant's arranged marriage at the very young age of 16; having her first child at the age of 17, her second four years later and her third child some nine years after her second. The third child, the appellant's daughter, was four years old when she drowned in May 2018. Ms Vuru also narrated the appellant's domestic life, the fact her husband was mostly away, her responsibilities to her husband's parents and the general lack of his moral support. Ms Vuru touched upon the five-year affair the appellant had and described the week immediately prior to the drowning. The appellant was away from 30 April to 5 May attending a religious festival in Labasa. Her children were not with her.
55. When the appellant returned home there was an argument with her husband about why she went to Labasa.¹⁹ The next morning, 6 May the appellant's husband went shopping, dropped the shopping home and said he was going to do some maintenance on the truck. But he returned with two police officers who brought custody papers. The appellant was incredibly upset and begged them not to take the children. They pointed out to the appellant a court date on the papers and said to her that she would solve her problem in court.
56. Ms Vuru's report simply states that upon the appellant's return home from Labasa on 6 May she was served with custody papers. But the appellant herself gave evidence that she returned home a day earlier and described the argument arising out of her absence.

¹⁹ Transcript of trial, p36.

57. Ms Vuru set out what she described as “important contributing factors that led to the crime” namely an unhealthy relationship with continuing accusations from her husband and in-laws, abusive language during arguments, poor support, being overloaded with family responsibilities and loss of trust.
58. Ms Vuru concluded: “At the critical moment she was psychologically traumatised and pushed to an extreme without proper and logically thinking which resulted in the incident”.
59. The appellant submits that taking the prosecution and defence evidence in its entirety “it is clear that her mind was substantially impaired at the time she committed the offence” thus her culpability is reduced and she should have been convicted of manslaughter.
60. Ms Vuru’s report sympathetically describes the very real domestic and marital difficulties that have beset the appellant. Her marital experience is of loneliness and lack of moral support. Ms Vuru’s report tended to focus, however, on what led the appellant to take the actions she took rather than the state of mind that s 243 requires in order to prove diminished responsibility.
61. For example, in cross-examination, Ms Vuru was asked whether a psychologically traumatised person can still be aware of their actions. Ms Vuru answered “not fully” and that whether a psychologically traumatised person could control their actions depended on the situation they were in. Ms Vuru did not amplify “fully.”
62. At [44] - [53] of his summing up, the trial Judge gave clear, appropriate and complete guidance on the defence of diminished responsibility. The Judge summed up accurately on the nature and degree of abnormality of mind required for responsibility to be diminished, the burden of proving the defence and the consequence of the defence being proved namely, “that she should be found not guilty of murder and guilty of the lesser charge of manslaughter”.
63. I find no fault in the summing up.
64. Nor was there any principled basis for the Judge to reduce the charge from murder to manslaughter. In all the circumstances of this case, it would not have been proper for

him to do so. As Lord Bingham stated when delivering the opinion of the House of Lords in *R v Coutts*:²⁰

The public interest in the administration of justice is ... best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support.

Ground six

65. The appellant contends the Judge erred in failing to direct the assessors to consider whether the act of jumping into the river with the deceased was done under imminent threat to her life as there was evidence her husband had threatened to kill her.
66. The appellant points to two sentences from a passage in the Judge's summing up as evidence there was a threat to kill:

She agreed that her husband and her family knew that she was having an affair for the past five years ... She also said in answer to another question that her husband threatened to kill her and the person she was going to stay with.

67. It is important that the two non-sequential sentences counsel relies upon are considered in context. I therefore reproduce the lengthy passage of the trial Judge's summing up in which the sentences appear:

[35] During cross examination, she said that, after listening to everything, she did not know what she was doing when she was driving the vehicle with the deceased. When it was suggested that she was informed by the police officers that she can fight for her children, her answer was *As I was served with the custody papers, I asked my husband 'why you did this', because I asked him before leaving Labasa, that 'have you filed custody for children' and he said 'no'. So, what was that? And he said to me, 'I have just called you to serve the papers'.*" She agreed that her husband and her family knew that she was having an affair and she said that the husband knew about the affair for the past 5 years. When it was suggested that she had the intention to kill herself and the deceased, she said that *"After my car went off the road, I called my husband. He didn't respond to me. So I had no other option and I took my daughter with me and I jumped. Because it was dark and there was no one around to help me out".* In answer to another question she said that *"I just knew that I didn't know how to swim. So, I will be with her never mind dead or alive".* She also said in answer to another question that her husband threatened to kill her and the person she was going to stay with. (Trial Judge's emphases)

68. Paragraph [35] of the summing up is favourable to the appellant because it ties the asserted threat to kill with the reasons for jumping. But at trial, the appellant gave the following evidence as to how and why she jumped into the water with her daughter:²¹

I tied my daughter because my daughter was alone there with me and I didn't know what to do, the only thing that came to my mind, my husband had already applied the custody, he will take all the children, and this is the only way I can be with my daughter.

When I jumped into the water tied with my daughter I just knew that I don't know how to swim and that place is known that if anything goes in the water is never found.

After my car went off the road, I called my husband, he didn't respond to me. So I had no other option and I took my daughter with me and I jumped.

Q: I put it to you, you knew it was wrong to jump into the river with your daughter, but you did so?

A: I just know that I didn't know how to swim. So I will be with her never mind dead or alive.

69. These are the reasons the appellant gave at trial for jumping into the water with her child tied to her. The appellant did not mention any threat to kill her until prosecution counsel, in cross examination said "I put it to you, you were a coward in facing the consequences because of your marital life?" The appellant answered: "No. I was threatened by my husband that he is going to kill me and the person whom I am going to stay with."

70. Accordingly, there being no evidence at trial that when she jumped into the water the appellant operated under any, much less an imminent, threat to her life the Judge was not required to direct the assessors to consider whether the act of jumping into the river was done under imminent threat to life.

Ground 7

71. Under this ground it is said the Judge erred in failing to direct the assessors that killing in pursuance of a suicide pact is a defence to murder: there was evidence the appellant

21 Transcript of trial pp 248 and 252.

tied her daughter to her chest; they jumped into the river to die together and the appellant intended to kill herself with her daughter by jumping into the river.

72. Counsel was asked if the appellant intended to pursue this ground. He confirmed it was not abandoned but relied on his written submissions and advanced no further oral argument in support. The written submissions acknowledge the suicide pact was not vigorously argued by the defence but there was evidence the appellant intended to kill herself with her daughter by jumping in the water.
73. Under s 249 of the Crimes Act a person charged with murder may raise a defence that they were acting in pursuance of a suicide pact. For the purposes of s 249 a suicide pact means “an agreement between two or more persons having for its object the death of all of them...”
74. Without dwelling on this tenuous ground of appeal it seems to me that the survivor of a suicide pact should be in a position to point to evidence that the non-survivor had a settled and informed intention to take his or her own life, or at the least to have consented to dying. Without any such evidence and in the context of a dependent, vulnerable four-year old, the argument is untenable.

An observation about the challenges to trial directions


75. Before concluding it is important to note that the appellant’s grounds have been given full consideration even where the complaint is a failure in the trial Judge’s directions. Three of the grounds were in that category. Yet after summing up the Judge asked counsel if any re-direction was sought. It was not. In this appeal no reason, much less any cogent reason, is offered for the failure to seek re-directions.
76. The Supreme Court has warned that such failures should be held against the party as having employed a deliberate tactic to find an appeal point.²² Because of the unusual and distressing facts of this case, however, the appellant has been given a full hearing and (barring the ill-conceived seventh ground) her appeal points have been fully considered.

²² *Alfaaz v State* [2018] FJSC 17 at [25] citing *Varasiko Tuwai v State* [2016] FJSC 35 (26 August 2016).

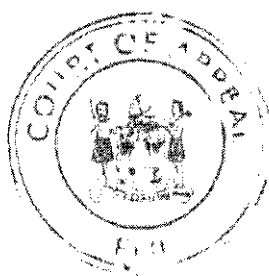
77. The appeal has no reasonable prospect of success.

Orders:

- 1) Leave to appeal against conviction is refused.
- 2) Appeal against conviction is dismissed.




Hon Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL





Hon Mr Justice Walton Morgan
JUSTICE OF APPEAL



Hon Madam Justice Karen Clark
JUSTICE OF APPEAL