

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

**CRIMINAL APPEAL NO.AAU 176 of 2019**  
**[High Court at Labasa Case No. HAC 21 of 2018]**

**BETWEEN** : **TEVITA VUNIWAI** *Appellant*

**AND** : **STATE** *Respondent*

**Coram** : **Prematilaka, RJA**  
**Mataitoga, RJA**  
**Dobson, JA**

**Counsel** : **Ms. S. Prakash and Ms. L. Taukei for the Appellant**  
: **Mr. L. J. Burney and Mr. R. Kumar the Respondent**

**Date of Hearing** : **07 May 2024**

**Date of Judgment** : **30 May 2024**

**JUDGMENT**

**Prematilaka, RJA**

- [1] The appellant had been indicted in the High Court at Labasa on a single count of murder of Amelia Baletagici Tuima contrary to section 237 of the Crimes Act, 2009 committed on 07 March 2018 at Labasa in the Northern Division.
- [2] Represented by counsel (two from Legal Aid Commission), the appellant had initially pleaded not guilty to murder and indicated later that he was ready to plead guilty to manslaughter which was treated as a ‘not-guilty’ plea. The matter then proceeded to trial and on the trial date namely 25 November 2019 the appellant represented by counsel had changed his mind and pleaded guilty to murder. He had admitted the summary of facts too. Upon being satisfied that the appellant had fully comprehended the legal effect of the plea of guilty and his plea was voluntary, the trial judge had

convicted him on 27 November 2019 and sentenced the appellant to mandatory life imprisonment with a minimum serving period of 18 years.

[3] The appellant in person had appealed against conviction and sentence in a timely manner. However, a single judge of this court refused the appellant's application for leave to appeal against conviction and sentence<sup>1</sup>. He had in person sought to renew his application for leave to appeal against conviction and sentence in December 2021 but had later filed a Form 3 on 09 March 2023 in order to abandon the conviction appeal. Subsequently, the Legal Aid Commission (LAC) had lodged a Renewal Notice of Appeal on 09 March 2024 to renew the appellant's application for leave to appeal only against sentence before the Full Court. The Legal Aid Commission had also sought a guideline judgment in terms of section 6, 7 and 8 of the Sentencing and Penalties Act from the Full Court in the matter of imposition and the length of the minimum term of imprisonment to be served for a person convicted of murder and sentenced to mandatory life imprisonment under section 237 of the Crimes Act 2009. Both the LAC and the State represented by the Director of Public Prosecutions (DPP) have filed written submissions on the sentence appeal as well as the application for a guideline judgment.

[4] At the commencement of the hearing of the appeal, this court considered the appellant's application to abandon his conviction appeal in terms of *Masirewa* guidelines (**Masirewa v The State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010)), allowed the application and accordingly dismissed the conviction appeal.

[5] The sole ground of appeal urged at the hearing before the Full Court on behalf of the appellant is as follows:

*'The Learned Judge erred in law and in fact in imposing a sentence with a high minimum term.'*

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<sup>1</sup> **Vuniwai v State** [2021] FJCA 174; AAU176.2019 (28 October 2021)

[6] The guidelines are sought in respect of the following issues:

- (i) *What matters should be considered by the trial judge in deciding whether to set a minimum term and*
- (ii) *What matters should be considered when determining the length of the minimum term in sentencing an accused under section 237 of the Crimes Act.*

**Background to the guideline judgment**

[7] I think that it is convenient and indeed necessary to consider the parameters of the guideline judgment before dealing with the appellant's sentence appeal.

[8] I have examined the sentencing order and find that the trial judge had set out the matters that should be considered in setting the minimum term as follows:

*'4. The punishment for the offence of Murder is a mandatory sentence of imprisonment for life. However, the sentencing court has been given a judicial discretion to set a minimum term to be served before pardon may be considered. In order to set a minimum term to be served for the offence of Murder, the court is required to consider the level of culpability, level of harm, aggravating factors and mitigating circumstances of the crime. Murders which are brutally carried out without any form of remorse or respect to human life must be given longer minimum period.'*

[9] In terms of section 237 of the Crimes Act, penalty for murder is *mandatory* sentence of imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered. Section 3(4) of the Sentencing and Penalties Act provides that:

*"(4) Any penalty for any offence prescribed by law shall be deemed to be the maximum penalty that a court may impose for that offence after taking account of the provisions of this Decree."*

[10] Although at first blush there is a tension between section 3(4) of the Sentencing and Penalties Act and section 237 of the Crimes Act, it has been decided that section 237 of the Crimes Act prevails and the sentencing court must impose a sentence of

imprisonment for life irrespective of the provisions of the Sentencing and Penalties Act [see Aziz v State [2015] FJCA 91; AAU112.2011 (13 July 2015)]. Section 3(3) of the Sentencing and Penalties Act seems to support this interpretation. However, it does not follow from that that the provisions of the Sentencing and Penalties Act are irrelevant to a court sentencing an offender to mandatory life imprisonment for murder. Therefore, the trial judge had correctly remarked, life imprisonment is the only and mandatory sentence available for murder (see Nute v State [2014] FJSC 10; CAV0004 of 2014 (19 August 2014) and the only matter that needs attention of this court in this appeal is the minimum term of 18 years.

- [11] Having considered *the level of culpability, level of harm, aggravating factors and mitigating circumstances of the crime* the trial judge had imposed the minimum serving period of 18 years. However, the trial judge does not seem to have set out as to what matters were considered in exercising his discretion to set a minimum term in the first place.
- [12] It is in this backdrop that the single Judge in the leave to appeal ruling remarked that there is a need for some guidelines (i) as to what matters should be considered by the trial judge in deciding whether to set a minimum term and (ii) as to what matters should be considered when determining the length of the minimum term in sentencing an accused under section 237 of the Crimes Act.
- [13] Neither the LAC nor the DPP has made an attempt to clarify the first issue in any detail as to what matters should be considered by the trial judge in deciding whether to set a minimum term in their respective written submissions. However, both parties have filed comprehensive submissions addressing the second issue as to what matters should be considered when determining the length of the minimum term. Similarly, both parties indicated to court that these guidelines should cover attempted murder as well. This court agrees with that proposition.
- [14] There is a paucity of material as to what considerations should go to the decision to impose a minimum term in this jurisdiction or elsewhere. This might explain the absence of a detailed discussion on that aspect in the written submissions filed by both

parties. Therefore, I shall first examine the second issue as to what matters are considered in other jurisdiction around the globe to determine the length of the minimum term and later come back to the first issue.

***What matters should be considered in deciding the length of the minimum term?***

***United Kingdom.***

[15] Judges must give a life sentence to all offenders found guilty of murder [see Murder (Abolition of Death Penalty) Act 1965]. Anyone given a life sentence, will be subject to that sentence for the rest of his life. When a judge passes a life sentence, he *must* specify the minimum term an offender must spend in prison before becoming eligible to apply for parole (sometimes called the tariff) for release by the Parole Board. The offender will be released only once he has served the minimum term and if the Parole Board is satisfied that detaining the offender is no longer necessary for the protection of the public. If released, an offender serving a life sentence will remain on license for the rest of his life. If he is ever thought to be a risk to the public he could be recalled to prison. He does not need to have committed another offence in order to be recalled. However, when a judge passes a ‘whole life order’ for the most serious cases of murder, the offender must spend the rest of his life in prison. A life sentence always lasts for life, whatever the length of the minimum term.

[16] In cases of murder, as the first step the courts use Schedule 21 to the Sentencing Act 2020 to set the minimum term. Depending on the facts of the case the *starting point* for the minimum time to be served in prison for an adult ranges from 15 years to whole life. For the purposes of setting the starting point for the minimum term, Schedule 21 to Sentencing Act 2020 in UK sets out four categories. A brief description of them are as follows:

***01<sup>st</sup> category***

- *In cases such as a carefully planned murder of two or more people, or a murder committed by an offender who had already been convicted of murder the starting point for an offender aged 21 or over is a whole life tariff. For an offender aged 18-20 the starting point would be 30 years and for an offender aged under 18 it is 12 years.*

***02<sup>nd</sup> category***

- *In cases such as those involving the use of a firearm or explosive the starting point is 30 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

***03<sup>rd</sup> category***

- *In cases where the offender brings a knife to the scene and uses it to commit murder the starting point is 25 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

***04<sup>th</sup> category***

- *In cases that do not fall into the above categories the starting point is 15 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

[17] It is important to note that what is stated under the four categories are starting points only. Having set the minimum term, the judge will then take into account any aggravating or mitigating factors that may amend the minimum term either up or down.

[18] Schedule 21 to Sentencing Act 2020 in UK has given some aggravating and mitigating factors to be considered for the determination of minimum term in relation to mandatory life sentence for murder as follows:

*'9. Aggravating factors (additional to those mentioned in paragraphs 2(2), 3(2) and 4(2) that may be relevant to the offence of murder include—*

- (a) a significant degree of planning or premeditation,*
- (b) the fact that the victim was particularly vulnerable because of age or disability,*
- (c) mental or physical suffering inflicted on the victim before death,*
- (d) the abuse of a position of trust,*
- (e) the use of duress or threats against another person to facilitate the commission of the offence,*
- (f) the fact that victim was providing a public service or performing a public duty, and*
- (g) concealment, destruction or dismemberment of the body.*

*10. Mitigating factors that may be relevant to the offence of murder include—*

- (a) an intention to cause serious bodily harm rather than to kill,*

- (b) *lack of premeditation,*
- (c) *the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered the offender's degree of culpability,*
- (d) *the fact that the offender was provoked (for example, by prolonged stress) but, in the case of a murder committed before 4 October 2010, in a way not amounting to a defence of provocation,*
- (e) *the fact that the offender acted to any extent in self-defence or, in the case of a murder committed on or after 4 October 2010, in fear of violence,*
- (f) *a belief by the offender that the murder was an act of mercy, and*
- (g) *the age of the offender.'*

[19] Factors mentioned in paragraphs 2(2), 3(2) and 4(2) are as follows:

**2(2) Cases that would normally fall within sub-paragraph (1)(a) include—**

- (a) *the murder of two or more persons, where each murder involves any of the following—*
  - (i) *a substantial degree of premeditation or planning,*
  - (ii) *the abduction of the victim, or*
  - (iii) *sexual or sadistic conduct,*
- (b) *the murder of a child if involving the abduction of the child or sexual or sadistic motivation,*
- (c) *the murder of a police officer or prison officer in the course of his or her duty, where the offence was committed on or after 13 April 2015,*
- (d) *a murder done for the purpose of advancing a political, religious, racial or ideological cause, or*
- (e) *a murder by an offender previously convicted of murder.*

**3(2) Cases that (if not falling within paragraph 2(1)) would normally fall within sub-paragraph (1)(a) include—**

- (a) *in the case of a offence committed before 13 April 2015, the murder of a police officer or prison officer in the course of his or her duty,*
- (b) *a murder involving the use of a firearm or explosive,*
- (c) *a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),*
- (d) *a murder intended to obstruct or interfere with the course of justice,*

- (e) *a murder involving sexual or sadistic conduct,*
- (f) *the murder of two or more persons,*
- (g) *a murder that is aggravated by racial or religious hostility or by hostility related to sexual orientation,*
- (h) *a murder that is aggravated by hostility related to disability or transgender identity, where the offence was committed on or after 3 December 2012 (or over a period, or at some time during a period, ending on or after that date),*
- (i) *a murder falling within paragraph 2(2) committed by an offender who was aged under 21 when the offence was committed.*

**4(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—**

- (a) *commit any offence, or*
- (b) *have it available to use as a weapon,*  
*and used that knife or other weapon in committing the murder.*

[20] Section 2(1) states that if—

- (a) *the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and*
- (b) *the offender was aged 21 or over when the offence was committed, the appropriate starting point is a whole life order.*

[21] Having set the minimum term and having taken into account any aggravating or mitigating factors adjusting the minimum term accordingly, the judge may also reduce the minimum term to take account of a guilty plea. The final minimum term will take into account all the factors of the case and can be of any length.

[22] **R v Neil Jones and Ors** [2006] 2 Cr. App. Rep (S) 19, the Court of Appeal said:

*‘A whole life order should be imposed where the seriousness of the offending was so exceptionally high that just punishment required the offender to be kept in prison for the rest of his or her life. Where such an order was called for, the case would often not be on the borderline. The facts of the case considered as a whole would leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life. If the judge was in doubt, this might well be an indication*



that a finite minimum term which left open the possibility that the offender might be released for the final years of his or her life was the appropriate disposal.

### New Zealand

- [23] Sections 167 and 168 of the Crimes Act 1961 defines when culpable homicide becomes murder and section 172 states that every one who commits murder is *liable* to imprisonment for life (discretionary life sentence). An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust and if a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so (see section 102 of the Sentencing Act 2002).
- [24] Once an offender has been sentenced to life imprisonment, the sentencing judge must then proceed to determine the minimum period of imprisonment (MPI), not less than 10 years, that the offender must serve before being eligible for consideration for release by the Parole Board (see section 103 of the Sentencing Act). However, if the court is satisfied that no minimum term of imprisonment would be sufficient to satisfy one or more of the purposes stated in section 103(2), the court may order that the offender (if he is over 18 years at the time he committed the murder) serve the sentence without parole. Section 103(2) factors are:
- (a) *holding the offender accountable for the harm done to the victim and the community by the offending:*
  - (b) *denouncing the conduct in which the offender was involved:*
  - (c) *detering the offender or other persons from committing the same or a similar offence:*
  - (d) *protecting the community from the offender.*
- [25] Section 104 sets out a number of circumstances which, if applicable, will require the sentencing court to impose an MPI of 17 years unless it would be manifestly unjust to do so. Once section 104 is deemed relevant and applicable, the court is then required to undertake a three-step process as highlighted in **Davis v R** [2019] NZCA 40. First to consider the notional MPI that would be imposed, then to consider whether any of

the section 104 factors are engaged and finally, if one or more of those factors are engaged but the notional MPI is less than 17 years, to then consider whether an MPI of 17 years would be manifestly unjust. Of course, it is also open for the court to consider MPI above 17 years should the circumstances permit so. Section 104 circumstances are:

- (a) *If the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or*
- (b) *If the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or*
- (c) *If the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or*
- (d) *If the murder was committed in the course of another serious offence; or*
- (e) *If the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or*  
*(ea) If the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or*
- (f) *If the deceased was a constable or a prison officer acting in the course of his or her duty; or*
- (g) *If the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or*
- (h) *If the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or*
- (i) *In any other exceptional circumstances.*

## **Canada**

- [26] In Canada, murder is either first or second degree. Persons convicted of either degree of murder must be sentenced to imprisonment for life (see section 235 of the Criminal Code 1985). Persons convicted of first-degree murder are not eligible for parole until they have served at least 25 years of their sentence (07 years for offenders between 12 to 17 years), pursuant to section 745(a) of the Criminal Code. If an offender is convicted of second-degree murder, parole is granted between 10 and 25 years for adult offenders (10 years for offenders between 12 to 17 years) at the sentencing judge's discretion as per section 745(c) of the Criminal Code. Once the minimum terms are served, the offender becomes eligible to be considered for parole, but this does not necessarily equate to the offender being released.

## Australia

### New South Wales

[27] In NSW, the offence of murder is a crime punishable by imprisonment for life or for 25 years (see section 18 of the Crimes Act 1900). Thus, it is not compulsory for an offender to receive a life sentence. If the Court does not impose the maximum penalty, as per Part 4 of the Sentencing Bench Book three standard non-parole periods for murder become applicable.

- (a) 25 years for the murder of a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker or other public official exercising public or community functions and the offence arose because of their occupation or voluntary work;
- (b) 25 years for the murder of a child; and
- (c) 20 years for other murders.

[28] However, if an offender is sentenced to life imprisonment as the maximum penalty, a non-parole period cannot be imposed and the offender must serve the sentence for their natural life, subject to the exercise of the prerogative of mercy (see **R v Harris** (2000) 50 NSWLR 409).

[29] Section 61(1) Crimes (Sentencing Procedure) Act 1999 guidance on how a court can determine whether to exercise the maximum penalty for murder, could be summarised as follows:

*A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.*

*The first stage involves considering the requirements of s 61(1), which focuses on the offender's "level of culpability". The court is required to consider objective factors, such as the objective seriousness of the offence, and subjective factors which cause an influence on the offender's culpability. The latter may include the offender's background and any mental health impairment, disorder or incapacity with a causative influence on their level of culpability.*

*The second stage is discretionary which involves deciding whether a lesser sentence is warranted. This invites consideration of subjective matters such as remorse, confessions, pleas of guilty and their timing and the offender's prospects of rehabilitation.*

[30] Some factors which assist the court in determining whether the maximum life imprisonment ought to be fixed are:

- *Murder of police officers in execution of their duties;*
- *Multiple murders;*
- *Contract killings;*
- *Circumstances of the case such as mutilation of deceased's body, deceased being subjected to sexual assault; torture and suffering over a prolonged period;*
- *Substantial harm, damage or loss caused to deceased's family;*
- *Future dangerousness;*
- *Murders motivated by financial greed;*
- *Motive for murder is to conceal another offence;*
- *Killing of political figure for political ends;*
- *Murder arising from planned extortion;*
- *Murder takes place in sight of deceased's children;*
- *Murder involves premeditation and cold-blooded execution; and*
- *Murders committed in domestic violence context.*

### **Victoria**

[31] Section 3 of the Crimes Act 1958 states that:

- '3.(1) Notwithstanding any rule of law to the contrary, a person convicted of murder is liable to - level 1 imprisonment (life); or imprisonment for such other term as is fixed by the court as the court determines.*
- (2) The standard sentence for murder is—*
- (a) 30 years if the court, in determining sentence, is satisfied that the prosecution has proved beyond reasonable doubt that—*
- (i) the person murdered was a custodial officer on duty or an emergency worker on duty; and*
- (ii) at the time of carrying out the conduct the accused knew or was reckless as to whether that person was a custodial officer or an emergency worker; and*
- (b) in any other case, 25 years.*

[32] Life imprisonment remains the maximum sentence for murder. The sentencing judge retains the discretion in relation to determining an appropriate non-parole period. The sentencing judges take account of several factors during the process such as:

- *Standard sentencing practices;*
- *Nature and gravity of harm;*
- *Whether crime was motivated by hatred or prejudice;*
- *Victim impact;*
- *Age of the offender;*
- *Relationship between offender and victim;*
- *Victim's vulnerability;*
- *Mental health or capacity of offender;*
- *Alcohol or drug use;*
- *Use of weapon;*
- *Criminal history;*
- *Number of victims; and*
- *Any other aggravating or mitigating factors.*

### **Queensland**

[33] Murder is outlined under section 302 of the Criminal Code (1899). The punishment for murder is set out under section 305 which states:

- (1) *Any person who commits the crime of murder is liable to imprisonment for life, which cannot be mitigated or varied under this Code or any other law or is liable to an indefinite sentence under part 10 of the Penalties and Sentences Act 1992.*
- (2) *If the person is being sentenced—*
  - (a) *on more than 1 conviction of murder; or*
  - (b) *on 1 conviction of murder and another offence of murder is taken into account; or*

*on a conviction of murder and the person has on a previous occasion been sentenced for another offence of murder;*

*the court sentencing the person must make an order that the person must not be released from imprisonment until the person has served a minimum of 30 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the Corrective Services Act 2006 .*
- (3) *Subsection (2) (c) applies whether the crime for which the person is being sentenced was committed before or after the conviction for the other offence of murder mentioned in the paragraph.*

(4) If—

(a) *the person killed was a police officer at the time the act or omission that caused the person's death was done or made; and*

(b) *the person being sentenced did the act or made the omission that caused the police officer's death—*

(i) *when—*

(A) *the police officer was performing the officer's duty; and*

(B) *the person knew or ought reasonably to have known that he or she was a police officer; or*

(ii) *because the police officer was a police officer; or*

(iii) *because of, or in retaliation for, the actions of the police officer or another police officer in the performance of the officer's duty;*

*the court sentencing the person must make an order that the person must not be released from imprisonment until the person has served a minimum of 25 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the Corrective Services Act 2006.*

[34] There are certain types of murder offences in which the minimum terms have been fixed by statute and the sentencing judges do not have discretion to fix a lower period.

[35] If an offender is sentenced to life imprisonment, they are eligible to apply for release on parole after serving the required minimum portion of their sentence. Once an offender is eligible to apply for parole, the date of release is determined by the Parole Board. An offender may only be released sooner under exceptional circumstances.

[36] If the court wishes to impose an indefinite sentence, the court must be satisfied that the offender is a serious danger to the community. Determining whether an offender is a serious danger to the community requires the court to consider all of the following:

- *whether the nature of the offence is exceptional;*
- *an offender's characteristics, including previous offending;*
- *any relevant medical, psychiatric, prison or other report about the offender;*
- *any risk of serious harm to members of the community if the offender is not given an indefinite sentence; and*

- *the need to protect the community from the offender.*

[37] If an offender is sentenced to an indefinite sentence, the court maintains a responsibility to review the sentence at legislated intervals. The indefinite sentence will remain in force until the court discharges it and replaces it with a finite sentence. An offender serving an indefinite sentence is not eligible to apply for parole.

### **Australian Capital Territory**

[38] The offence of murder is outlined under section 12 of the Crimes Act 1900 which *inter alia* states that a person who commits murder is guilty of an offence *punishable*, on conviction, by imprisonment for life. Thus, life imprisonment is the maximum penalty and section 33 of the Crimes (Sentencing) Act 2005 provides a long and detailed list of factors that are relevant for determining the length of sentence.

### **Tasmania**

[39] The offence of murder is outlined under section 158 of the Criminal Code Act 1924 and it *inter alia* states that any person who commits murder is guilty of a crime, and is *liable* to imprisonment for the term of the person's natural life or for such other term as the court determines. Thus, life imprisonment is the maximum penalty for murder and court retains judicial discretion in the fixing of both head sentences and the non-parole period.

[40] Offenders convicted for murder could be sentenced in either of the categories:

- (a) *Fixed term of imprisonment – court has discretion whether to grant parole or not after considering factors like the nature and circumstances of offence, offender's character, any other sentences the offender is undergoing and any other matter deemed necessary or appropriate; or*
- (b) *Term of imprisonment for natural life – court has discretion whether to set a non-parole period or not based on similar principles and parole is administered by Parole Board.*

### **Northern Territory**

[41] The offence of murder is outlined under section 156 of the Crimes Code Act 1983 and in terms of section 157, a person who is guilty of the offence of murder is liable to mandatory imprisonment for life. Thus, the punishment for murder is a mandatory life imprisonment. A 20 year standard minimum non-parole period applies as per sections 53 and 53A of the Sentencing Act 1995 which relates to the offences in the middle range of objective seriousness. If any one of a number of specified circumstances applies, the minimum non-parole period that can be fixed may be increased:

- (a) premeditated murder;*
- (b) contract killing;*
- (c) multiple or serial murder;*
- (d) murder of a child under 18 years old;*
- (e) murder with sexual motivation; and*
- (f) murder of police officer or public official.*

[42] The court may also fix a shorter non-parole period, but its discretion to do so is limited by the requirement for ‘exceptional circumstances’, which are restricted by the legislation. Furthermore, under section 82(3) of the Youth Justice Act 2005, a youth may also be sentenced to life imprisonment or a shorter period of imprisonment, as the court considers appropriate.

### **South Australia**

[43] Murder is defined as per the common law, however the punishment for murder in terms of section 11 of the Criminal Law Consolidation Act 1935 is mandatory in that any person who commits murder shall be imprisoned for life. The Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007 makes provisions for fixing of non-parole periods in respect offenders sentenced to life imprisonment for murder. The mandatory minimum non-parole period prescribed in respect of the offence is 20 years which represents the non-parole period for an offence at the lower end of the range of objective seriousness. The court is entitled to fix a non-parole period that is higher than 20 years as well.



### **Western Australia**

- [44] Under section 279 of the Criminal Code Act Compilation Act 1913 and a person, other than a child, who is guilty of murder must be sentenced to mandatory life imprisonment unless the court considers that a life imprisonment is unjust and the offender is not a threat to the community in which case a sentence of 20 years imprisonment may be given.
- [45] If a life sentence is handed down pursuant to s 90(1) of the Sentencing Act 1995, the court must either set a minimum non-parole period of at least 10 years or order that the offender must never be released. The latter must only be made *'if it is necessary to do so in order to meet the community's interest in punishment and deterrence'*. If set, once the non-parole period has been served an offender may be considered for release on parole by the Governor, following a report from the Prisoners Review Board.

### **Hong Kong**

- [46] In terms of section 2 of the Offences against the Persons Ordinance (Cap 212) 1865 any person who is convicted of murder shall be imprisoned for life (*i.e.* mandatory life imprisonment). There is no discretion or compulsion to fix a minimum term for adult offenders. However, if it appears to the court that a person convicted of murder was under 18 years of age at the time of the offence, the court has a discretion as to whether the person should be sentenced to imprisonment for life or to imprisonment for a shorter term.
- [47] Discretionary life sentences are available only to the following types of offenders and in such cases, a minimum term must be fixed by virtue of section 67B of the *Criminal Procedure Ordinance* (Cap 221).
- (a) *those convicted of Murder but who are under the age of 18 years at the time of the commission of the offence (and not sentenced to a fixed term); and*
  - (b) *those convicted of offences other than Murder which have as their maximum penalty a life term.*

[48] **Lau Cheong v. HKSAR** [2002] 3 HKC 146, the defendants while committing a robbery tied up and stabbed a person, who died from ligature strangulation. It was possible that the defendants did not intend to kill the victim but they received mandatory life imprisonment sentences for murder. They appealed the life imprisonment sentence and Court of Final Appeal did not accept that the mandatory life imprisonment represented a manifestly disproportionate sentence so as to contravene Basic Law 28 on the ground of arbitrariness.

[49] The Court of Appeal in **Tong Yu Lam V. The Long-Term Prison Sentences Review Board** [2006] HKCFI 321 considered a judicial review application of an offender sentenced to mandatory life imprisonment where the applicant while accepting *Lau Cheong* still contended that the statutory provisions that required the setting of a minimum term in the case of discretionary life sentences and ‘prescribed prisoners’ in the Criminal Procedure Ordinance (Cap.221) were unconstitutional in that they omitted to make similar provision for adults sentenced to mandatory life imprisonments. The Court held that there was no substantive error of law or procedural irregularity and the application was dismissed. However, the Court stated as follows:

*‘But what must be remembered is that the mandatory life prisoner is not forgotten. Even though his sentence is for an indeterminate time to be ended by his death in prison or by an executive act of clemency, the key is not thrown away. The Board must regularly review his circumstances and, when required, as for example in the present case, report to the Chief Executive. The mandatory life prisoner may not have the benefit of knowing the minimum term he must serve but he does have the benefit of knowing that his progress in prison is the subject of regular reviews by a statutory body that is able to marshall a broad range of expertise. He therefore has the benefit of knowing that any consideration of executive clemency will be informed.’*

### **General sentencing practice and methodologies in Fiji**

[50] Whilst Fiji’s sentencing regime for murder is not identical to that of any of the jurisdictions discussed above, it is imperative that Fiji draws guidance and adopt relevant principles from them in order to achieve consistency in our sentencing approach particularly in regard to the minimum term to be served by an offender who is sentenced to mandatory life imprisonment.

- [51] The typical and widespread sentencing practice in Fiji is the two-tiered system as explicitly put in **Naikелеkelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008)] which involves a sentencing judge setting an appropriate sentence (starting point) commensurate with the objective severity of the offence and only then making allowances up and down, in light of relevant subjective aggravating and mitigating. Two-tiered system would require more rigour and inject more complexity into an already difficult process. However, it would make sentencing a more exacting task, whereby judges would be required to set out their reasoning in greater detail infusing a certain degree of transparency into the sentencing process. It would, thus, produce more complex sentencing reasons and compel judges to think more deeply and precisely about their decisions. As a result, considerable benefit would accrue to the community and ultimately to judges, whose decisions would become more legally sound and defensible. At the minimum it will require judges to think more carefully about sentencing decisions and resist any temptation to obfuscate or ‘keep secret’ the underpinnings of their reasoning. The temptation for judges to keep secret their real thinking has been recognized by Justice Kirby in **Markarian v The Queen** (2005) 228 CLR 357. Thus, two-tiered system when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability.
- [52] However, as held in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015), Sentencing and Penalties Act does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as ‘instinctive synthesis’. The ‘instinctive synthesis’ method of sentencing is where the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case; only at the end of the process does the judge determine the sentence [see **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022)].
- [53] ‘Instinctive synthesis’ will, by definition, produce outcomes upon which reasonable minds will differ. Among other tricky areas, a key problem with the instinctive synthesis is that it leads to inconsistent and unpredictable sentences. This is an

obvious shortcoming of this approach and the criticism has not been missed by the High Court of Australia in **Hili v The Queen** [2010] HCA 45; (2010) 242 CLR 520, 527 [18], but French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated that consistency in sentencing is important, but the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence.

[54] The Supreme Court in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) seems to have suggested another sentencing methodology where the court identifies its *starting point*, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors.

[55] However, the Supreme Court and the Court of Appeal have premised the application of the sentencing guidelines in **Tawake**<sup>2</sup> (*aggravated robbery in the form of street mugging*), **Kumar**<sup>3</sup> (*burglary & aggravated burglary*), **Seru**<sup>4</sup> (*cultivation of cannabis sativa*), **Matairavula**<sup>5</sup> (*aggravated robbery against public service providers*) and **Chand**<sup>6</sup> (*Defilement*) in such a way that not only is it advisable and preferable but may indeed be convenient for the sentencing courts to adopt the two-tiered system and not ‘Instinctive synthesis’ methodology in order to effectively give effect to the sentencing guidelines. Therefore, in my view, the two-tiered methodology, at least for the time being, should be the preferred option for sentencing courts in Fiji whether there are specific guidelines or otherwise.

### **Sentencing for Murder in Fiji – Historical perspective**

[56] Under the Penal Code (Cap 70) any person convicted of murder ‘*shall be*’ sentenced to imprisonment for life (see sections 199 and 200) and life imprisonment was rightly regarded as the mandatory sentence for murder as opposed to a discretionary life

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<sup>2</sup> **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022)

<sup>3</sup> **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022)

<sup>4</sup> **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023)

<sup>5</sup> **Matairavula v State** [2023] FJCA 192; AAU054.2018 (28 September 2023)

<sup>6</sup> **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023)

sentence (*i.e.* life imprisonment as the maximum penalty) that can be imposed on many other offences where a person who commits the relevant offence ‘*is liable to*’ imprisonment for life (see **Waganivalu v State** [2008] FJSC 44; CAV0005.2007 (27 February 2008)). The example of offences that recognize life imprisonment as the maximum penalty as opposed to a mandatory penalty could be found under Arms & Ammunitions Act 2003 (trafficking in arms), Crimes Act 2009 (genocide, arson, rape, preventing escape from wreck, crimes against humanity, piracy, etc.), Public Order Act 1969 (act of terrorism, provision of weapons, etc.), Illicit Drugs Control Act 2004 (unlawful importation, possession, cultivation, manufacture, etc.) and Civil Aviation (Security) Act 1994 (hijacking, endangerment, etc.).

- [57] Section 33 of the Penal Code further provided leeway for the judges who impose sentences of imprisonment for life to recommend the minimum period for the offenders to serve.

### **Crimes Act 2009**

- [58] Murder is now criminalised under section 237 of the Crimes Act, 2009 as follows:

*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.*

- [59] Lord Mustill in **R v Secretary of State for the Home Department, Ex p Doody** [1994] 1 AC 531 at 549 E has described mandatory life imprisonment as ‘... a unique formality..’ and that:

*‘.... Although it is a very grave occasion it is a formality in this sense, that the task of the judge is entirely mechanical. Once a verdict of guilty is returned the outcome is pre-ordained. No matter what the opinion of the judge on the moral quality of the act, no matter what circumstances there may be of mitigation or*

*aggravation, there is only one course for him to take, namely to pass a sentence of life imprisonment.'*

- [60] Any person convicted for murder may petition the Mercy Commission under section 119 of the Constitution to recommend that the President exercises a power of mercy by granting a free or conditional pardon or remitting all or a part of a punishment, regardless of whether a minimum term is fixed or not. In terms of section 49 (4) of the Prisons and Corrections Act 2006 the Parole Board should make recommendations to the Minister on several matters including the release on license of any person serving a life sentence.

**Life imprisonment and Minimum term under the Crimes Act**

- [61] The provisions of section 18 of the Sentencing and Penalties Act will have general application to all sentences, including where life imprisonment is prescribed as a *maximum sentence* (such as for rape & aggravated robbery) as opposed to the *mandatory sentence* unless a specific sentencing provision excludes its application. A sentencing court is not expected to select a non-parole term or necessarily obliged to set a minimum term when sentencing for murder under section 237 of the Crimes Act. As a result any person convicted of murder should be sentenced in compliance with section 237 of the Crimes Act for a mandatory sentence of life imprisonment. For the same reason the discretion given to the High Court under section 19(2) of the Sentencing and Penalties Act, being an enactment of general application, does not apply to the specific sentencing provision for murder under section 237 of the Crimes Act (see *Aziz*). Under section 119 of the Constitution any convicted person may petition the Mercy Commission to recommend that the President exercise a power of mercy by amongst others granting a free or conditional pardon or remitting all or a part of a punishment. Therefore, the right to petition the Mercy Commission is open to any person convicted of murder even when no minimum term had been fixed by the sentencing judge in the exercise of his discretion [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

- [62] Legally, a minimum term set by the sentencing court does not preclude the Mercy Commission from recommending a presidential pardon at any time upon the petition of a convicted person, 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 [see **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016)]. Similarly, the powers of the Parole Board under section 49 (4) of the Prisons and Corrections Act 2006 to make recommendations to the Minister *inter alia* on the release on license of any person serving a life sentence seems unaffected by the minimum term fixed by the sentencing court. However, the respondent argues that a minimum term set by a sentencing court is in the nature of a recommendation to the Mercy Commission that a petition should not be entertained before the expiry of the minimum term set by the sentencing court. The same logic may apply to the Parole Board as well.
- [63] The minimum period to be served before a pardon may be considered is a matter of discretion on the part of a sentencing judge depending on the facts and circumstances of the case. However, the discretion to set a minimum term under section 237 of the Crimes Act is not the same as the mandatory requirement to set a non-parole term under section 18 of the Sentencing and Penalties Act. The specific sentencing provision of section 237 of the Crimes Act displaces the general sentencing arrangements set out in section 18 of the Sentencing and Penalties Act. The reference to the court sentencing a person to imprisonment for life in section 18 of the Sentencing and Penalties Act is a reference to a life sentence that has been imposed as a maximum penalty, as distinct from a mandatory penalty. Examples of life imprisonment as the maximum penalty can be found, for example, for the offences of rape and aggravated robbery under the Crimes Act [see **Balekivuya**]
- [64] In **Balekivuya** the Court of Appeal dealt with the issues surrounding the discretion to set a minimum period and how the length of that term should be determined.

*‘[42] Balekivuya also challenges the length of the minimum period set by the trial Judge. As I observed earlier, **there is no guidance as to what matters should be considered by the judge in deciding whether to set a minimum term. There are also no guidelines as to what matters***

*should be considered when determining the length of the minimum term.*

[43] *He should however give reasons when exercising the discretion not to impose a minimum term. He should also give reasons when setting the length of the minimum term. Some guidance may be found in the decision of **R v Jones** [2005] EWCA Crim. 3115, [2006] 2 Cr. App. R (S) 19 for the purpose of deciding whether a minimum term ought to be set. The Court of Appeal observed at paragraph 10:*

*"A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life."*

*In determining what the length of the minimum term should be a trial judge should consider the personal circumstances of the convicted murderer and his previous history.*

[48] *It is clear that the sentencing practices that were being applied prior to the coming into effect of the Crimes Decree, the Sentencing Decree and the Constitution no longer apply. Whatever matters a trial judge should consider when determining whether to set a minimum term and the length of that term under section 237, the process is not the same as arriving at a head sentence and a non-parole period. In my judgment the decision whether to set a minimum term and its length are at the discretion of the trial judge on the facts of the case.*

[65] In **Khan v State** [2009] FJSC 6; CAV0019.2008S (12 February 2009), the accused had been sentenced to mandatory life imprisonment (section 200) without a minimum period he must serve (section 33), upon his conviction for abduction, unnatural offence and murder under the Penal Code. The offences involved cruelty and brutality to an extreme degree. The accused, who was 14 years of age, ran after a seven year old girl, caught her and took her into his house. By holding a knife at her neck, he forced her to lie on the floor and despite her pleas and cries, sodomised her. Thereafter he stabbed her hand, leg and back and slit her throat. She died and he threw her body into a river. The Court of Appeal having considered the seriousness of the offences, the matters in mitigation, and the aggravating features, held that the imposition of life imprisonment was required. The principal relief the accused sought from the Supreme Court was to be given "*a fixed sentence so that I can know the date for me to be discharged*". The Supreme Court held that the appalling circumstances of the crimes entirely justified the decisions and dismissed the accused's petition and



stated that, nevertheless, it was important that he being a young man, should not be lost in the system, and that his situation be reviewed as the law provided, and that he understood the remedies available to him.

[66] The Supreme Court referred to the state counsel's submission that the Commission on the Prerogative of Mercy would consider examining a request from an offender for relief under s.115 of the Constitution once he had served 10 years imprisonment. It was also observed that by s.64 of the Prisons Act (cap 86), the Controller of Prisons was required to report at stipulated times to Minister on the general condition of prisoners (such as the petitioner) sentenced to life imprisonment. The state counsel had informed court that according to an internal administrative directive by the Prisons Department, the Department should refer a prisoner to the Commission on the Prerogative of Mercy after the Prisoner has served ten years of his term of life imprisonment accordingly. The court added that it would be open to the accused, himself, to refer his case to the Commission, once he has completed serving ten years imprisonment.

[67] The respondent had submitted as follows on the practice under the current legislative framework.

- '23. *The respondent has made inquiries of the Fiji Corrections Service and has been informed that there are currently 149 prisoners serving sentences of life imprisonment. Of these, 69 prisoners are serving life without a minimum term fixed by the sentencing court and 80 prisoners are serving life sentences with a minimum term fixed by the sentencing court.*
- 24. *Fiji Corrections Service advises that prisoners serving life imprisonment, both with and without minimum terms, typically apply to the Mercy Commission for pardon. Historically, prisoners without minimum terms attached to their sentences have been advised to apply for Presidential Pardon after completing 10 years of their sentence.'*
- 32. *It is not known whether the Mercy Commission has promulgated any rules or protocols governing its procedures.'*

[68] Under the Penal Code in both mandatory and discretionary life sentences the sentencing court was given a discretion under section 33 to impose a minimum term. However, after the Crimes Act 2009 and the Sentencing and Penalties Act 2009 came

into effect, sentencing courts retained a discretion whether or not to impose a minimum term when imposing a mandatory life sentence, and a non-parole period when imposing a discretionary life sentence (in the absence of a Parole Board, a non-parole period in effect operates as a minimum term of imprisonment). Currently when a court sentences an offender to be imprisoned for life or for a term of 02 years or more the court must fix a period during which the offender is not eligible to be released on parole (see s.18(1) of the Sentencing and Penalties Act). However the Court of Appeal held in *Balekivuya* that specific sentence provision of section 237 of the Crimes Act displaces the general sentencing arrangements set out in section 18 of the Sentencing and Penalties Act and the reference to the court sentencing a person to imprisonment for life in section 18 of the Sentencing and Penalties Act is a reference to a life sentence that has been imposed as a maximum penalty, as distinct from a mandatory penalty for murder. In other words, the court upheld the discretion vested in the High Court by section 237 of the Crimes Act to impose a minimum term or not on an offender sentenced to mandatory life imprisonment.

### **Should the sentencing court always set a minimum term?**

[69] The respondent argues that this Court should issue clear guidance that a sentencing court must *always* set a minimum term under section 237 Crimes Act. The reasons are:

1. *Under the provisions of section 33 of the Penal Code there was no dichotomy between mandatory and discretionary life sentences – in both cases the sentencing court was given a discretion to impose a minimum term.*
2. *Whereas section 237 Crimes Act gives a sentencing court a broad discretion whether or not to set a minimum term, section 18 of the Act imposes a mandatory duty on the sentencing court to fix a non-parole period when imposing a discretionary life sentence. There is no rational basis for this different treatments. There is no rational basis for a trial judge to relinquish his or her duty to set a minimum term under section 237 Crimes Act when a non-parole period must be fixed in discretionary life sentence cases, and reasons given, under section 18 of the Act. The same minimum requirements of fairness should apply in respect of all life prisoners (both mandatory and discretionary).*

3. *The overarching reason why the fixing of a minimum term ought to be mandated is that an offender convicted of murder is entitled to know the trial judge's view on how long he should serve before being considered for pardon. Since an offender has a right to make informed representations to the Mercy Commission, natural justice requires that a prisoner serving a mandatory life sentence be informed, prior to his making representations, of what the trial judge has recommended and it is a matter of basic fairness that the offender should be informed of the trial judge's view at the commencement of his or her life term.*
4. *It is a judicial function instrumental to a fair trial process to give reasons for the sentence imposed. The recommended minimum term is properly to be regarded as part of the sentence. The fixing of a minimum term will also facilitate appellate review.*
5. *A decision not to set a minimum term potentially creates ambiguity. This is because it could be taken as an indication that the sentencing judge has taken the view that the offending is so serious that an offender should never be pardoned (a whole life tariff). The alternative, and more likely, view is that the sentencing court has adopted a lenient approach in deciding not to impose a minimum term so as not to impede the offender's right to petition the Mercy Commission at the earliest opportunity.*
6. *The pronouncement of a minimum term in open court promotes transparency and consistency and thereby enhances public confidence in the criminal justice system.*

[70] Without doubt, all of these are very persuasive arguments in favour of setting a minimum term under section 237 of the Crimes Act. However, I am not inclined to recommend that a sentencing court *must always* set a minimum term for two reasons. Firstly, such a pronouncement may be construed as an act of 'judicial legislation' in the face of clear and express discretion vested in the sentencing courts to fix or not to fix a minimum term. Secondly, such a commendation will have the effect of preventing or at least deterring the sentencing judge from imposing a life imprisonment without a minimum term ('whole life order') in an appropriate case as he may deem fit.

[71] Nevertheless, considering all matters urged by the respondent, and in order to make an accused's right of appeal to, or review by, higher court (see section 14(2) (o) of the Constitution) meaningful and to ensure that the absolute discretion of the sentencing judge under section 237 of the Crimes Act would not limit an accused's above

Constitutional right, I am inclined to adopt a more restricted interpretation of section 237 in the context of Bill of Rights in Chapter 2 of the Constitution and its impact upon an accused (see section 7(3) and (5) of the Constitution) with regard to the exercise of the wide discretion to or not to impose a minimum term.

[72] Therefore, I would recommend that fixing a minimum term under section 237 of the Crimes Act should be the norm and the absence of a minimum term should be the exception. If the sentencing court decides not to impose a minimum term it *must* give adequate reasons when exercising the discretion not to impose a minimum term *i.e.* imposing a ‘whole life order’. Similarly, if the court proceeds to impose a minimum term it should demonstrate as to what matters were considered (A) in deciding to set a minimum term and (B) when determining the length of the minimum term. As pointed out below, there may certainly be an overlap in reasons for (A) and (B).

[73] In order to avoid any doubt, I may also add that the mere fact that a case falls within ‘Extremely High’ or ‘High’ category of seriousness in the Table below *per se* is not a bar for a judge to impose a life imprisonment without a minimum term if it could be justified with adequate reasons, provided such a case coupled with one or multiple aggravating factors and fundamental purposes of punishment makes a whole life order just and inevitable. I would expect such cases to be exceptionally high in terms of seriousness and aggravation and naturally demand and warrant whole life sentences.

[74] Victoria State Government’s Sentencing Advisory Council (2021) has declared that a sentence can only be imposed in order to achieve one or more of the following purposes. These are known as the five purposes of sentencing. Generally no one purpose is the main or dominant purpose of sentencing for all cases. For each case, the court looks at the features of the offending and the offender, and decides on the purpose or combination of purposes that apply.

- *Just punishment – to punish the offender in a way that is just in all the circumstances.*
- *Deterrence – to discourage the offender (known as specific deterrence) or other people (known as general deterrence) from committing the same or similar offences.*

- *Rehabilitation – to create conditions that help the offender to lead a law-abiding life*
- *Denunciation – to denounce, condemn or censure the offender’s behaviour (that is, make it clear to the community that the behaviour is wrong)*
- *Community protection – to protect the community from the offender.*

[75] However, if the court wishes to impose an indefinite sentence namely whole life order, the court must *inter alia* (such as those referred to [77] to [80] below) be satisfied that the offender is a serious danger to the community (community protection). Determining whether an offender is a serious danger to the community requires the court to consider all of the following:

- (a) *Whether the nature of the offence is exceptional;*
- (b) *An offender’s characteristics, including previous offending;*
- (c) *Any relevant medical, psychiatric, prison or other report about the offender;*
- (d) *Any risk of serious harm to members of the community if the offender is not given an indefinite sentence; and*
- (e) *The need to protect the community from the offender (see **R v Radich** [1954] NZLR 86).*

[76] I shall now turn to a general discussion on matters that may be considered in deciding to impose a minimum term and the length of the minimum term. While some considerations may overlap between determining whether to fix a minimum term and deciding the length of that minimum period, there are also distinct factors for each stage of the decision-making process. By carefully weighing these considerations, judges strive to make informed and just decisions regarding the imposition and length of minimum terms for individuals convicted of serious crimes such as murder or attempted murder.

**Matters to be considered for determining whether to fix a minimum term**

[77] On the topic of considerations for determining whether to fix a minimum term (which incidentally are also relevant to the decision to impose an indefinite sentence), without seeking to limit the judicial discretion, in general, they could be broadly identified as follows:

1. *Severity of the Crime: This involves evaluating the nature and extent of the offense. Factors such as whether the crime was premeditated, involved extreme violence, or resulted in multiple victims can influence the decision. The judge assesses the overall impact of the crime on the victim, their family, and society.*

2. Culpability of the Offender: The judge considers the level of the offender's responsibility for the crime. This includes examining the degree of intent, motive, and any aggravating factors such as previous violent behavior or lack of remorse.
3. Victim Impact: Judges take into account the emotional, psychological, and financial harm inflicted on the victim and their loved ones. Victim impact statements may provide insight into the lasting effects of the crime, helping the judge understand the full scope of the harm caused.
4. Public Safety: Ensuring the safety of the public is paramount. Judges assess the risk posed by the offender to society, considering factors such as the likelihood of reoffending and the potential danger posed by releasing the offender back into the community.
5. Previous Criminal History: The offender's criminal record, particularly any history of violent or serious offenses, is considered. Repeat offenders or those with a pattern of criminal behavior may receive harsher sentences to protect the public and deter future crimes.
7. Sentencing Guidelines and Precedents: Judges refer to established legal principles, sentencing guidelines, and precedents in similar cases to ensure consistency and fairness in sentencing. This helps prevent arbitrary or disproportionate sentences and promotes confidence in the justice system.

[78] I may also add that considerations for deciding the length of the minimum period could be broadly recognised as follows:

1. Rehabilitation Potential: Assessing the offender's potential for rehabilitation is crucial. Judges consider factors such as participation in rehabilitation programs, expressions of remorse, and willingness to change as indicators of rehabilitation potential.
2. Specific Deterrence: The length of the minimum term may serve as a deterrent to the offender, dissuading them from committing future crimes. A longer minimum term may be imposed to deter the offender from reoffending or engaging in similar criminal behavior.
3. General Deterrence: The minimum term also serves as a deterrent to others in society. Judges consider the message sent to the community about the consequences of similar crimes. A longer minimum term may be necessary to send a strong deterrent message and protect the public interest.
4. Proportionality: The length of the minimum term should be proportionate to the severity of the offense and the offender's level of culpability. Judges strive to ensure that the punishment fits the crime and is not unduly harsh or lenient.
5. Age and Maturity: In cases involving young or juvenile offenders, judges consider the offender's age, maturity, and capacity for change. Rehabilitation

*and education may play a more significant role in determining the length of the minimum term for these offenders.*

6. Human Rights Considerations: *Judges must ensure that the offender's rights are respected throughout the sentencing process, including the right to a fair trial and proportionate punishment. This involves balancing the need for justice with the principles of fairness and respect for human dignity.*
7. Judicial Discretion: *Judges have discretion to consider the unique circumstances of each case. This may include mitigating factors such as the offender's cooperation with authorities, remorse, or evidence of rehabilitation. Conversely, aggravating factors may warrant a longer minimum term.*

[79] Level of culpability, level of harm, aggravating factors, and mitigating circumstances as considered by the trial judge involves a thorough examination of various aspects of the crime and the offender's conduct. These considerations can be organized under specific headings to facilitate a structured analysis.

*1. Level of Culpability:*

*Intent: Was the crime premeditated, deliberate, or committed with specific intent to cause harm?*

*Knowledge: Did the offender have full knowledge of the consequences of his actions?*

*Motive: What motivated the offender to commit the crime?*

*Degree of Participation: Was the offender the primary instigator, or did they play a lesser role in the commission of the crime?*

*2. Level of Pain:*

*Physical Pain: What physical injuries or pain resulted from the crime?*

*Emotional Pain: What emotional or psychological impact did the crime have on the victim and their loved ones?*

*Financial Loss: Did the crime result in financial losses or damages to the victim or society?*

*3. Aggravating Factors:*

*Previous Criminal History: Does the offender have a history of violent or serious offenses?*

*Vulnerability of the Victim: Was the victim particularly vulnerable due to age, disability, or other factors?*

*Abuse of Power or Trust: Did the offender abuse a position of power or trust to commit the crime?*

*Multiple Victims: Were there multiple victims or instances of harm caused by the offender's actions?*

*Degree of Planning: Was the crime carefully planned and executed, indicating a higher level of culpability?*

#### 4. Mitigating Circumstances:

*Remorse: Has the offender expressed genuine remorse for their actions?*

*Cooperation with Authorities: Did the offender cooperate with law enforcement during the investigation or trial?*

*Mental Health Issues: Does the offender have any mental health issues that may have contributed to their behavior?*

*Provocation short of being a partial defence: Was the offender provoked or subjected to extenuating circumstances that influenced their actions?*

*Lack of Criminal History: Does the offender have a clean or limited criminal history, suggesting a lower likelihood of reoffending?*

[80] Level of culpability, level of harm, aggravating factors, and mitigating circumstances are relevant to both the imposition of a minimum period and the determination of its length.

1. *Level of culpability, level of harm, aggravating factors, and mitigating circumstances for imposing a minimum period:*

*When deciding whether to impose a minimum period, judges consider the seriousness of the offense and the offender's level of culpability. Factors such as intent, motive, and the degree of harm caused to the victim are crucial in determining the necessity of imposing a minimum period. Aggravating factors, such as a history of violence or abuse of trust, may also weigh in favor of imposing a minimum period. Similarly, mitigating circumstances, such as genuine remorse or cooperation with authorities, may influence the decision to impose a minimum period or its length.*

2. *Level of culpability, level of harm, aggravating factors, and mitigating circumstances for deciding the length of the minimum period:*

*When determining the length of the minimum period, judges further assess the offender's level of culpability, the severity of the harm inflicted, and the presence of aggravating or mitigating factors. These considerations help judges determine the appropriate length of the minimum period that reflects the gravity of the offense, the offender's degree of responsibility, and the need for deterrence, rehabilitation, and proportionality in sentencing.*

[81] Organizing these considerations under specific headings helps judges systematically evaluate the factors relevant to sentencing decisions. This structured approach ensures that all relevant aspects of the case are carefully considered, leading to a more fair and balanced outcome.

[82] In summary, while all the above considerations are relevant to both the imposition of a minimum period and the determination of its length, they play slightly different



roles at each stage of the sentencing process. They guide judges in assessing the overall circumstances of the case and making informed decisions that balance the interests of justice, rehabilitation, deterrence, and public safety.

**Matters to be considered for determining the minimum term (Fiji)**

[83] In the absence of any guidelines judges in Fiji in the past have formulated certain parameters how to determine the minimum term to be served by a murder convict. For example, it was thought that the more serious the murder, the longer the minimum term; a murder with intention to kill will also attract a longer term than a murder committed by recklessness<sup>7</sup> and in some instances judges in Fiji drew guidance from Criminal Justice Act 2003 from UK in assessing the minimum term<sup>8</sup>. However, the Court of Appeal in **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) correctly remarked that English legislation on mandatory life sentence for murder is quite different from section 237 and section 119(3) of the Constitution and as a result only limited guidance can be gained from the English decisions. In UK the judge must impose a life sentence and follow guidance on the minimum amount of time the offender must be in prison before being considered for release.

[84] The fundamental guidance to determine the minimum term to be served by a murder convict should be section 4 of the Sentencing and Penalties Act 2009 which provides the following general principles for sentencing offenders which are equally relevant to the fixing of the minimum term as well.

- (1) *The only purposes for which sentencing may be imposed by a court are—*
- (a) *to punish offenders to an extent and in a manner which is just in all the circumstances;*
  - (b) *to protect the community from offenders;*
  - (c) *to deter offenders or other persons from committing offences of the same or similar nature;*
  - (d) *to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*

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<sup>7</sup> **State v Chand** [2013] FJHC 385; HAC45.2013 (9 August 2013)

<sup>8</sup> For example **State v Rokete** - Sentence [2014] FJHC 114; HAC084.2009 (4 March 2014)

- (e) to signify that the court and the community denounce the commission of such offences; or*  
*(f) any combination of these purposes.*

[85] The respondent has submitted that in UK, when setting a minimum term, the sentencing judge is only directly concerned with “seriousness”, the protection of the public being provided by the imposition of the life sentence. After the minimum term has been served, protection of the public becomes the responsibility of the Parole Board, which then decide when it is safe to release the offender on licence (see **R v Sullivan** [2005] 1 Cr App R 3 at [9]).

[86] However, the Mercy Commission in Fiji has no statutory obligation to make recommendations based only on protection of the public. Currently, there is no duly constituted Parole Board and therefore there is no system of release on licence in Fiji. Thus, the effect of a pardon is to clear the accused from all infamy, and from all consequences of the offence for which it is granted. Therefore, it is an important consideration for a sentencing court in Fiji to consider, amongst other things, the need to protect the community from murder convicts setting a just and proportionate minimum term. A sentencing court can only make an initial assessment of an offender’s dangerousness and risk to the community and a functioning Parole Board would be better able to take a view on risk at the time release is being considered having regard to the progress an offender has made during his incarceration.

[87] It is hoped that the Mercy Commission would pay due attention and give due consideration to this aspect when recommending an accused for pardon and in any event would not under normal circumstances do so before the minimum term fixed by the sentencing court expires. Similarly, the Mercy Commission may pay due heed to a whole life order made by the sentencing court.

### **Sentencing guidelines in Fiji**

[88] As submitted by the respondent one of the difficulties with promulgating a prescriptive guideline for murder is that the crime of murder as defined in Fiji, as in England, embraces acts of widely varying culpability, including horrific and brutally

sadistic conduct at one end of the spectrum to the almost venial, “mercy killing” of a beloved partner at the other. In light of Lord Phillip’s observation in **R v Bouhaddaou** [2006] EWCA Crim 3190; [2007] 2 Cr App R (S) 23, at [18] that depending upon the particular facts, sentences for murder should cover all parts of the area between the two starting points which in the case of Fiji is 08 to 25 years as suggested in the Table below, so many categories of seriousness (perhaps over-specific and over-engineered) including separate ones based on age as in UK, may not be helpful to the sentencing judges in Fiji to meet out individualised justice as it would unduly interfere with the sentencing discretionary powers vested in them by legislature in Fiji and not promote overall consistency in the end. Hence, the recommendation for only three categories of seriousness irrespective of the age of the offender which, of course, will be considered under mitigating factors where relevant. It is also clear from a survey of past cases and sentences for murder in Fiji as submitted to this court by the LAC and DPP that the majority of cases (if not the great majority) falls within the ‘High’ category of seriousness as opposed to ‘Extremely High’ and ‘Low’ categories in the Table.

[89] I agree with the DPP’s contention that a starting point of less than 20 years, which may, after an appropriate discount for plea, result in an ultimate minimum term significantly lower than 15 years upon a plea of guilty, is likely to be perceived by the general public as not sufficiently meeting the purposes of deterrence and community denunciation thereby undermining public confidence in the criminal justice system. Hence, the starting point of 20 years for cases falling within ‘High’ category where the sentencing range is between 15-25 years. In all 03 categories, the *ultimate* minimum term may be substantially reduced below the normal starting point where the offender’s culpability is significantly reduced, and a substantial upward adjustment from the higher starting point may be appropriate in the most serious cases.

[90] It appears from the table of cases attached herewith as Annex A by DPP – 50 cases, Annex B by LAC - 28 cases for sentences for murder and Annex C by the DPP – 22 cases for sentences for attempted murder and considered by this court (excepting the minimum term of 04 years in one case of murder), the average minimum term

prescribed in Fiji for murder has been 17 ½ years (Annex A- highest 30 and lowest 11) and according to the cases cited by LAC the average has been 19 years (Annex B- highest 28 years and lowest 12 years). For attempted murder cases in Annex C cited by the DPP (the LAC has not submitted a table) the average minimum term has been 10 years (highest 15 and lowest 07 years). These cases are only a representative collection and not all the cases decided in the past. This empirical data too suggest that for the majority of cases of murder in Fiji, the starting point of 20 years within ‘High’ category with a sentencing range of 15-25 years is most appropriate.

### **01<sup>st</sup> step**

- [91] In cases of murder (or the combination of murder and one or more offences associated with it), as the first step the courts should use the following Table to set the minimum term. For the purposes of setting the starting point for the minimum term, the Table sets out three categories *i.e* Extremely High, High and Low.

<b>Categories of Seriousness</b>	
<b>Extremely High</b>	
Starting point	25 years’ imprisonment
Minimum term range	20 – 30 years’ imprisonment
<b>High</b>	
Starting point	20 years’ imprisonment
Minimum term range	15 – 25 years’ imprisonment
<b>Low</b>	
Starting point	8 years’ imprisonment
Minimum term range	05 – 15 years’ imprisonment

- [92] The court may consider that the seriousness of the murder (or the combination of murder and one or more offences associated with it) is Extremely High, High or Low in the following cases but this is not an exhaustive list.

### **Extremely High**

1. *The murder of two or more persons, where each murder involves a substantial degree of premeditation or planning or the abduction or kidnapping of the victim, or sexual or sadistic conduct.*

2. *The murder of a child if involving the abduction of the child or sexual or sadistic motivation.*
3. *The murder of a judicial officer, court officer, police officer, prison/correctional officer, any other law enforcement officer, civil servant, security guard/officer or any other worker (health, teaching etc.) exercising public or community functions in the course of his or her duty.*
4. *A murder done for the purpose of advancing a political, religious, racial or ideological cause or terrorist act or in furtherance of a coup (military or otherwise) involving overthrowing a democratically elected government or involving ethnic cleansing or in the course of ethnic riots or killing of a political figure for political ends.*
5. *A murder by an offender previously convicted of murder or the offender is convicted of two or more counts of murder whether or not arising from the same transaction.*
6. *A murder committed with extreme brutality, cruelty, depravity or callousness or cold-blooded execution.*
7. *A murder committed in any other exceptional circumstance including instances amounting to crimes under international criminal law.*

### **High**

1. *A murder involving unlawful entry into, or unlawful presence in a dwelling house or commercial or public establishment or place or the use of a firearm, other weapon, explosive or poison.*
2. *A murder done for or in furtherance of payment, ransom or gain (such as a murder done in the course of contract killing or in furtherance of extortion, robbery or burglary or done in the expectation of property- moveable or immovable or intangible gain as a result of the death).*
3. *A murder intended to conceal another offence or avoid the detection, prosecution or conviction of any person or in any other way to obstruct or interfere with the course of justice.*
4. *A murder involving sexual or sadistic conduct.*
5. *The murder of two or more persons.*
6. *A murder that is aggravated by racial or religious hostility or by hostility related to sexual orientation.*
7. *A murder that is aggravated by hostility related to disability or transgender identity.*
8. *If the offender took a knife, other weapon or poison to the scene intending to commit any offence or have it available to use as a weapon and used that knife, other weapon or poison in committing the murder.*
9. *A murder committed in the course of arson, treason, espionage, sabotage, piracy, escaping or rescuing from prison, lawful custody or detention or in the course of any other serious offence.*
10. *A murder committed in sight of deceased's children.*
11. *A murder committed in domestic-violence context.*

### **Low**

1. *Those cases in which, in the judge's opinion, the seriousness does not fall within Extremely High or High.*

## 02<sup>nd</sup> step

- [93] Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point. In this exercise, double counting should be avoided. The aggravating and mitigating factors identified in other comparable jurisdictions provide helpful checklists. However, the weight to be given to those factors is obviously a matter for the judgment of the sentencing court having appropriate regard to the local societal context. As pointed by Lord Phillips in **R v Bouhaddaou** [2006] EWCA Crim 3190; [2007] 2 Cr App R (S) 23, at [18] that it may be appropriate to move a long way from the starting point to reflect aggravation or mitigation in any given case.
- [94] Aggravating factors (additional to those within Extremely High, High and Low categories) that may be relevant to the offence of murder include (not exhaustive):
- (a) *Significant degree of planning or premeditation.*
  - (b) *The fact that the victim was particularly vulnerable because of age, health, or any other disability.*
  - (c) *The fact that the offender had repeatedly or continuously engaged in behaviour towards the victim that was controlling or coercive and at the time of the behaviour, the offender and the victim were personally connected.*
  - (d) *Mental or physical suffering such as torture inflicted on the victim before death.*
  - (e) *The abuse of a position of trust.*
  - (f) *The use of duress or threats against another person to facilitate the commission of the offence.*
  - (g) *The fact that victim was providing a public service (such as taxi driver) or performing a public duty.*
  - (h) *The use of sustained and excessive violence towards the victim.*
  - (i) *Concealment, destruction of the murder weapon or other means used in murder or concealment, destruction or dismemberment of the body.*
  - (j) *Murder committed whilst on bail.*
  - (h) *Substantial harm, damage or loss caused to the deceased's family.*
- [95] Mitigating factors (not considered as part of the initial starting point) that may be relevant to the offence of murder include (not exhaustive):
- (a) *An intention to cause serious bodily harm rather than to kill,*
  - (b) *Lack of premeditation,*

- (c) *The fact that the offender suffered from any mental disorder or mental disability which (although not falling within mental impairment under section 28(1) or diminished responsibility under section 243 of the Crimes Act) lowered the offender's degree of culpability.*
- (d) *The fact that the offender was provoked (for example, by prolonged stress) but, in a way not amounting to provocation under section 242 of the Crimes Act.*
- (e) *The fact that the offender acted to any extent in self-defense (although not falling within self-defense under section 42(1) of the Crimes Act) or, in the case of a murder committed in fear of violence,*
- (f) *A belief by the offender that the murder was an act of mercy, and*
- (g) *The age of the offender.*

### **The age of the offender as a mitigating factor**

[96] In terms of the Juveniles Act as amended by section 57 of the Prisons and Corrections Act and the Constitution, in terms of biological age one would reach adulthood at 18 years of age in Fiji [see para [26] in **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023)]. However, the legal age alone is not conclusive of one's adulthood or maturity. In **R v Peters** [2005] 2 Cr App R(S) 101, the Appeal Court said at para. 11 and 12:

*"It has long been understood that considerations of age and maturity are usually relevant to the culpability of an offender and the seriousness of the offence.....Although the passage of an eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday....., when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender's maturity."*

*"..... The principle is simple. Where the offender's age, as it affects his culpability and the seriousness of the crime justifies it, a substantial, or even a very substantial discount, from the starting point may be appropriate..."*

[97] In **R v Clarke** [2018] EWCA Crim 185 [Clarke, Andrews & Thompson [2018] EWCA Crim 185] where Clarke was just 18, Thompson was 19 and Andrews was 17 at the time of the offending), the Lord Chief Justice observed:

*"Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear... Full*

*maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday”*

- [98] In **R v Balogun** [2018] EWCA Crim 2933, the appellant was convicted of three offences of rape and pleaded guilty to four further offences of rape and one offence of distributing offensive photographs of a child. The offences were committed during a five month period in 2016 when the appellant was aged between 18 years 04 months and 18 years 09 months. His victims were aged between 13 and 16. His behaviour was described as a ‘campaign of rape’. The Court of Appeal stated:

*“The fact that the appellant had attained the age of 18 before he committed the offences does not of itself mean that the factors relevant to the sentencing of a young offender had necessarily ceased to have any relevance. He had not been invested overnight with all the understanding and self-control of a fully mature adult.”*

- [99] Therefore, there is ample authority to show that young adults should be treated differently within the criminal justice system as a result of their continuing lack of maturity, particularly when the offender is very young and the disparity in age between the offender and the victim is very small. The youth and immaturity of an offender must always be potential mitigating factors for the courts to take into account when passing sentence. However, where the facts of a case are particularly serious, the youth of the offender will not necessarily mitigate the appropriate sentence (See **R v Paiwant Asi-Akram** [2005] EWCA Crim 1543 and **R v Patrick M** [2005] EWCA Crim 1679).

- [100] In the light of above observations, as adverted to by the DPP, I too do not believe that that there is much utility in prescribing different starting points based on the age of an offender. Whilst youth and immaturity of the offenders undoubtedly constitute significant mitigation, maturity does not necessarily correlate with biological age.



[101] There is also a principle in sentencing that a sentence should normally be shortened so as to avoid the possibility that an elderly offender will not live to be released from prison. However, it must be stressed that old age is not a mitigating factor especially in cases of sexual offences and old age is definitely not a license to commit a crime [**State v Vukici** [2018] FJHC 1193; HAC104.2017 (14 December 2018) & **Rokota v The State** [2002] FJHC 168; HAA0068J.2002S (23 August 2002)].

[102] In **Vila v State** [2016] FJCA 149; AAU0013.2012 (29 November 2016), Calanchini, P said:

6. *There are a number of unreported decision of the Court of Appeal to which reference has been made by Mr D A Thomas in his text “Principles of Sentencing” (1980) in support of the proposition at page 196 that “age is most effective as a mitigating factor when combined with another such as good character.”*

7. *However recognition of age as a mitigating fact does not mean that appropriate prison sentences should not be imposed on elderly offenders.....”*

[103] Advanced age can be a factor taken into account when fixing a minimum term for offenders sentenced to life imprisonment. Advanced age may be a significant factor that can influence the decision on fixing a minimum term for life imprisonment. It necessitates a careful and balanced approach that considers health, rehabilitation potential, humanitarian concerns, public safety, and the practical implications for the prison system. Here is how and why advanced age might influence this decision.

*Health and Life Expectancy:*

*Physical Health: Older offenders often have more health issues, which can influence the decision on the minimum term. Judges may consider the likelihood of the offender being able to survive a long minimum term, as well as the impact of incarceration on their health.*

*Life Expectancy: Advanced age naturally shortens life expectancy. A long minimum term may effectively amount to a whole-life sentence for an older offender, which could be seen as disproportionate depending on the circumstances of the crime and the individual’s health.*

*Rehabilitation Potential:*

*Capacity for Change: Older offenders might have a lower risk of reoffending due to factors like diminished physical ability or changes in mentality and behavior*

*with age. Their potential for rehabilitation might be assessed differently than younger offenders.*

*Prison Programs: The availability and suitability of rehabilitation programs for elderly prisoners can be limited, influencing the court's approach to sentencing and minimum terms.*

#### *Human Rights and Compassionate Grounds:*

*Humanitarian Concerns: Courts may consider the humanitarian aspects of incarcerating elderly individuals for extended periods. Factors like the harshness of prison life for elderly individuals, who may need special care, are relevant.*

*Dignity and Compassion: Sentencing should balance justice with compassion, ensuring that sentences are humane. An excessively long minimum term for an elderly offender might be viewed as lacking in compassion.*

#### *Public Safety and Risk:*

*Risk of Reoffending: Advanced age generally correlates with a reduced risk of reoffending. The court may consider whether a long minimum term is necessary to protect public safety if the offender poses a minimal future threat.*

*Specific Deterrence: The need for specific deterrence might be lessened if the offender is of an advanced age, as the likelihood of committing future crimes diminishes.*

#### *Impact on Prison Resources:*

*Healthcare Costs: Older prisoners often require more medical care, which can be a burden on prison resources. Judges might consider the practical implications of incarcerating elderly offenders for long periods, including the strain on healthcare services within the prison system.*

*Accommodation Needs: Special accommodations for elderly prisoners, such as accessible facilities and age-appropriate care, are additional factors that the court might weigh.*

[104] When considering advanced age as a factor in fixing a minimum term, judges will typically:

*Assess Medical Reports: Review detailed medical assessments to understand the offender's health status and specific needs.*

*Consider Age-Related Guidelines: Refer to any sentencing guidelines or legal precedents that provide direction on handling cases involving elderly offenders.*

*Balance Factors: Balance the offender's age and health with the severity of the crime, the need for punishment, deterrence, and the interests of justice.*

*Evaluate Compassionate Release Possibilities: Take into account the potential for compassionate release policies that might apply in the future due to the offender's advanced age or deteriorating health.*

[105] However, there are arguments against taking advanced age as a significant factor in setting minimum terms for serious murder offenses. These arguments often focus on ensuring justice for the severity of the crime and maintaining public confidence in the legal system. Here are some key points:

*Severity and Gravity of the Crime:*

*Justice for the Victim: The seriousness of murder, particularly in cases involving extreme brutality or multiple victims, demands a proportionate response regardless of the offender's age. The need to deliver justice for the victim and their families can outweigh considerations of the offender's advanced age.*

*Moral Accountability: Regardless of age, individuals must be held fully accountable for heinous crimes. Allowing age to significantly mitigate the sentence could be seen as undermining the gravity of the offense.*

*Equality before the Law:*

*Consistency in Sentencing: Sentences should be consistent and fair, ensuring that all individuals, regardless of age, are subject to the same legal standards. Making significant allowances for age could create disparities and perceptions of inequality.*

*Precedent Setting: Reducing sentences for elderly offenders could set a precedent that might be seen as unjust or overly lenient, potentially leading to challenges in future cases.*

*Deterrence:*

*General Deterrence: Sentences serve to deter others from committing similar crimes. Leniency based on age might weaken the deterrent effect of the legal system, suggesting that older individuals could commit serious crimes with less severe consequences.*

*Specific Deterrence: While the risk of reoffending may be lower for older individuals, ensuring that even elderly offenders receive appropriate sentences serves to reinforce the message that serious crimes will be met with serious consequences.*

*Public Confidence and Safety:*

*Maintaining Public Trust: The public's confidence in the justice system can be undermined if it appears that older offenders receive undue leniency. Ensuring that sentences reflect the seriousness of the crime helps maintain trust and respect for the legal system.*

*Protection of Society:*

*Even if the risk of reoffending is lower, the justice system must ensure that society is protected from individuals who have committed serious crimes. A minimum term that reflects the severity of the offense can serve this protective function.*

Retributive Justice:

*Moral Retribution: The principle of retributive justice emphasizes that offenders deserve to be punished in proportion to the severity of their crimes. Age should not significantly diminish the punitive aspect of sentencing for severe offenses like murder.*

*Victims' Rights: The rights and perspectives of victims and their families are paramount. They may view a lenient sentence due to the offender's age as insufficient justice for the harm inflicted.*

- [106] While these arguments highlight the importance of treating serious offenses with the gravity they deserve, it's important to balance them with considerations of fairness, human rights, and the individual circumstances of each case. Courts must weigh these competing interests carefully to ensure just and appropriate sentencing outcomes. However, in serious murder cases, the arguments against allowing advanced age to significantly mitigate the minimum term often carry substantial weight, reflecting the need to uphold the principles of justice, deterrence, and public protection.

**A belief by the offender that the murder was an act of mercy as a mitigating factor**

- [107] Some intentional murders, for example so-called mercy killings, may be considered less serious than murders involving a very high degree of recklessness, for example an offender stomping on the head of a helpless victim. Judge LJ said in **R v Peters and Others** (supra) at [14]:

*“.....there is no specific or special starting point for cases where the offender intended really serious harm rather than death..... For example, where the killing represents an act of mercy, motivated by love and devotion,...the intention is indeed to kill, to provide a merciful release. It is unlikely that the mitigation in such a case will be less than the mitigation allowed to an offender who involves himself in an unlawful violent incident and, intending to do really serious harm, causes death. Similarly, there are cases in which death, even if unintended, is a possible or likely consequence of the offender's premeditated conduct. For example, those who abduct a child intending to blackmail the parents into providing a large ransom may deliberately make the parents aware that the child is being tortured, to encourage a positive response from the parents. In the course of torture the child may die. Just because the very objective of the criminal is a ransom, death may not be intended. If it is a consequence of the abduction or torture, we doubt whether much, if any, allowance would normally be made in mitigation for the fact that the death of the child was an unintended consequence of the deliberate infliction of bodily harm.”*

**Intention to cause serious harm as opposed to intention to kill as a mitigating factor**

[108] In the context of the distinction between an intention to kill and an intention to cause serious harm under English law, Judge LJ said in **R v Peters and Others** (supra) at [13] – [14] it was held *inter alia* that it has however long been recognised that, all other features of the case being equal, the seriousness of a murder committed with intent to kill is normally more grave and serious than one committed with intent to cause grievous bodily harm. Such an intention to cause grievous bodily harm, as opposed to an intention to kill, ‘may’ provide relevant mitigation, but not necessarily, and not always.

[109] In **R v Hummerstone** [2014] EWCA Crim 670 the Court considered the absence of an intention to kill, at [22], where it said:

*“Turning to the absence of an intention to kill, that plainly is a mitigating factor, but, as was observed in R v Peters and others [2005] 2 Cr App R (S) 101, it cannot be assumed that the absence of an intention to kill necessarily provides very much mitigation. Where a weapon is taken and used and is of a sort which is liable to cause death, the mitigation on this ground is reduced...”*

[110] However, under the Crimes Act 2009 in Fiji, intention to cause serious harm or recklessness in causing serious harm are fault elements of manslaughter (section 239 of the Crimes Act) and not murder and manslaughter is punishable with a maximum 25 years of imprisonment. Intention to do grievous harm is the fault element of ‘Acts intended to cause grievous harm or prevent arrest’ under section 255 of the Crimes Act punishable with maximum life imprisonment. It is in this context that intention to cause serious harm as opposed to intention to kill as a mitigating factor should be considered, if at all.

**03<sup>rd</sup> step (Guilty plea)**

[111] Having set the minimum term and having taken into account any aggravating or mitigating factors adjusting the minimum term accordingly, the judge may also reduce the minimum term by taking into account a guilty plea. Section (4)(2)(f) of the Sentencing and Penalties Act obligates a sentencing court to have regard to whether

the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so. Thus, it is mandatory for a court to have regard to a guilty plea but the credit to be given to a guilty plea involves an exercise of discretion by sentencing court, and the utilitarian value of an early guilty plea has been well-recognized [see **Mataunitoga v State** [2015] FJCA 70; AAU125.2013 (28 May 2015)]. A first opportunity plea was accepted as a substantial sign of remorse and the offender received a substantial discount for the early plea, a long standing practice followed by sentencing courts but there is a difference in mitigation between an early plea of guilty and a late plea (such as one made just prior to the commencement of trial in the High Court which is not to be treated as substantial remorse); a late plea, albeit that remorse was expressed to the sentencing court and given credit for it, will attract substantially less discount in sentence [per Gates CJ in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015)].

[112] In **R v Peters and Others** (supra) Judge LJ said on the effect of a guilty plea on the sentencing process which may guide sentencing courts in Fiji in a similar situation:

*‘19. The defendant may accept that he was responsible for the fatal injuries, or contributed to them, or was responsible for the injuries which the prosecution witnesses say caused death (even if his experts do not), but he will nevertheless often need expert legal advice whether the case should properly be contested on the basis of absence of intent, self-defense, provocation, or diminished responsibility. In relation to the allowance for pleas of guilty, even if there is a delay in obtaining the advice of leading counsel, the defendant should not normally expect to obtain the maximum discount unless a very early indication is given that as a matter of fact he accepts responsibility for the fatal injuries, or involvement in death. Once he has seen his leading counsel and received advice, if he is then to benefit from the maximum discount, it is necessary for a plea to be indicated as soon as practicable thereafter. Subject to this consideration, we are not unsympathetic to the argument that in some murder cases at any rate, the first reasonable opportunity firmly and finally to indicate an intention to plead guilty to murder may not arise until after the defendant has seen leading counsel. Equally, it is essential for leading counsel instructed in such cases to arrange a consultation with the defendant at the earliest practicable date. When the defendant has indicated that he accepts responsibility for the death, the case management powers of the court should be exercised to require that the necessary consultation should take place within a specific time.’*

[113] I had the occasion to remark in **State v Ravasua** [2023] FJCA 95; AAU153.2020 (9 June 2023) on this topic as follows:

**'Discount on guilty plea in general**

[22] Madigan J in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) identified a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity as the 'high water mark'. The 33% discount for a guilty plea was expressed in the New Zealand case of **Hessell v R** [2009] NZCA 450, [2010] 2 NZLR 298 [Hessell (CA)] where the Court of Appeal established a sliding scale which permitted a discount of 33 per cent for a plea entered at first reasonable opportunity, reducing to 10 per cent for a plea entered three weeks before trial. In **Hessell** the court held that the maximum discount of 33 per cent included remorse, for which an additional allowance might be made only in exceptional cases where it had been demonstrated in a practical and material way. The Court justified bundling the guilty plea with non-exceptional remorse on four grounds: a guilty plea is the best evidence of remorse; an allowance for remorse is "automatically built in" to the guilty plea discount; remorse is easily claimed but not easily gainsaid; and the guilty plea discount would be more predictable if it incorporated remorse. However, the New Zealand Supreme Court in **Hessell v R** [2010] NZSC 135, [2011] 1 NZLR 607 [Hessell (SC)] at [73] rejected the Court of Appeal's scaled discount approach, holding rather that a guilty plea discount requires an evaluative assessment reflecting all the circumstances of the case, including the strength of the prosecution case and the point at which the defendant had the opportunity to be informed of all implications of the plea. It follows that an early plea need not earn a full discount. The Supreme Court capped the guilty plea discount at 25 per cent.

[23] It is clear that those remarks by Madigan J were not part of the main judgment and cannot be considered as part of ratio decidendi of the decision. In **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) the Supreme Court stated that the principle in **Ranima** must be considered with more flexibility and the overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given and the one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably. Therefore, in Fiji there is neither 1/3 discount or 1/4 discount automatically granted to an early guilty plea.'

[114] The Supreme Court in **Aitcheson** approved the approach taken by Goundar JA in **Mataunitoga** where it was held:

*"In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea .....and assess the effect of the plea on the accused by taking into*

*account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment”.*

[115] It is high time that the sentencing courts in Fiji avoid following Madigan J’s remarks in *Rainima* and follow, as they are bound to do, the guidance in *Mataunitoga* and *Aitcheson* in the matter of discounts for guilty pleas which is in line with section 4(2)(f) of the Sentencing and Penalties Act 2009 rather than a mechanical percentage of discounts as suggested in in *Rainima*.

[116] In **R v Browning** [2001] EWCA Crim 1831, [2002] 1 Cr App R (S) 377, Browning had pleaded guilty but there had to be a *Newton* hearing (see **R v Newton** 77 Cr. App. R. 13). Browning's evidence was not accepted so he was not entitled to full credit for his plea. *Browning* was endorsed in **R v Cooksley R v Stride R v Cook Attorney General's Reference** (No 152 of 2002) All ER 2003 Volume 3; [2003] EWCA Crim 996.

**04<sup>th</sup> step (time served on remand)**

[117] In *Balekivuya*, the Court of Appeal held, at [41], that there is no requirement for a trial judge to consider the time spent on remand when imposing a minimum term under section 237 Crimes Act. Whilst section 237 Crimes Act provides a separate regime for sentencing murderers, it does not follow that the provisions in Sentencing and Penalties Act is ineffectual in murder cases. Section 24 of the Sentencing and Penalties Act provides that if an offender is sentenced to a term of imprisonment any period of time during which the offender was held in custody prior to the trial of the matter shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.

[118] I agree with the DPP that as a matter of principle there seems no justifiable reason why a murder convict, who is sentenced to a term of imprisonment (mandatory life with a minimum term) should be treated any differently to other serious offenders who enjoy the benefit of section 24 of the Sentencing and Penalties Act. In UK time



spent on remand is deducted from the minimum term fixed by the sentencing court in murder cases.

- [119] Therefore, the sentencing courts in Fiji too should, unless a court otherwise orders for adequate reasons, regard the pre-trial remand of the murder convict as a period of imprisonment already served by him and an appropriate discount should be given from the minimum term already arrived at following the 01<sup>st</sup>, 02<sup>nd</sup> and 03<sup>rd</sup> steps.

**05<sup>th</sup> step (proportionality)**

- [120] For all sentencing courts in Fiji it is useful to keep in mind the remarks in **Hessell v R** [2010] NZSC 135, [2011] 1 NZLR 607 [*Hessell* (SC)] at [73], by the New Zealand Supreme Court:

*‘[77] All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence.’*

- [121] This means *inter alia* that all minimum terms imposed on murder convicts must not breach the principle of proportionality in the end.

**Attempted murder**

- [122] The sentence for attempted murder is the same as for murder *i.e.* life imprisonment with a discretionary right for the judge to fix a minimum term to be served by the offender (see s.237 read with s.44 (1) of the Crimes Act). The fault element for attempted murder is intention and knowledge [section 44(3)]. Intention and knowledge are defined in sections 19 and 20 of the Crimes Act respectively. In contrast the fault elements for murder are intention and recklessness. When recklessness is a fault element proof of intention, knowledge or recklessness will satisfy the fault element [section 21(4)]. On the question whether the absence of recklessness from section 44(3) was an oversight by the drafters of the Crimes Act<sup>9</sup>,

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<sup>9</sup> **Tabua v State** [2020] FJCA 79; AAU165.2015 (12 June 2020)

Prof Eric Colvin in his **Criminal Law of Fiji 02<sup>nd</sup> Edition** (LexisNexis) at page 126 at 13.6 argues that the restriction of fault elements to intention or knowledge is in line with the common law on attempts and statutory provisions elsewhere. In any event, an offender convicted of attempted murder will have demonstrated a high level of culpability, although the precise level of culpability will vary according to the circumstances of the offence.

[123] The DPP has made the following submissions (the LAC has not made specific submissions on fixing a minimum term for attempted murder though both parties agree that this court should consider a guideline judgment for attempted murder in the context of providing guidance for murder) on guidance for sentencing convicts of attempted murder.

83. *Whilst the degree of harm will vary greatly, even in cases where a low level of injury has been caused, an offence of attempted murder will be extremely serious.*
84. *Logically, the factors to be taken into consideration by a sentencing court in assessing an offender's culpability when setting a minimum term for attempted murder ought to mirror those taken into consideration by a sentencing court in setting a minimum term for murder.*
85. *By mandating a sentence of life imprisonment for attempted murder the legislature has signalled that attempted murder may be regarded as equally as serious as the completed offence. Accordingly, it may be felt that, if this Court is minded to give guidance on appropriate starting points for minimum terms imposed for murder, the same starting points ought to apply in cases of attempted murder, with the ultimate minimum term adjusted downwards to reflect the level of physical or psychological harm actually caused to the victim.*
86. *Where the level of harm is serious and long term, the ultimate minimum term ought to be very close to the appropriate minimum term for the completed offence. Where little or no physical or psychological harm is caused, depending on all the specific aggravating and mitigating factors, the appropriate ultimate minimum term may be significantly lower than the appropriate minimum term for the completed offence.*
87. *It is noted that under the Sentencing Council Definitive Guideline for Attempted Murder the appropriate starting points for offences causing little or no harm are roughly half the starting points for offences causing serious and long term harm. All things being equal, that feels about right.*

88. *It is also noteworthy that the sentencing range under the Definitive Guideline is 6 – 35 years. This extremely broad range is an inevitable consequence of the widely differing levels of seriousness encompassed by the offence of attempted murder (in common with the offences of murder and manslaughter).*
89. *The relatively narrow sentencing range in Fiji for the offence of attempted murder tends to suggest that sentencing courts in this jurisdiction are not adequately reflecting differing levels of seriousness when setting minimum terms for the most serious offending.*

[124] When setting a minimum term in attempted murder cases, several specific factors come into play in addition to those considered for murder cases as already set out above. The judges need to follow the same methodology for attempted murder as elaborated above for murder. The same principles relating to the decision on the imposition of a minimum term and if so, the length of the minimum term as applicable to murder would apply to attempted murder as well. While many considerations overlap, such as culpability, harm, and aggravating/mitigating factors, there are unique aspects relevant to the nature of attempted murder. Here are additional matters to consider:

1. *Degree of Harm Intended vs. Actual Harm Caused:*

*Intended Harm: This involves evaluating the severity of the harm the offender intended to inflict. Even though the victim did not die, the intention behind the act was to cause death, which demonstrates high culpability. The judge will consider the seriousness of the intended outcome.*

*Actual Harm: The actual physical and psychological injuries sustained by the victim are assessed. Even if death was not achieved, the inflicted injuries can still be severe and life-altering. The judge will look at the extent of medical treatment required, the recovery process, and any lasting impacts on the victim's life.*

2. *Likelihood of Death:*

*This factor involves assessing how close the attempt came to resulting in the victim's death. The judge considers the lethality of the method used, the extent of injuries inflicted, and whether the victim's survival was due to fortuitous circumstances such as timely medical intervention or the actions of bystanders.*

3. *Intervention and Prevention:*

*The circumstances that prevented the completion of the murder are crucial. The judge will consider whether external factors such as immediate medical*

*help, intervention by others, or the victim's own defensive actions played a role in saving the victim's life. The effectiveness and timing of these interventions are significant.*

4. Premeditation and Planning:

*Similar to murder cases, the level of premeditation and planning involved in the attempt is critically assessed. Detailed and meticulous planning indicates higher culpability and a greater threat to society. The judge examines evidence of preparation, such as acquiring weapons, stalking the victim, or creating an alibi.*

5. Use of Deadly Weapons:

*The type and use of weapons or tools during the attempt are evaluated. The judge considers whether the offender used a firearm, knife, poison, or other lethal means, and how these were employed during the attempt. The potential lethality of these tools influences the severity of the sentence.*

6. Persistence and Effort:

*Persistence in the attempted murder, such as repeated attempts to inflict fatal harm or sustained efforts over a period, indicates a higher degree of culpability. The judge will consider whether the offender made multiple attempts to kill the victim or took several steps to ensure the victim's death.*

7. Victim Vulnerability:

*The vulnerability of the victim at the time of the attack is a critical factor. If the victim was particularly vulnerable due to age (e.g., children or elderly), disability, or circumstances (e.g., asleep or incapacitated), the offender's actions are viewed as more heinous.*

8. Impact on the Victim:

*The long-term impact on the victim includes physical scars, psychological trauma, and any permanent disabilities resulting from the attack. The judge will consider victim impact statements and expert testimonies to understand the full scope of the harm caused.*

9. Offender's Background and Intentions:

*The offender's criminal history and specific intentions behind the attempted murder are scrutinized. The judge assesses whether the offender has a history of violent behavior, any previous convictions for similar offenses, and whether the attempt was driven by motives such as revenge, financial gain, or other malicious intents. This helps in understanding the threat the offender poses to society.*

[125] By including these additional considerations, judges can tailor the minimum term to the specific circumstances of attempted murder cases, ensuring that the sentence

appropriately reflects the severity and context of the crime. This approach helps balance the interests of justice, deterrence, and rehabilitation in a way that is proportionate to the unique nature of attempted murder compared to completed murder. For example if the offender charged with attempted murder has used a knife in the attack but little or no physical or psychological harm is caused to the victim or the harm caused is minimal, though his case may fall within the ‘High’ category in the Table, all other things being equal the sentencing court may seek guidance from the starting point and minimum term under ‘Low’ category of seriousness for the purpose of fixing the minimum term.

[126] Therefore, I would recommend that sentencing courts would use the same Table for murder in fixing the minimum term on an offender convicted of attempted murder and sentenced to mandatory life imprisonment.

[127] However, I would also recommend the sentencing judges to take note of the following matters submitted by the DPP in fixing minimum terms in attempted murder cases.

- ‘85. *By mandating a sentence of life imprisonment for attempted murder the legislature has signalled that attempted murder may be regarded as equally as serious as the completed offence. Accordingly, it may be felt that, .....the same starting points ought to apply in cases of attempted murder, with the ultimate minimum term adjusted downwards to reflect the level of physical or psychological harm actually caused to the victim.*
- 86. *Where the level of harm is serious and long term, the ultimate minimum term ought to be very close to the appropriate minimum term for the completed offence. Where little or no physical or psychological harm is caused, depending on all the specific aggravating and mitigating factors, the appropriate ultimate minimum term may be significantly lower than the appropriate minimum term for the completed offence.*
- 87. *It is noted that under the Sentencing Council Definitive Guideline for Attempted Murder the appropriate starting points for offences causing little or no harm are roughly half the starting points for offences causing serious and long term harm. All things being equal, that feels about right.*
- 88. *It is also noteworthy that the sentencing range under the Definitive Guideline is 6 – 35 years. This extremely broad range is an inevitable consequence of the widely differing levels of seriousness encompassed by the offence of attempted murder (in common with the offences of murder and manslaughter).*
- 89. *The relatively narrow sentencing range in Fiji for the offence of attempted murder tends to suggest that sentencing courts in this jurisdiction are not*

*adequately reflecting differing levels of seriousness when setting minimum terms for the most serious offending.’*

### **What is a guideline judgment?**

[128] The prime justification and function of the guideline judgment is to promote consistency in sentencing levels nationwide. Like cases should be treated in like manner, similarly situated offenders should receive similar sentences and outcomes should not turn on the identity of the particular judge. Consistency is not of course an absolute and sentencing is still an evaluative exercise. The guideline judgments are ‘guidelines’ (and not tramlines from which deviation is not permitted), and must not be applied in a mechanistic way. The categories of seriousness themselves typically allow an overlap at the margins. Sentencing outside the categories is also not forbidden, although it must be justified [see [54] in **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023)].

[129] The Court of Appeal said in **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) that:

*‘[45] Sentencing is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.*

*[46] Sentencing guidelines are designed to find the correct equilibrium between giving a sentencing magistrates or judges sufficient discretion to tailor a sentence that is appropriate in the circumstances of the individual case, yet limiting discretion enough to achieve consistency between cases. Justice O'Regan in **R v Taueki** [2005] NZCA 174; [2005] 3 NZLR 372 (CA) went to significant lengths to highlight the need to avoid a ‘rigid or mathematical approach’.*

### **The appellant’s sentence appeal**

[130] Section 23 (3) of the Court of Appeal Act governs the powers of this court with regard to sentence appeals. In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February

1999) the Court of Appeal laid down the applicable principles in exercising those powers as follows:

*[2] The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the Court of Appeal Act (Cap 12)? 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 The King* (1936) 55 CLR 499).'*

[131] *Bae* was adopted by the Supreme Court in *Naisua v State* [2013] FJSC 14; CAV0010.2013 (20 November 2013) stating that it is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in *House v The King* (1936) 55 CLR 499.

[132] If specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy (see *Markarian* at [25]). The Court will not interfere with the minimum term specified by the judge unless it is manifestly excessive or wrong in principle (*R v Peters and Others* (supra).

[133] The Supreme Court of Appeal of South Africa in *Thembinkosi Mekuto v The State* (1120/2020) [2022] ZASCA 86 (8 June 2022) held in relation to a sentence appeal on attempted murder that:

*[33] .....To justify interference on appeal, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. Interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed.*

[134] In **S v Bogaards**, 2013 (1) SACR 1 (CC) Khampepe J held, at [41], that:

*‘It can only do so [i.e. interfere with the sentence imposed] where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.’*

[135] **S v Hewitt**, 2017 (1) SACR 309 (SCA) Maya DP held that:

*‘It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it...’*

[136] A judgment issuing sentencing guidelines applies to all sentencing that takes place after the date of the judgment regardless of when the offending took place. However a guideline judgment only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an appeal against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant (see **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023); **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023). The Supreme Court in **Ratu v State** [2024] FJSC 10; CAV24.2022 (25 April 2024) followed this approach.

[137] The first condition for the application of the current guidelines to the appellant’s case is satisfied. I shall now proceed to consider whether the second condition will be satisfied in order to decide whether these guidelines should be applied to his sentence appeal or not.

[138] The summary of facts have been set out by the trial judge as follows:

*‘3. According to the summery of facts, which you admitted in open court, you and deceased were married with one son, who is now four years old. During*



*the month of February in 2018, the deceased had complained about domestic violence caused to her by you. She had then moved to another place and obtained a Domestic Violence Restraining order against you on the 21st of February 2019. You were aware of the said order as the deceased informed you about it on the 6th of March 2018. On the 7th of March 2018, you came in a taxi and picked the deceased from a bus stop. You then took her to a location close to Coca Cola warehouse in Naseakula, Labasa. You then had a conversation with the deceased for a while. When she wanted to leave to attend her classes, you took a pocket knife which you were carrying with you and struck the deceased on her abdomen, causing a gapping laceration on her abdomen measuring 20 mm x 10 mm x 120 mm. You have further struck her on the right side of her neck with the said pocket knife causing a deep incise slash wound measuring 70 mm x 30 mm over the right aspect of her neck, which had caused a transection of the muscles, trachea and blood vessels. She was admitted to the hospital, but 30 minutes after her admission, she succumbed to death due to those injuries.*

[139] The appellant does not challenge the imposition of the minimum term by the trial judge but only the length of the minimum term of 18 years. The appellant has submitted that if the UK guidelines are adopted in the his case, then it is likely that the seriousness of the offence would be classified as sufficiently high, which would deem the starting point of minimum term to be around 25 years imprisonment.

[140] It is clear from the summary of facts that the appellant's case falls within High seriousness category in the current guidelines as per the Table and therefore the starting point in calculating the minimum term should be taken as 20 years with the minimum term to be fixed between 15-25 years.

[141] It is the submission of the appellant that the minimum term in his case is excessive because the judge failed to take into account relevant considerations namely the reduction for guilty plea and prolonged stress.

[142] The trial judge has picked up the factual reasons from the summary of facts to explain as to why he arrived at 18 years as the minimum term to be served by the appellant in the following paragraphs in the sentencing order.

5. *According to the summery of facts, the deceased had come with you to discuss the issues she had with you irrespective of the domestic violence caused by you. You then struck her on her abdomen and on the right side of the neck with a pocket knife, causing severe injuries to her. She was alone*

*and not in a position to escape or seek for help. In view of the fact that you had carried this pocket knife with you when you took the deceased to this location, it appears that this was a pre-planned attack. Accordingly, I find the level of harm and culpability in this matter are substantially high.*

6. *By killing your wife who was the mother of your own child, you have breached the trust that she had in you as her husband. Just because she was your wife, she was not required to surrender her personal autonomy to you. If she found your abusive behavior is unbearable, she had a right to move away from you and make her own life as she wanted. Therefore, you were not in a position to control every aspects of her life and punish her for her decision to leave you. I find these reasons as aggravating factors.*
7. *You are a 22 years old young first offender at that time. You pleaded guilty to this offence on the eve of the hearing. You have saved the time of the court from having a hearing. However, your late plea does not fully demonstrate your genuine remorse in committing this crime. However, I take into consideration that your willingness to plead guilty to a lesser offence of manslaughter as an indication of your willingness to accept the responsibility of this crime to a certain degree. I consider your young age, previous good character and plea of guilty in your favour.*
8. *Having taken into consideration the level of culpability and harm, the aggravating factors and mitigation factors, I fix a period of eighteen (18) years of imprisonment as the minimum term to be served before pardon may be considered.*

### **Guilty plea**

[143] The appellant in the written submissions has set out the chronology of events leading to his tendering the guilty plea for murder as follows:

*‘5.108 The guilty plea was entered on 25 January 2019. The High Court transcripts show that after disclosures were served to the Appellant, on 05 June 2018, he had pleaded guilty to Murder, however, the matter was adjourned for him to speak to his counsel.<sup>10</sup> Thereafter, on 08 June 2018, the Appellant pleaded not guilty to Murder. On 24 August 2018, the matter was again adjourned for the Appellant to seek advice on pleading guilty to Manslaughter. Finally, on 27 August 2018, the Appellant offered to plead guilty to Manslaughter but the same was rejected by State.<sup>11</sup> As such, the matter was set for Trial on Murder charge.’*

[144] The appellant had been produced for the first time in the Magistrates court on 12 March 2018 and a duty solicitor from the LAC had appeared for him. He had not

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<sup>10</sup> Page 179 – Record of the High Court

<sup>11</sup> Page 182 – Record of the High Court

given any indication that he accepts responsibility for the fatal injuries, or involvement in the death of the deceased. After the case was transferred to the High Court on that day, he appeared in the High Court represented by his counsel on 22 March, 04 April, 03 May 2018 and 05 June 2018 (where he had pleaded guilty). It is clear that his guilty plea for murder had come about as a result of reading disclosures served on him on the previous day which most likely indicated an inevitable outcome had he proceed to trial and not as a result of genuine remorse or to save judicial time and the expense of a contested trial (utilitarian value). However, he had retracted his guilty plea for murder on the very next day *i.e.* 08 June 2018 and informed court that he was not pleading guilty. Thereafter, intriguing as it was, prompted by the trial judge on 24 August 2018 whether he would take a plea on the lesser charge of manslaughter, the appellant then indicated on 27 August 2018 that he wished to do so. The State refused to accept a plea for manslaughter. Thereafter, the case was called for 09 days for pre-trial proceedings and on 18 September 2019 the appellant seemed not to agree that he had the necessary fault element for murder. After the case was mentioned for 03 more days to finalize the admitted facts signed by parties and the judge on 25 September 2019, the appellant had finally pleaded guilty on the day fixed for trial on 25 November 2019 to last for a week. The prosecution had indicated on 31 October 2019 that it would call 07 witnesses. Thus, all preparations for the trial had been made and in all probability the prosecution would have summoned its witnesses to court as well. The one week time allotted by court for the trial would have been in vain. In these circumstances, the appellant's initial admission in his cautioned interview, though not expected to be challenged at the trial, carries little weight.

- [145] Similarly, in these circumstances the appellant cannot expect to obtain any significant discount for his acceptance of the responsibility for the fatal injuries, or involvement in the deceased's death because not only was it not given at the earliest stage but also it was arguably not given due to genuine remorse but out of realizing the inevitability of the outcome. The subsequent reversal of the guilty plea diminished the value of the initial admission of guilt further. The tentative nature of the guilty plea was further revealed when the appellant wanted to plead to manslaughter instead of murder. Finally, when the guilty plea arrived it was the day of the trial after 17 mention dates

and after all pre-trial steps had been completed and the court having spent valuable judicial time for about 01 year and 08 ½ months.

**Prolonged stress**

[146] While it could be accepted that if the offender was provoked by prolonged stress in a way not amounting to provocation under section 242 of the Crimes Act, it may be considered as a mitigating factor, the summary of facts do not reveal the kind and degree of prolonged stress that may account for mitigation of some measure. If the appellant was under some stress, it appeared to have been self-imposed or self-inflicted rather than caused by the deceased. Thus, I do not see any tangible basis for considering prolonged stress as a mitigating factor in this case.

[147] On the other hand, there is ample evidence of significant degree of planning or premeditation on the part of the appellant for the brutal attack on the deceased, and that he had engaged in domestic violence towards the victim earlier. At the time of the incident, the appellant and the victim were married from 2015 with a 02 year old son and he had inflicted serious physical suffering on the victim before death. The appellant was clearly attempting to breach or in fact breached the DVRO on 04 March 2018 and 06 March 2018 prior to the attack on 07 March 2018. After the attack in order to conceal the murder weapon he threw the knife in the Nasekula creek. These are borne out by the record<sup>12</sup>. Not all but only some of them were considered by the trial judge as aggravating the offending.

[148] Therefore, the aggravating factors should enhance the starting point of 15 years significantly. The factors put forward as mitigating the offending do not carry much weight. So does the plea of guilty. The result is that if the current guidelines are applied to the appellant to determine the minimum term with a starting point of 20 years, I do not see a reasonable prospect of the ultimate minimum term getting to a point lower than 18 years as it now stands which is at the lower end of the range of

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<sup>12</sup> See page 169-170 of Record of the High Court

15-25 years. Thus, I do not propose to apply the current guidelines to the appellant because doing so would not result in a more favourable outcome to the appellant.

[149] The trial judge had used the instinctive synthesis method in arriving at the minimum term. He had considered the level of culpability and harm, the aggravating factors and mitigation factors particularly the appellant's young age, previous good character and plea of guilty in his favour in fixing the minimum term of 18 years though he had not used a starting point or assigned any values to these separately. Nevertheless, I do not see any sentencing error in order to conclude that the sentencing discretion by the trial judge had miscarried. Nor can I say that there is a 'striking' or 'startling' or 'disturbing' disparity between the trial court's minimum term and that which this court would have imposed without the current guidelines. Neither would I say that the minimum term is unreasonable or plainly unjust. I cannot also say that the minimum term of 18 years is so disproportionate or shocking that no reasonable court could have imposed it. It is the law that an appellate Court will not interfere with the sentence imposed by a trial Court unless it is shown to be manifestly excessive in the circumstances or wrong in principle.

[150] Before parting with the judgment, I wish to place on record the court's appreciation to the counsel for the LAC and the DPP for assisting in the formulation of the above guidelines in their written and oral submissions.

#### **Mataitoga, RJA**

[151] I support the judgment and the conclusion.

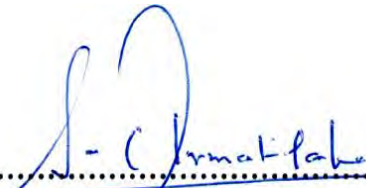
#### **Dobson, JA**

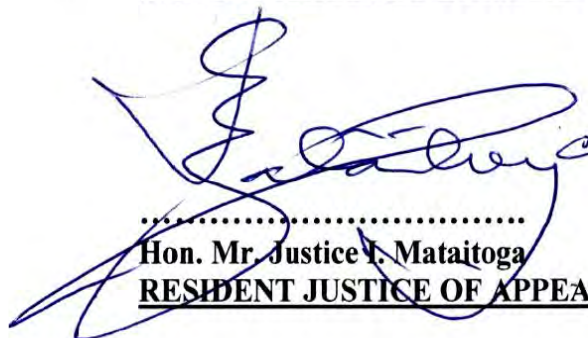
[152] I agree with the reasons for dismissing the immediate appeal. I agree with the guidelines proposed in the Judgment of Prematilaka RJA for consideration by sentencing Judges of whether to impose a minimum term, and if so, its length when sentencing for murder or attempted murder. I particularly endorse the recommendation in [72] of the judgment, and the observation in [86].

**Order of the Court:**

1. Appeal against sentence is dismissed.



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

  
.....  
**Hon. Mr. Justice I. Maitaitoga**  
**RESIDENT JUSTICE OF APPEAL**

  
.....  
**Hon. Mr. Justice R. Dobson**  
**JUSTICE OF APPEAL**

**Solicitors:**

Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecution for the Respondent

## *Annex A*

NUMBER	MURDER  CASE REFERENCES	APPELLANT AGE	RELATIONSHIP	WEAPON	PLEA	SENTENCE  MINIMUM TERM	APPELLATE STAGE	BRIEF
1	Singh v State [2024] FJCA 74; AAU56.2022 (19 April 2024)	46	Domestic: Step-father / de facto son-in-law	Piece of timber	Not Guilty	18 years	Leave: Leave to appeal conviction refused.	Appellant had, during the night of 25/12/17, at his house in Koropitia, Lautoka, bludgeoned to death the 25 year de facto partner of his step-daughter with a 2x1 piece of timber during a drunken fight between the appellant and deceased. Convicted and sentenced after trial to mandatory life imprisonment, MT 18 years.
2	Muhammed Raheesh Isoof v State [2024] FJCA 18; AAU0011.2022 (2 February 2024)  Note: case is also for attempted murder but the sentence is designed for 05 murders.	65	Family friends.	Poison	Not Guilty	20 years	Leave: Leave to appeal conviction, sentence and BPA refused.	Appellant, on 25/08/19, at Nausori Highlands, Nadi, had poisoned an entire family to whom he was a trusted friend where he killed the elderly father, mother, their adult daughter and her two children while the baby girl of the adult daughter was later found and treated back to life. Convicted and sentenced after trial, to mandatory life imprisonment, MT 20 years.
3	Solomoni Qurai v State [2024] FJCA 17; AAU118.2022 (31 January 2024)	20	Nil (opportunistic street mugging).	Knife	Not Guilty	No minimum term imposed.	Enlargement of time to appeal sentence	Appellant, during the night of 11/02/06, had participated in a joint enterprise robbery with violence with another where the other had stabbed and killed one of the street robbery

							allowed.	victims. Convicted and sentenced after trial, concurrent terms of 03 years for robbery, 01 year for larceny with mandatory life imprisonment for murder under joint enterprise but without a minimum term.
4	Kiala Henry Lusaka v State [2024] FJCA 11; AAU80.2022 (22 January 2024)	39	Domestic: Husband / Wife.	Electrical cord.	Not Guilty	20 years	Leave: Leave to appeal conviction and sentence refused.	Appellant, on 23/07/19, at Suva, had planned and manually strangled his 46 year old wife in their home. Convicted and sentenced after trial, to mandatory life imprisonment, MT 20 years.
5	Fatai Peni v State [2023] FJCA 276; AAU107.2020 (13 December 2023)	54	Domestic: Husband / Wife.	Knife	Guilty	20 years	Leave: Enlargement of time to appeal conviction and Leave to appeal sentence refused.	Appellant, during the night of 29/12/19 at Kinoya, had fatally stabbed his 47 year old wife on her chest and back. Convicted and sentenced per voluntary guilty plea to mandatory life imprisonment, MT 20 years.
6	Rozleen Razia Khan v State [2023] FJCA 263; AAU118.2019 (29 November 2023)	35	Domestic: Biological mother / daughter.	Nil: Mode drowning.	Not Guilty	No minimum term imposed.	Full Court: Conviction appeal dismissed; sentence appeal abandoned.	Appellant, on 06/05/18 in Nausori, had attempted suicide by drowning herself in Rewa River while having her child daughter tied to her chest. Her daughter died due to drowning. Convicted and sentenced after trial to mandatory life imprisonment but without a minimum term.



7	Yang Xiu Qi v State [2023] FJCA 163; AAU67.2021 (28 August 2023)	25	Nil: hired assassination	Knife	Guilty	17 years	Leave: Enlargement of time to appeal conviction and sentence refused.	Appellant, with another, had been hired to kill businessman Mr Fong where they jointly stabbed him to death during the night of 08/04/12 in front of Angels Nightclub, Suva.
8	Viliame Ratubukete v State [2023] FJCA 156; AAU127.2020 (15 August 2023)	26	Nil (PSV robbery).	Piece of timber and safety boots.	Not Guilty	25 years	Leave: Leave to appeal conviction refused; sentence allowed.	Appellant, during the early hours of 28/07/19 in Labasa, had bludgeoned to death a 33 year old taxi driver with a piece of timber and had kicked and stomped his face with his safety (steel tipped) boots before stealing the deceased's taxi, mobile phone and wallet. Convicted and sentenced after trial to a concurrent 01 year for theft alongside mandatory life imprisonment for murder, MT 25 years.
9	Serupi Baba v State [2023] FJCA 149; AAU113.2020 (2 August 2023)	29	Domestic: Husband / Wife.	Mango stick and electrical cords.	Not Guilty	18 years	Leave: Leave to appeal conviction allowed (relating to medical causation of death) and sentence also allowed.	Appellant, on 12/03/16 in Nadi, had viciously beaten his adult aged wife to death at their home using a mango stick and electrical cords due to rumors of marital infidelity. Convicted and sentenced after trial to mandatory life imprisonment, MT 18 years.
10	Ilaisa Sousou Cava v State [2023] FJCA 115;	Age unspecified,	Nil (PSV robbery)	Physical assaults and	Not Guilty	16 years	Leave: Enlargement	Appellant (with others), on 25/08/07 in Lami, had robbed and heavily assaulted their hired taxi

	AAU0019.2009 (27 June 2023)	even on CASES (likely 20-30).		rope strangling.			of time to appeal sentence allowed.	driver before strangling him to death and leaving him hung by his neck at a bridge. Convicted and sentenced after trial to a concurrent 07 months imprisonment for unlawful use of motor vehicle, mandatory life imprisonment for murder, MT 16 years.
11	Suliasi Nasara v State [2023] FJCA 64; AAU 36 of 2018 (25 May 2023)	24	Nil (PSV robbery)	Wheel spanner	Not Guilty	18 years	Full Court: conviction and sentence appeals dismissed.	Appellant, during the night of 16/11/14 in Lautoka, had bludgeoned to death his hired van driver with a wheel spanner before making of with the said hired van. Convicted and sentenced after trial to concurrent 10 years 09 months imprisonment for aggravated robbery, mandatory life imprisonment for murder, MT 18 years.
12	Jovilisi Godrovai v State [2023] FJCA 46; AAU0008.2017 (24 February 2023)	29	Nil (home invasion)	Physical assaults and gagging deceased which caused breathing obstruction.	Guilty	20 years	Full Court: Appeals against conviction and sentence refused / dismissed.	Appellant, during the night covering 19-20/05/16 in Lautoka, had invaded the home of the 69 year deceased lady whilst armed with a knife and had violently assaulted her before leaving her tied up and gagged where the gagging had caused breathing obstruction causing her to asphyxiate. Convicted and sentenced per voluntary guilty plea to concurrent 12 years and 07 months for aggravated robbery, mandatory life imprisonment for murder, MT 20 years.
13	Josevata Werelali Koro v State [2023] FJCA 9; AAU048.2021 (23 January	32	Domestic: Husband / Wife.	Knife	Not Guilty	18 years	Leave: Leave to appeal conviction and sentence	Appellant, on 01/05/20 at Vunidawa, had used a knife to stab his 27 year old wife on her chest and back, causing her death. Convicted and sentenced after trial to mandatory life

	2023)						refused.	imprisonment, MT 18 years.
14	Timoci Lolohea v State [2022] FJCA 201; AAU118.2020 (23 December 2022)	53	Domestic:  De facto partners.	02 Knives	Not Guilty	18 years	Leave: Leave to appeal conviction, sentence and BPA refused.	Appellant, on 20/03/17 in Suva, had stabbed to death his estranged 23 year de facto partner with 02 knives. Convicted and sentenced after trial to mandatory life imprisonment, MT 18 years.
15	Tarun Kumar Rawat v State [2022] FJCA 168; AAU0186.2016 (24 November 2022)	23	Domestic: Sexual partners	Physical assault and stone used as a projectile	Not Guilty	17 years	Full Court: Conviction appeal dismissed (no renewal of sentence appeal).	Appellant, during the night of 21/07/11 in Nadi, had exchanged punches with his 51 year lover during an argument where the appellant had heavily assaulted the deceased and used a stone to throw at his head leading to the death of his lover. Convicted and sentenced after trial to mandatory life imprisonment, MT 17 years.
16	Jekope Naimawi v State [2022] FJCA 121; AAU108.2020 (26 October 2022)	31	Domestic: Husband / Wife.	Accelerant: Burning using benzene.	Not Guilty	18 years	Leave: Leave to appeal conviction refused.	Appellant, on 10/01/19 in Nasinu, had physically assaulted his 37 year old wife after a homebrew drinking party before carrying her helpless person inside their home, dousing her in benzene and setting her alight where she was burnt to death. Convicted and sentenced after trial to mandatory life imprisonment, MT 18 years.
17	Anare Mara v State [2022] FJCA 114; AAU039.2020 (18 October 2022)	21	Nil: drunk and disorderly brawl.	Nil: physical punches and kicks (03 vs 01).	Not Guilty	14 years	Leave: Enlargement of time to appeal conviction allowed (on	Appellant, during the night of 29/11/12 in Nadi (with 02 others Ulaiasi Radike and Kelemedi Sevura) had punched, kicked and stomped the 21 year deceased to death outside DeepSea Night Club during a drunken brawl. Majority assessors opined for manslaughter while

							recklessness and joint enterprise) and EOT to appeal sentence allowed regarding the minimum term.	appellant was convicted for murder, MT 14 years.
18	Lloyd Richard Senikauca v State [2022] FJCA 109; AAU136.2016 (29 September 2022)	33	Trust: deceased was the girlfriend of appellant's uncle.	Nil: physical assaults and manual strangulation using hands and feet.	Not Guilty	16 years	Full Court: Conviction appeal dismissed (sentence appeal was abandoned)  <b>Supreme Court: On 25/04/24 Special Leave was refused.</b>	Appellant, during the early hours of 07/11/14 in Vunavutu, Sigatoka, had punched the intoxicated deceased lady unconscious after which he had choked her to death using his hands and feet so he could be a business partner with his uncle instead of the deceased who was his uncle's girlfriend. Convicted and sentenced after trial to mandatory life imprisonment, MT 16 years.
19	Rafaele Noa & 04 Ors v State [2022] FJCA 49; AAU166.2015 (27 May 2022)	Ages of the 05 appellants remain unspecified, even on	Nil: home invasion aggravated robbery	Nil: heavy physical assaults by 03 of 05 assailants	Not Guilty	20 years (each per 03 murderers).	Full Court: Appeals against conviction dismissed for	Appellants Rafaele Noa, Sireli Lilo, Iliesa Vakabua, Ilivasi Navunicagi and Eparama Tamanivakabauta were jointly charged with murder and home invasion aggravated robbery they committed during the night of 21/08/10 at

		CASES (likely 20-35).					<p>all 05 appellants (no sentence appeals for the 03 appellants convicted for joint enterprise murder).</p> <p><b>Supreme Court:</b></p> <p>Note on 25/04/24 the Supreme Court has quashed Vakabua's aggravated robbery sentence and substituted it with 09 years 03 months, NP 08 years and inter alia, remaining 04 sentence appeals were ordered for listing before the Court of Appeal to determine the applications to abandon the appeals against</p>	<p>the deceased's home in Lautoka. Rafael Noa, Iivasi Navunicagi and Eparama Tamanivakabauta were convicted for murder and aggravated robbery while Lilo and Vakabua were convicted only for joint enterprise aggravated robbery. Murder sentence for 03 appellants each, mandatory life imprisonment, MT 20 years.</p>
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							sentence.	
20	Tevita Vuniwai v State [2021] FJCA 174; AAU176.2019 (28 October 2021)	22	Domestic: Separated husband / wife	Pocket knife	Guilty on trial day,	18 years	Full Court (This very appeal / TBC:  Leave: Leave to appeal conviction and sentence refused.	Appellant had, on 07/03/18, in Naseakula, Labasa, stabbed the deceased's abdomen and neck during a martial argument where the vicious stabbings resulted in her death about 30 minutes post hospital admission soon after the incident. Convicted and sentenced per belated guilty plea to mandatory life imprisonment, MT 18 years.
21	Venkatesh Permal Goundar v State [2021] FJCA 117; AAU0042.2018 (6 August 2021)	32	Domestic: Separated Husband / wife	Accelerant: paint thinner	Not Guilty	18 years	Leave: Leave to appeal conviction refused, sentence allowed.	Appellant, during broad daylight on 04/04/15, outside Bargain Box, Lautoka, where his 25 year separated wife had been employed, had doused her in paint thinner and set her alight alleging martial infidelity. The burning resulted in 35% burns to deceased who succumbed to her injuries after 10 days in hospital. Convicted and sentenced after trial to mandatory life imprisonment, MT 18 years.
22	Binesh Prasad v State [2021] FJCA 118; AAU0045.2017 (6 August 2021)	33	Domestic: Husband / wife / daughter / father-in-law (incidental 02 tenants at in-laws property)	Accelerant	Guilty	28 years	Leave: Leave to appeal conviction refused, sentence allowed.	Appellant, on 15/10/15 in Nasinu, had used fuel accelerant to douse the dwelling home of his in-laws and had intended to kill all occupants therein. The arson / murder conduct resulted in the deaths of the appellant's 29 year wife, his 10 year daughter, elderly father-in-law and 02 tenants at the in-law's property. Another tenant had survived where for the resulting attempted murder charge, appellant was handed a 10 year

								minimum term per his guilty plea. For the 05 murders, the overall term, also per guilty pleas, was mandatory life imprisonment, MT 28 years.
23	<p>Tevita Dakuituraga v State [2021] FJCA 221; AAU0012.2018 (7 July 2021)</p> <p>Josaia Vusuya v State [2021] FJCA 222; AAU0070.2017 (7 July 2021)</p> <p>Kelepi Qaqa v State [2021] FJCA 223; AAU0073.2017 (7 July 2021)</p>	Ages of the 03 appellants remain unspecified, even on CASES (likely 20-35).	Nil: Drunk and disorderly brawl	Nil: 03 versus 01 heavy physical assaults including punches, kicks and stomping prone deceased.	Not guilty by all 03.	All 03: 15 years.	Leave (all 03): Leave to appeal conviction allowed to all 03, sentence refused to all 03 (separate Rulings).	The 03 appellants had, during the night of 18/07/15, violently murdered the deceased during a drunken and moving brawl in Nausori town wherein they had brawled along a number of adjacent streets in Nausori town. All 03 appellants had ganged up on the deceased and his brother (who was grievously harmed with a broken beer bottle) where they punched, kicked and stomped on the deceased's head whilst he was prone on the concrete ground. All 03 were convicted and sentenced after trial to mandatory life imprisonment, consistent MT 15 years.
24	<p>Joeli Masicola v State [2021] FJCA 176; AAU073.2015 (29 April 2021)</p> <p>Joeli Masicola v State [2023] FJSC 27;</p>	33	Domestic: Separated husband / wife; appellant murdered wife's new lover and attempted to murder the wife	Cane knife	Guilty	19 years	Full Court: Conviction appeal dismissed (no sentence appeal).	Appellant had, during the early hours on 21/02/14 at KiliKali settlement, Nasinu murdered his estranged wife's boyfriend, by viciously hacking his left side body and head with a cane knife whilst deceased was sleeping inside his estranged wife's aunt's home. Appellant had attempted to murder his estranged wife as well and had also acted with intent to cause grievous

	CAV0011.2021 (30 August 2023)						Supreme Court: Enlargement of time granted, Special Leave refused.	harm to his estranged wife's aunt at the material time. Convicted and sentenced per guilty pleas to concurrent terms of 04 years for acts intended to cause grievous harm, 14 years with mandatory life imprisonment for attempted murder and mandatory life imprisonment for murder, MT 19 years.
25	Waisea Motonivalu v State [2021] FJCA 64; AAU122.2017 (5 March 2021)	35	Nil: Home invasion aggravated robbery	Nil: stomping to death.	Guilty	20 years	Leave: Leave to appeal sentence and BPA refused for aggravated robbery while appellant had attempted to hide his related guilty plea conviction and sentence for murder which was revealed during Leave.	Appellant, with Niko Baleiwairiki and Eroni Raivani (both below), during midnight of 31/12/16 to early hours of 01/01/17, forcefully barged into the home of the 46 year deceased to rob him of his outboard motor engine. Waisea Motonivalu was the assailant who had chased after the deceased when he had escaped outside his home and had dragged the deceased into nearby bushes where deceased was stomped to death. Niko Baleiwairiki and Eroni Raivani asserted they only planned to rob the deceased. Motonivalu was convicted and sentenced for murder (and aggravated robbery) per his guilty plea to mandatory life imprisonment, MT 20 years.
26	Niko Baleiwairiki and Eroni Raivani v State [2021] FJCA 239; AAU0059.2019 (10	Both ages unspecified even on	Nil: Home invasion aggravated robbery (same case as Waisea	Nil: stomping to	Both not guilty.	Both 22 years.	Leave: Leave to appeal allowed to	Niko Baleiwairiki and Eroni Raivani were convicted and sentenced after trial to concurrent 12 years each for aggravated robbery and



	December 2021)	CASES; (likely 25-35)	Motonivalu above)	death			both on issue of lesser manslaughter direction.	mandatory life imprisonment each for murder, MT for both as 22 years.
27	Marianne Premila Devi v State [2021] FJCA 4; AAU0070.2018 (12 January 2021)	41	Domestic:  De facto partners.	Accelerant: Kerosene	Not Guilty	17 years	Leave: Leave to appeal conviction refused, sentence allowed.	Appellant had, during the evening of 17/11/16, at their shared home in Sakoca settlement, Suva, doused her 34 year de facto partner with kerosene before setting him alight after a domestic dispute. Deceased suffered 3 <sup>rd</sup> degree burns to 80% of his body and died as a result. Convicted and sentenced after trial to mandatory life imprisonment, MT 17 years.
28	Ashil Kumar v State [2020] FJCA 136; AAU086.2016 (18 August 2020)  State v Ashil Kumar [2014] FJCA 86; AAU0040.2012 (2 June 2014)	22	Domestic:  Appellant / Respondent is the son of the deceased's lover while deceased was also appellant/respondent's paternal step-uncle.	Knife	Guilty	04 years	Leave (both): AAU86/16: Leave to appeal conviction refused.  AAU40/12: Leave to appeal sentence allowed.	Appellant had, on 10/04/10, at his home in Nawaka, Nadi, stabbed the deceased to death during an altercation after having discovered the deceased hiding underneath his mother's bed. Convicted and sentenced per guilty plea, to mandatory life imprisonment, MT 04 years (MT recommended by former ODPP Officer Puamau.S.K).  Note: In the State Appeal Leave Ruling of <b>02 June 2014</b> , Goundar JA (as then) observed at paragraph 03: <i>"Both counsel have filed detailed and helpful submissions. Mr. Delaney submits that the 4-year term is manifestly lenient having regard to the nature and circumstances of the offence. Mr. Delaney has also provided a tabulation of cases to show that in Fiji the</i>

								<i>non-parole period for murder is between 12 to 24 years."</i>
29	Tomasi Waimuka v State [2020] FJCA 160; AAU0075.2017 (13 August 2020)	33	Domestic: Brothers	Wooden club	Not Guilty	12 years	Leave: Leave to appeal conviction was allowed.	Appellant had, on 26/12/15 at their home in Delaivuna, Taveuni, murdered his elder brother during a heavily drunken brawl by bludgeoning the deceased with a wooden club which appellant had obtained after having disarmed the aggressive deceased of said wooden club. Convicted and sentenced after trial to mandatory life imprisonment, MT 12 years.
30	Colanaudolu v State [2020] FJCA 128; AAU095.2017 (11 August 2020)	Rapes (22-39) Murder at 39	Nil to murder victim (same village).	Nil: bare hands.	Not Guilty	30 years	Leave: Leave to appeal conviction was allowed (voir dire medical report issue; records required).	Appellant, from the age of 22, from 01/04/99 had began raping a 14 year girl in Navua and continued raping her on 08 sperate occasions over time. Then appellant violently raped the first survivor's 20 year old elder sister after which he raped his own 18 year niece. Finally appellant tortured and raped another unsuspecting 14 year girl from 13-14/03/16 in Navua and murdered her before dumping her body along a beach. Convicted and sentenced for serial rapes, abduction, indecent annoyance and murder. .Overall mandatory life imprisonment, MT 30 years.
31	Bernard Hicks v State [2020] FJCA 87; AAU02.2017 (23 June 2020)	50	Domestic: De facto partners	Knife	Guilty	16 years	Leave: Leave to appeal conviction and sentence	Appellant had, during the evening of 01/05/16 stabbed his 33 year old de facto partner to death at Safs Motel Suva by stabbing her chest 08 times. Convicted and sentenced per guilty plea

							refused.	to mandatory life imprisonment, MT 16 years.
32	Wang Qi Yong v State [2022] FJCA 68; AAU120.2020 (20 June 2022)	43	Nil: Hired sexual services.	Nil: Bare handed manual strangulation	Not Guilty	No minimum term imposed.	Leave: Leave to appeal conviction refused.	Appellant, a Chinese citizen, had during the morning of 13/05/19 at the deceased's (also of Chinese heritage) residence in Namadi Heights, Suva, manually strangled her to death due to a dispute which turned into a physical altercation over the amount he owed for sexual services she had provided to him the night before. Convicted and sentenced after trial to mandatory life imprisonment with no minimum term imposed with the State (Immigration) at liberty to sort out whether appellant was to serve his time in Fiji or China.
33	Kilaiverata v State [2020] FJCA 55; AAU163.2016 (15 May 2020)	30	Domestic: De facto partners	Nil: heavy physical assaults	Not Guilty	18 years	Leave: Leave to appeal conviction and sentence refused.	Appellant had, during the early hours of 04/04/15 at their rented apartment in Toorak, Suva, viciously kicked his de facto partner's head after she had fallen down due to a heavy face punch from the appellant during some domestic argument. The assaults caused severe brain injury resulting in immediate death. Convicted and sentenced after trial for intentional murder, mandatory life imprisonment, MT 18 years.
34	Lepani Temo v State [2020] FJCA 8; AAU0069.2012 (27 February 2020)  Lepani Temo v State [2023]	Age unspecified even on CASES (but was an adult).	Domestic: Cousins and former lovers.	Cane knife	Not Guilty	18 years	Full Court: Appeals against conviction and sentence	Appellant had, during the evening of 19/11/11 in Taveuni, slashed the neck of his cousin sister with whom the appellant had used to be involved in a romantic relationship with. The deceased had died due to her neck vertebrae being severed due to the cane knife being struck at her

	FJSC 15; CAV0008.2020 (29 June 2023)						dismissed.  Supreme Court: Special Leave refused; conviction and sentence affirmed.	neck. Convicted and sentenced after trial to mandatory life imprisonment, MT 18 years.
35	Sundar Kaur v State [2019] FJCA 271; AAU74.2016 (11 December 2019)	32	Domestic: Mother / daughter	Aluminum pipe	Guilty	14 years	Full Court: Sentence appeal abandoned.	Appellant had, on 01/11/15, viciously beaten her 14 year daughter to death with an aluminum pipe (mop handle) after having tied her daughter with cloth and rope and had her hung from the rafters of their house in Sigatoka. Appellant and accomplice Geeta Devi had thereafter disposed the deceased's body by backyard cremation and deposited her remains inside their septic tank. Offence discovered due to information to Police. Convicted and sentenced on guilty plea to mandatory life imprisonment, MT 14 years.
36	State v Sitiveni Qio Vasuturaga [2019] FJCA 278; AAU114.2016 (11 December 2019)  Sitiveni Qio Vasuturaga v State [2019] FJCA 278;	41	Domestic: Husband / wife / but lesser conviction of manslaughter for also killing mother-in-law	Knife	Not Guilty	21 years	Leave: AAU114/16: Leave to appeal murder acquittal of mother-in-law allowed.	Appellant had, on 10/08/14 at their rented home in Kadavu, murdered his 38 year old wife by stabbing her twice with knife on her neck and chest and had also killed his 51 year old mother- in-law in the course of the same incident. Convicted and sentenced after trial to mandatory life imprisonment, MT 21 years (07 years concurrent for lesser manslaughter as well).

	AAU115.2016 (11 December 2019)						AAU115/16: Leave to appeal conviction and sentence refused.  Full Court Hearing on 08/05/24 at 0930.	
37	Nilesh Chand v State [2019] FJCA 254; AAU0078.2013 (28 November 2019)	31	Nil: appellant was the uncle of the deceased's girlfriend.	Full beer bottle and cane knife	Guilty	25 years	Full Court: Enlargement of time to appeal conviction refused; Leave to appeal sentence refused with counsel competence inquiry referred to Hon.CR.  Supreme Court: Special Leave	Appellant had, during the evening of 05/07/13, taken the 20 year boyfriend of his niece and his 17 year old friend to Korosomo Hills, Seaqaga where he had deceptively smashed a full beer bottle on the face of his niece's boyfriend before hacking his face and chest multiple times with a cane knife while his accomplice restrained the 17 year old friend. Appellant had thereafter slashed the 17 year youth to death, severing his spine from his neck before leaving both deceased bodies at the scene. Convicted and sentenced per guilty pleas to mandatory life imprisonment, MT 25 years.

							refused; conviction and sentence affirmed.	
38	Sudesh Mani Naidu v State [2019] FJCA 268; AAU33.2017 (27 November 2019)	Age unspecified even on CASES (but was an adult between 30- 40).	Nil: appellant was familiar with the neighborhood and opportunistically murdered and robbed the deceased.	Nil: physical assaults.	Not Guilty	17 years	Leave: Leave to appeal conviction allowed on issue of consideration of voir dire medical report and departure from assessors opinions not said to be perverse. No appeal / application against sentence.	Appellant had, on 13/01/13 at Lautoka, severely assaulted the 74 year lady inside her home whom he had known of in passing, having been familiar to her neighborhood, before robbing her of assorted jewelries. The physical assaults had led to the deceased's death. Convicted and sentenced after trial to concurrent 10 years for robbery, mandatory life imprisonment for murder, MT 17 years.
39	Joji Rokete and 02 Ors v State [2019] FJCA 49; AAU0009.2014 (7 March 2019)	Joji Rokete:31  Josua Waka: 34	Nil: home invasion robbery with violence	Asphyxiation by gagging with cloth.	Not Guilty	Rokete and Waka more physical roles: 18 years	Full Court:  All appeals dismissed; convictions and	All 03 appellants had, during the early hours of 08/09/09 at Yalalevu, Ba, broken into the slumbering elderly deceased's home wherein they tied him up, gagged him with a cloth and kept the deceased muffled with handheld pressure where the cloth gagging caused the

	Joji Rokete and 02 Ors v State [2022] FJSC 11; CAV002.2019, CAV003.2019, CAV004.2019 (29 April 2022)	Jonetani Rokoua: 39				Rokoua, lesser physical role 15 years	sentences affirmed.  Supreme Court: Special Leave refused; COA decision affirmed.	deceased to asphyxiate. Convicted and sentenced after trial Rokete and Waka, overall to 18 year minimum terms for physically holding and suffocating the deceased while Rokoua received MT of 15 years as he was not so physically involved.
40	Seremaia Naidole Momo v State [2018] FJCA 220; AAU107.2017 (30 November 2018)	27	Nil	Spade and tree branch	Guilty	24 years	Full Court: Sentence appeal was abandoned.	Appellant had, on 13/03/11 in Kasavu, Nausori, violently bludgeoned to death the 22 year old couple with a spade and tree branch after having felt slighted by vulgar language from the deceased male. Appellant had further twice raped and then choked to death the deceased female. Convicted and sentenced per guilty plea to mandatory life imprisonment, MT 24 years.
41	Bimlesh Prakash Dayal v State [2018] FJCA 153; AAU109.2014 (4 October 2018)  Bimlesh Prakash Dayal v State [2023] FJSC 21; CAV0027.2019 (29 June 2023)	32	Domestic: Husband / wife and 02 biological daughters	Chopper knife	Not Guilty	20 years	Full Court: Appeal dismissed; conviction and sentence affirmed.  Supreme Court: Appeal against conviction and sentence	Appellant had, during the early hours of 29/10/11 at their home in Vatuwaqa, Suva, using a kitchen chopper knife, hacked to death his 29 year old wife and 02 daughters aged 07 and 05 years due to some alleged martial infidelity by appellant's wife. The motive was seen as an honour killing. Convicted and sentenced after trial to mandatory life imprisonment, MT 20 years.

							denied; conviction and sentence affirmed.	
42	Talat Mahamood v State [2018] FJCA 128; AAU130.2014 (24 August 2018)	35	Domestic: Nephew / Aunt	Knife	Guilty	15 years	Full Court: improperly termed Non- parole of 15 years was corrected to minmim term of 15 years.	Appellant had, during the afternoon of 27/01/14, at his neighbouring aunt's home in Navuki, Nadi, stabbed her to death using a kitchen knife which the deceased had initially used to attack the aggressive appellant during a familial argument.
43	Darshani v State [2018] FJCA 79; AAU0064.2014 (1 June 2018)  Darshani v State [2018] FJSC 25; CAV0015.2018 (1 November 2018)	22	Domestic: De facto relationship	Crow bar	Guilty	17 years  (reduced on appeal)	Full Court: Conviction appeal dismissed. Sentence appeal allowed with initial 20 year MT reduced to 17 years.  Supreme Court: Special Leave refused; altered	Appellant had, during the day of 18/12/13, at the second home of her male de facto partner, violently, using a crow bar, bludgeoned to death the second de facto female partner of her said male de facto partner and had also used the said crow bar to kill the deceased's 07 month baby. Appellant had also attempted to murder their 03 other children with the same crow bar, leaving them severely beaten in their own home before fleeing the scene. Convicted and sentenced per guilty plea to mandatory life imprisonment, MT 20 years which was reduced to 17 years MT by the COA.



							sentence of COA affirmed.	
44	Rohit Khan v State [2017] FJCA 17; AAU122.2011 (23 February 2017)	26	Nil: Acquaintances	Cane knife	Guilty during trial	15 years	Full Court: appeals abandoned.	Appellant had, during the night of 17/04/11 at the 23 year old deceased's home, using a cane knife, violently slashed the deceased to death and had also acted with intent to cause grievous harm to the deceased's mother using the same cane knife. Appellant said his reasons for his actions were that the deceased would intimate to him having immoral desires towards the appellant's sister. Convicted and sentenced on belated guilty plea to 04 years concurrent for acts intended to cause grievous harm, with mandatory life imprisonment, MT 15 years.
45	Tracey Bernadette Shaw v State [2016] FJCA 125; AAU6.2012 (30 September 2016)  Varasiko Tuwai v State [2016] FJSC 35; CAV0013.2015 (26 August 2016)	Both Shaw and Tuwai were adults (20-35)	Short romantic relationship between female Shaw and deceased.	Bondage with tape to immobilise before heavy physical assaults and stabbing with pen knife.	Not Guilty (both)	Shaw: 18 years  Tuwai: 15 years.	Shaw: COA Full Court: sentence appeal dismissed.  Tuwai: SC Special Leave dismissed.	Appellant Shaw with her de facto partner Tuwai had, during the day of 17/12/08 in Lautoka hired the deceased's taxi. However Shaw had been planning to kill the deceased after a romantic falling out. Shaw and Tuwai had taken the deceased to secluded areas, tied him up using black tape, viciously beaten him before stabbing him with a pen knife; injuries causing death. Convicted and sentenced after trial both to mandatory life imprisonment, Shaw to an 18 year MT for being the principal offender and Tuwai to a 15 year MT for his high culpability but secondary role.

46	Dutaboto v State [2016] FJCA 133; AAU116.2014 (30 September 2016)	20	Nil	Aider and abettor in the Nilesh Chand Korosomo Hill double murders.	Guilty	11 years	Full Court: Sentence appeal dismissed.	See record 33 above Nilesh Chand: Appellant had, during the evening of 05/07/13 at Korosomo Hills, Seaqaqa, aided and abetted Nilesh Chand to murder the 02 unsuspecting youths. Convicted and sentenced on guilty plea to mandatory life imprisonment, MT 11 years.
47	Salesi Balekivuya v State [2016] FJCA 16; AAU0081.2011 (26 February 2016)  Salesi Balekivuya v State [2016] FJSC 37; CAV0014.2016 (26 August 2016)	19	Nil: Drunken street aggravated robbery	Spade	Not Guilty	15 years (reduced on appeal)	Full Court: Conviction appeal dismissed; sentence appeal allowed with 20 year MT reduced to 15 years.  Supreme Court: Special Leave dismissed.	Appellant, during the morning of 04/05/10, at Shalimar Street, Vatuwaqa, whilst heavily intoxicated, during an attempted robbery, using a spade that was initially used against the appellant, had violently bludgeoned the deceased youth to death outside the deceased's gate. His co-offender Tukana was convicted and sentenced for manslaughter. Appellant was convicted and sentenced after trial to concurrent terms of 09 months for damaging property and theft, 09 years for attempted robbery with mandatory life imprisonment for murder, MT 20 years. Minimum term was reduced to 15 years by the COA.
48	Moreen Lata Prakash & 02 ORS v State [2016] FJCA 114; AAU44.2011 (30 September 2016)	Moreen aged 30.  Bharat aged 35.	Domestic: Wife / Husband.	Vehicular murder.	Not Guilty	All 03: 20 years.	Full Court: conviction appeals dismissed, non-parole term of 20	Appellant Moreen Lata Prakash was married to the 39 year deceased but subsequently had an affair with Bharat Lal. Appellant Prakash, acting together with Bharat Lal and his nephew Jayant Lal, had on 20/06/09 stupefied her husband's rum with hallucinogen dhatora resulting in heavy

	Jayant Lal & 02 ORS v State [2017] FJSC 20; CAV0036-0037 and 0039.2016 (20 July 2017)	Jayant (20's).					years changed to minimum term of 20 years.  Supreme Court: Special Leave refused to all 03.	intoxication, before she, Bharat and Jayant Lal drove him to a secluded area at Saweni, Nausori where they twice ran him over with their vehicle. Convicted and sentenced after trial to mandatory life imprisonment, with MT 20 years for all 03.
49	Mesulame Waqabaca and Tiko Uate v State [2015] FJCA 167; AAU0063.2010 (3 December 2015)  Waqabaca v State [2016] FJSC 11; CAV039.2015 (21 April 2016)  Uate v State [2016] FJSC 20; CAV6.2016 (23 June 2016)	Waqabaca aged 19.  Uate aged 20.	Nil: Street aggravated robbery	Nil: heavy group physical assaults.	Not Guilty	Waqabaca: for the killing punch 14 years.  Uate: 12 years.	Full Court: appeals against conviction dismissed (no appeals against sentence).  Supreme Court: Special Leave for conviction refused to both separately.	Appellants Waqabaca and Uate, with 03 others (acquitted) had, during the night of 16/05/09, along a short cut path in Makoi Nasinu, violently assaulted the unsuspecting deceased to death during a joint enterprise street mugging whilst intoxicated. Convicted and sentenced after trial, both to mandatory life imprisonment; Waqabaca for being the instigator and who dealt the death blow to MT 14 years while for his culpable but secondary role, Uate, MT 12 years.

50	Abdul Aziz v State [2015] FJCA 91; AAU112.2011 (13 July 2015)  Abdul Aziz v State [2016] FJSC 26; CAV 0035.2015 (22 June 2016)	65	Domestic: Separated Husband / Wife (deceased was de facto partner of separated wife)	Cane knife	Not Guilty	No non-parole (or minimum term imposed).	Full Court: conviction appeal dismissed (no sentence appeal).  Supreme Court: Special Leave refused (no sentence appeal).	Appellant had, during Eid on 10/09/10 in Togoru, Navua, upon seeing his estranged wife, her de facto partner and daughter walking together, sharpened his cane knife before attacking the de facto partner of his separated wife and killing him. Appellant had also criminally intimidated his separated wife by chasing her with the same cane knife after killing the deceased. Convicted and sentenced after trial to mandatory life imprisonment, but without a non-parole / legally "minimum term" due to prior good character and age (urged by State Ms Leweni). An 18 month term was imposed for criminal intimidation.
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**Notes:** Appeals with convictions quashed or charges reduced have not been included in this table while the tabulations albeit selective, respectfully, are not exhaustive and may not contain all possible material details per briefs; details which are a summary only.

1. **Lowest Minimum Term: 04 years** (*an unfortunate anomaly which the State appealed where Leave to appeal sentence was allowed, however it appears that the appeal was thereafter deemed abandoned per information from COA Registry due to some supposed non-compliance with record directives as per the closure information on CASES*).
2. **Highest Minimum Term: 30 years** for serial rapist where the violent rape and murder of the 14 year child, his final victim, had shocked the whole country (*as per a recollection of media reports from March 2016*).

### **Annex B**

No.	Case Name	Citation	Plea	Facts	Sentence (Min. Term)
1	State v Vunakece	[2023] FJHC 684	Not Guilty	Vic and Acc in a live-in relationship. Vic was assaulted with timber and stomped upon. Act fueled by alcohol.	25 years
2	State v Lusaka	[2022] FJHC 518	Not Guilty	Vic was Acc's wife, she was strangled to death over suspicion of infidelity, children were in the house too. Breach of trust and trauma faced by children. Acc was suffering from psychosis.	20 years
3	State v Koroi	[2021] FJHC 224	Not Guilty	Vic was Acc's wife, she was stabbed multiple times. Acc was remorseful after being found guilty.	18 years
4	State v Sigabalavu	[2021] FJHC 185	Not Guilty	Vic was Acc's pregnant girlfriend. Vic was assaulted for a period of time, leading to her death.	18 years
5	State v Naiwami	[2020] FJHC 641	Not Guilty	Vic was Acc's wife. There was an argument at a drinking party over rumour of vic's affair, Acc assaulted the vic with wire and stick. There was planning, breach of trust.	18 years
6	State v Peni	[2020] FJHC 593	Guilty	Vic was Acc's wife. Vic admitted having extramarital affair and continued even after reconciliation. Vic was stabbed multiple times and her throat was slit. Acc later confessed to daughter. Late remorse.	20 years

7	State v Lal	[2020] FJHC 70	Guilty	Vic was Acc's estranged wife. Acc disconnected electricity, waited for vic to come out and struck her with cane knife, pursed her inside house and continued striking. Attack in front of child. Acc was first offender but not remorseful.	24 years
8	State v Fuata	[2019] FJHC 1038	Guilty	Vic was Acc's defacto partner. Argument over facebook account, vic was stabbed multiple times with dagger. Breach of trust and child witnessed incident. Acc was 21 years old.	18 years
9	State v Ali	[2019] FJHC 1012	Guilty on trial date	Vic was Acc's defacto partner. Both were drinking alcohol and argument occurred. Acc struck vic multiple times with cane knife. Acc severed body parts and hid it. Breach of trust, Acc was first offender.	19 years
10	State v Bale	[2019] FJHC 404	Guilty (late)	Vic was Acc's wife. Vic was stabbed multiple times over an argument, children saw vic after incident. Acc confessed and asked friend to look after children. 1 PC for assault. Acc was 39 years.	16 years
11	State v Tupou	[2018] FJHC 1108	Not Guilty	Vic was Acc's defacto partner. She was pregnant. Acc stabbed her multiple times. Vic fled but Acc caught her and struck her with cane knife. Breach of trust, not pre-planned.	12 years (Acc had already served 6 years and spent 1 year 6 months in

					remand)
12	State v Ali	[2018] FJHC 492	Not Guilty	Vic was Acc's defacto partner. Vic was assaulted with iron rod and strangled with cord. Breach of trust, first offender.	18 years
13	State v Lolohea	[2018] FJHC 378	Not Guilty	Vic was Acc's defacto partner, she admitted having an affair and moved away. Acc pursued her and stabbed her with 2 knives. 3 previous convictions.	18 years
14	State v Goundar	[2018] FJHC 312	Not Guilty	Vic was Acc's wife. There were matrimonial problems and DVRO existed between parties. Acc rubbed paint thinner on vic and set her on fire, she suffered 35% burns. Acc was first offender.	18 years
15	State v Singh	[2018] FJHC 171	Guilty (after 2 years when trial already set)	Vic was Acc's wife. Acc assaulted her with stick multiple times and threw her from horseback, abandoned body at hill. First offender.	17 years
16	State v Yasin	[2018] FJHC 781	Not Guilty	Vic was Acc's wife, she had taken out DVRO against him. Acc stabbed her multiple times.	18 years
17	State v Prasad	[2017] FJHC 115	Guilty (after 1 year 4 months)	Murder x 5, Attempted Murder x 1, Arson x 1, Damaging Property x 1. One of the Vic was his wife, she had non contact DVRO against Acc. He threw fuel on her and set her on fire. House caught fire	28 years

				along with other flats, killing other occupants. Remanded for 1 year 4 months, first offender.	
18	State v Deo	[2016] FJHC 791	Not Guilty	2 Acc persons. Vic was husband of Acc 2. Family court proceedings active, Accs planned to kill vic. They met him, Acc 1 assaulted vic and hit him with stone, strangled and dumped body in swamp. Pre-meditation.	20 years
19	State v Hicks	[2016] FJHC 777	Guilty (early)	Vic was Acc's defacto partner. After having alcohol, they had argument where Acc stabbed her multiple times. Acc then surrendered himself in police custody. First offender, genuine remorse.	16 years
20	State v Vasuturaga	[2016] FJHC 697	Not Guilty	Murder x 1, Manslaughter x 1. Vic was Acc's wife in murder charge. After argument, Acc stabbed her multiple times. First offender.	21 years
21	State v Turagava	[2016] FJHC 165	Not Guilty	Vic was Acc's defacto partner who had taken out DVRO against him. Acc attempted to force her to withdraw, punched and stomped on her and abandoned her in a bush. Breach of trust, spontaneous.	15 years
22	State v Narayan	[2015] FJHC 588	Not Guilty	Arson x 2, Murder x 3. Vics were Acc's wife and children. Acc was suffering from mental illness, poured kerosene, locked vics inside house and set on fire.	25 years



23	State v Masicola	[2015] FJHC 411	Guilty	Murder x 1, Att. Murder x 1, AWITCGH x 1. Vic was estranged wife. Acc struck cane knife unto her and her partner. Voluntarily surrendered to police.	19 years
24	State v Mociu	[2014] FJHC 804	Not Guilty	Vic was Acc's wife, whom he stabbed multiple times. Pre-planning, first offence.	20 years
25	State v Rajendra	[2014] FJHC 762	Not Guilty	Vic was Acc's defacto partner. Stabbed on chest. No remorse. First offender.	20 years
26	State v Chand	[2013] FJHC 627	Not Guilty	Vic was Acc's wife. Argument happened, Acc set vic on fire where she suffered 40% burns. Preplanning. First offender.	18 years
27	State v Nath	[2013] FJHC 65	Guilty	Murder x 2, Att. Murder x 1. Vic was Acc's wife. Acc struck her axe on rumours of infidelity. Another axe used on other occupants.	18 years
28	State v Lal	[2011] FJHC 202	Not Guilty	3 x Accs. Acted together to kill husband of Acc 3. Previous attempts failed. Acc 3 drugged vic, Acc 1 ran over his car on vic on instructions of Acc 3 and Acc 2.	20 years

## *Annex C*

NUMBER	ATTEMPTED MURDER CASE REFERENCES	APPELLANT AGE	RELATIONSHIP	WEAPON	PLEA	SENTENCE MINIMUM TERM	APPELLATE STAGE	BRIEF
1	Joni Malaulau v State [2024] FJCA 79; AAU091.2022 (18 April 2024)	50	Domestic: Husband / wife	Cane knife	Not Guilty	07 years	Leave: Enlargement of time to appeal conviction and sentence refused.	Appellant had, on 01/10/19 during breakfast at their home in Kadavu, attempted to kill his wife by striking the unsuspecting victim on her head and body with a cane knife. Other family members intervened to stop the attack. Convicted and sentenced after trial to mandatory life imprisonment, MT 07 years.
2	Vijay Kumar v State [2024] FJCA 72; AAU88.2021 (8 April 2024)	54	Domestic: Husband / wfie	Iron rod	Guilty during prosecution's trial case.	10 years	Leave: Leave to appeal conviction refused.	Appellant had, on 27/12/16 at their home in Nadi, attempted to kill his wife by striking her face, jaw and head several times with an iron rod until she was unconscious before fleeing the scene. Convicted and sentenced after trial to mandatory life imprisonment, MT 10 years.
3	Ravin Nath v State [2024] FJCA 48; AAU71.2022 (8 March 2024)	50	Domestic: De facto partners.	Cane knife	Not Guilty	08 years	Leave: Leave to appeal conviction and sentence refused.	Appellant, on 26/01/18, in Lautoka, had struck his de facto partner's legs, hands and shoulders multiple times with a cane knife during the evening at their home. Convicted and sentenced after trial, to mandatory life imprisonment, MT 08 years.
4	Kiniviliame Rabici v State [2024] FJCA 46; AAU054.2022 (6 March 2024)	28	Friends	Knife	Not Guilty	08 years	Leave: Leave to appeal conviction and sentence refused.	Appellant, during the early hours of 23/07/20 in Savusavu, had stabbed his slumbering friend's head, neck and back with a knife. Convicted and sentenced after trial, to mandatory life imprisonment, MT 08 years.

5	Pranil Alvin Singh v State [2024] FJCA 16; AAU51.2022 (31 January 2024)	33	Domestic: Biological father / sons.	Accelerant: Burning / arson (including attempted suicide by immolation)	Not Guilty	14 years	Leave: Leave to appeal conviction and sentence refused.	Appellant, on 05/06/20 in Nasinu, had attempted to immolate himself and his 02 sons (aged 09 and 1.5) at their rented flat where is actions also amounted to arson. Convicted and sentenced after trial, to mandatory life imprisonment, with an aggregate MT of 14 years.
6	Arjun v State [2023] FJCA 237; AAU078.2021 (19 October 2023)	54	Domestic: Romantic partner.	Knife	Not Guilty	08 years	Leave: Leave to appeal conviction refused.	Appellant had, on 13/01/18 at a neighbors home in Ba (kitchen area), attempted to kill his long term romantic partner by striking her head with a kitchen knife. Convicted and sentenced after trial (acquitted for a second criminal intimidation count) to mandatory life imprisonment, MT 08 years.
7	Anil Chand v State [2023] FJCA 4; AAU064.2020 (4 January 2023)	33	Trust: Former boyfriend / girlfriend (jilted lover)	Knife	Guilty	08 years	Leave: Enlargement of time to appeal conviction refused; Leave to appeal sentence refused.	Appellant had, during the evening of 25/07/18 at her former girlfriend's flat in Vatuwaqa, attempted to kill her by stabbing her shoulder, back (multiple times) and abdomen during an argument where she refused to get back together with appellant. Victim' sister intervened and was knifed on her arms in result. Appellant chased the victim outside and pushed her in the drain before being apprehended by neighbours. Convicted and sentenced on guilty plea to mandatory life imprisonment, MT 08 years (aggregate, including assault causing harm to victim' sister).
8	Monish Nischal Prasad v State [2022] FJCA 145; AAU48.2020 (1 December 2022)	21	Trust: Former boyfriend / girlfriend (jilted lover)	Kinife	Guilty on trial day (voir dire ruled cautioned interview	15 years	Leave: Leave to appeal conviction and sentence refused.	Appellant had, during the early morning hours of 10/04/17, after laying in wait for his former girlfriend, aged 20, at the Ba Bus Stand, attempted to kill her by stabbing her stomach thrice, neck twice with 03 defensive wounds

					admissible)			suffered by victim to her right hand. Appellant had seen victim's friend approach 02 Police Officers to intervene prior to stabbing victim but remained undeterred. Two civilians and 02 Police Officers intervened during the frenzied attack and save the victim's life. Convicted and sentenced on belated guilty plea when facing the inevitable to mandatory life imprisonment, MT 15 years.
9	Romuluse Senileba v State [2022] FJCA 100; AAU074.2020 (31 August 2022)	42	Domestic: Husband / wife	Cane knife	Not Guilty	12 years	Leave: Enlargement of time to appeal sentence refused.	Appellant had, during the day of 13/10/18 at their home in Samabula, snuck into their home in breach of a DVRO and attempted to kill his unsuspecting 46 year old wife by striking her head, neck several times with a cane knife. Convicted and sentenced after trial to mandatory life imprisonment, MT 12 years.
10	Mohammed Faiyash v State [2022] FJCA 132; AAU010.2020 (8 August 2022)	46	Domestic: De facto relations (denied by victim)	Vehicle (car)	Not Guilty	08 years (less RIC, 01 year, 04 months, 10 days) remaining MT 06 years, 07 months, 20 days.	Leave: Enlargement of time to appeal conviction refused.	Appellant had, during the afternoon of 15/02/18 outside Lautoka Police Station, attempted to kill his estranged de facto partner (romantic relations refuted by victim in evidence) by attempting to run her over with his car whilst she had taken shelter from the rain in a phone booth outside the Lautoka Police Station. Appellant had also damaged the phone booth worth FJ\$3000.00. Convicted and sentenced after trial to mandatory life imprisonment with an aggregate effective MT of 06 years, 07 months and 20 days (08 years less RIC).
11	Dinesh Chand v State [2022] FJCA 105; AAU162.2020 (4 July 2022)	46	Domestic: Separated husband / wife	Iron rod used to stab victim's neck	Not Guilty	08 years	Leave: Leave to appeal	Appellant, during the night of 22/08/19 at his home in Suva, had attempted to murder his estranged wife whilst she slept on a couch in his house by

				and scarf used to choke victim.			conviction allowed on question of law (lesser alternative directions).	attempting to choke her with a scarf and then stabbing her neck with an iron rod, resulting in a life threatening injury. Convicted and sentenced after trial to mandatory life imprisonment, MT 08 years.
12	Binesh Prasad v State [2021] FJCA 118; AAU0045.2017 (6 August 2021)	33	Domestic: Husband / wife / daughter / father-in-law (incidental 02 tenants at in-laws property)	Accelerant	Guilty	10 years for attempted murder  <i>Note: murder statistic in Murder Table (entry 21).</i>	Leave: Leave to appeal conviction refused, sentence allowed.	Appellant, on 15/10/15 in Nasinu, had used fuel accelerant to douse the dwelling home of his in-laws and had intended to kill all occupants therein. The arson / murder conduct resulted in the deaths of the appellant's 29 year wife, his 10 year daughter, elderly father-in-law and 02 tenants at the in-law's property. <b><u>Another tenant had survived where for the resulting attempted murder charge.</u></b> appellant was handed a 10 year minimum term per his guilty plea. For the 05 murders, the overall term, also per guilty pleas, was mandatory life imprisonment, MT 28 years.
13	Sailosi Rokotuiwailevu v State [2022] FJSC 21; CAV0011.2018 (28 April 2022)	25	Domestic: Son / father	Cane knife	Not Guilty	08 years	Leave: dismissed under S.35(2) by single JA.  Supreme Court: Enlargement of time for special Leave to appeal conviction and sentence	Appellant had, during the day of 24/04/15 at their home in Vitawa Village, Rakiraki, senselessly struck his father's head and back with a cane knife after a trivial argument. Convicted and sentenced after trial to mandatory life imprisonment, MT 08 years.

							refused.	
14	Rajiv Krishan Padyachi v State [2021] FJCA 227; AAU0002.2020 (23 July 2021)	28	Trust: Former boyfriend / girlfriend (friends)	Nil: attempted drowning.	Not Guilty	15 years	Leave: Leave to appeal conviction refused, sentence allowed.	Appellant had, on 15/09/18 at Colo-i-suva natural pools, attempted to drown his former girlfriend to whom he had owed a considerable sum of money. Victim was saved due to intervening Special Response Police Officers who were on boxing training. Convicted and sentenced after trial to mandatory life imprisonment, MT 15 years.
15	Joeli Masicola v State [2021] FJCA 176; AAU073.2015 (29 April 2021)  Joeli Masicola v State [2023] FJSC 27; CAV0011.2021 (30 August 2023)	33	Domestic: Separated husband / wife; appellant murdered wife's new lover and <b>attempted to murder the wife</b>	Cane knife	Guilty	14 years  <i>Note: murder statistic in Murder Table (entry 23).</i>	Full Court: Conviction appeal dismissed (no sentence appeal).  Supreme Court: Enlargement of time granted, Special Leave refused.	Appellant had, during the early hours on 21/02/14 at KiliKali settlement, Nasinu murdered his estranged wife's boyfriend, by viciously hacking his left side body and head with a cane knife whilst deceased was sleeping inside his estranged wife's aunt's home. Appellant had attempted to murder his estranged wife as well and had also acted with intent to cause grievous harm to his estranged wife's aunt at the material time. Convicted and sentenced per guilty pleas to concurrent terms of 04 years for acts intended to cause grievous harm, <b><u>14 years with mandatory life imprisonment for attempted murder</u></b> and mandatory life imprisonment for murder, MT 19 years.
16	Rakesh Narayan v State [2020] FJCA 189; AAU0610.2017 (6 October 2020)	47	Domestic: Former husband / wife	Knife	Not Guilty	12 years	Leave: Leave to appeal conviction refused.	Appellant had, during the night of 16/03/16 at Shop N Save parking lot, Nakasi, Suva, attempted to kill his former wife by stabbing her head, neck and left hand/elbow (defence wound) with knife because she had re-married. Appellant had also acted with intent to cause grievous harm to his former wife's new husband who tried to save her

								but was slashed in the face with same knife by appellant. Convicted and sentenced after trial to 03 years, 06 months NP 01 year, 06 months for acts intended to cause grievous harm and mandatory life imprisonment for attempted murder, MT 12 years.
17	Josateki Tabua v State [2020] FJCA 79; AAU165.2015 (12 June 2020)	ADULT (30's)	Domestic: De facto partners	Knife	Not Guilty	08 years	Leave: Leave to appeal conviction and sentence refused.	Appellant had, during the early hours of 28/07/13, at their rented home at Charles Street, Toorak, Suva, thrice stabbed his de facto partner with a knife on her chest; below collar bone, breast and rib side due to being rejected by victim. Victim, a serving Police Officer, managed to escape the house and make her way to nearby CWM where she collapsed before being saved due to immediate medical intervention. Convicted and sentenced after trial to mandatory life imprisonment, MT 08 years.
18	Mohammed Shaheen v State [2019] FJCA 88; AAU078.2015 (6 June 2019)  Mohammed Shaheen v State [2022] FJSC 17; CAV0015.2019 (28 April 2022)	ADULT (20-30'a)	Domestic: Former de facto partners	Knife	Not Guilty	08 years	Full Court: Appeal against conviction dismissed (no renewal for sentence).  Supreme Court: Special Leave to appeal conviction refused.	Appellant had, during the day of 07/09/12, along a public street (Nativi) in Lautoka, attempted to kill his de facto partner by stabbing her head, chest and stomach with a knife as she had found a new boyfriend. Victim was saved by a good Samaritan who fended off the attacking appellant and disarmed him. During trial, victim was declared a hostile witness who evasively tried to save appellant by saying the stabbing was accidental and her fault. Convicted and sentenced after trial to mandatory life imprisonment, MT 08 years.

19	State v Samy [2019] FJSC 33; CAV0001.2012 (17 May 2019)	39	Domestic: Son / mother, nephew and cousin nephew	Chopper knife	Guilty	09 years (concurrent 09 year imprisonment terms for 03 attempted murder counts)	Full Court: Attempted murder convictions quashed due to improper reliance on disclosure statements leading Appeal Justices to conclude a lack of required mens rea. Supreme Court: Special Leave allowed, COA Judgment quashed and HC convictions and sentences reinstated.	Appellant had, during the day of 07/06/06, at her elderly mothers home in Nadawa, Nasinu, attempted to murder her by striking her head, face and neck with a chopper knife. When his nephew intervened to save his (nephew's) grandmother by striking appellant with a piece of timber, appellant attacked his nephew with the same chopper knife and struck his forehead and neck while also severing 02 of his fingers (defensive wounds). When another cousin of his nephew came in aid of his brother, appellant also attacked him with the same chopper knife by striking a blow to his head before escaping the scene in his taxi. Convicted on belated guilty pleas, to concurrent 09 year terms of 03 counts of attempted murder ( <i>note: convictions were under repealed Penal Code where mandatory life was not specified for attempted murder but life imprisonment was the maximum available punishment</i> ).
20	Neetin Ajesh Prasad v State [2017] FJCA 168; AAU159.2016 (14 December 2017)	35	Domestic: Husband / wife	Cane knife	Not Guilty	07 years	Full Court: Sentence only appeal abandoned.	Appellant had, on during the day of 05/06/14, at the home of his separated wife, attempted to kill her due to being embroiled in a custody battle for their 02 children by striking her head, face and



								hands (defensive wounds) with a cane knife. Victim's skull was fractured due to cane knife strikes to head. Convicted and sentenced after trial to mandatory life imprisonment, MT 07 years.
21	Anasa Baleinabodua v State [2016] FJCA 14; AAU0019.2012 (26 February 2016)	22	Public Order: Attempted to murder an on duty Police Officer	Cane knife	Not Guilty	10 years	Full Court: Appeal dismissed, convictions and sentences affirmed	Appellant had, during the evening of 22/07/10 entered into Raiwaqa Police Post armed with a cane knife, and attempted to murder an on-duty Police Constable who had arrested and was questioning appellant's drunk and disorderly father. Appellant had struck the cane knife on the victim's forehead causing cranial fracture and serious brain damage. Appellant had also smashed the Police Post louver blades whilst heavily intoxicated while his father, having escaped lawful custody, had criminally intimidated another Police Officer to prevent his and appellant's arrest. Convicted and sentenced after trial to mandatory life imprisonment, MT 10 years (with 01 month concurrent terms for damaging property and drunk and disorderly conduct).
22	Sachindra Nand Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)  Sachindra Nand Sharma v State [2016] FJSC 31; CAV0001.2016 (26 August 2016)	ADULT (30-40's)	Domestic: jilted lover	Knife and accelerant: Victim's chest and thighs were stabbed several times while accelerant, kerosene or benzene	Not Guilty	14 years  (Head sentence under Penal Code: 16 years, non-parole 14 years).	Full	Appellant had, during the early hours of 09/11/07 at Vatuwaqa, Suva, had attempted to murder the victim who had broken of their romantic relationship, by stabbing her chest and thighs several times whilst she was asleep before dousing her home with kerosene/benzene and setting it ablaze. In his attempt at murder by arson, had caused grievous harm to victim's slumbering brother as well who was heavily burned in the fire. The arson fire had spread to 02 neighbouring homes, leaving a total of 03 families

				was used to commit attempted murder by arson.				homeless. Convicted and sentenced after trial to 16 years imprisonment for attempted murder with concurrent 06 year terms for acts intended to cause grievous harm and arson. Non-parole 14 years.
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**Notes:** certain appeals with murder and attempted murder convictions together aren't tabulated here as no sentences were imposed for attempted murder vis-à-vis minimum terms for murder(s). Appeals with convictions quashed or charges reduced have not been included either. The table is not exhaustive while summaries may not necessarily contain all material details.

1. **Lowest Minimum Term: 07 years**

2. **Highest Minimum Term: 15 years** (The 16 year imprisonment term for Sharma at entry 22 is not stated as the "highest minimum" vis-à-vis the non-parole term therein being only 14 years imprisonment).