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

CRIMINAL APPEAL NO.AAU0069 OF 2012
(High Court Criminal Case No. HAC060 of 2011)

BETWEEN	:	**LEPANI TEMO** *Appellant*
AND	:	**THE STATE** *Respondent*
Before	:	The Hon. Justice Daniel Goundar
Counsel	:	Mr. J. Savou for the Appellant Mr. S. Babitu for the Respondent
Date of Hearing	:	4 July 2016
Date of Ruling	:	15 July 2016

RULING

[1] On 30 May 2012, the appellant was sentenced to life imprisonment with a minimum term of 18 years after being convicted of murder in the High Court at Labasa. On 2 June 2012, he gave a timely Notice of Appeal to the Department of Corrections, but by the time that Notice was received by the Court of Appeal Registry on 16 August 2012, the appeal was late by one month and sixteen days. The State takes no issue with the delay. In these circumstances I consider this as a timely appeal. The question is whether the appellant should be granted leave to appeal against conviction and sentence. The test for leave is whether the appeal is arguable (***Naisua v State*** unreported Cr App No CAV0010/13; 20 November 2013).

[2] The grounds of appeal are as follows:

Conviction appeal

1) That the learned trial Judge erred in law and fact by failing to give reasons on why he failed to accept during the voire dire as well as the trial proper that the Appellant's confession had been obtained unfairly and also under oppressive circumstances as a result of the following:

- The breach of the rights of the accused under common law for being in custody prior to being charged for more than 48 hours;
- The evidence of the Legal Officer, Ms Lemaki who stated that the Appellant had informed her that he was pressurised to admit the allegations.

2) The learned trial Judge's directions on the element of recklessness as it relates to murder allegation at paragraph 10 of his summing up, lacked fairness and objectivity when he used example that fitted the prosecution case.

3) The learned trial Judge failed to address the assessors on the issue of circumstantial evidence despite there being evidence to that effect as highlighted at paragraphs 13 to 16. This meant that the assessors were not warned on the reasonable conclusion they could have drawn from the evidence as highlighted at paragraphs 13 to 16.

4) The learned trial Judge erred in fact when he failed to consider in his judgment that despite the evidence of Salote and Mataiasi who stated that the deceased had uttered the name 'Lepani', the pathologist had opined that the injury by the deceased would have caused instant death.

Sentence Appeal

a) The learned trial Judge erred in principle when he adjudged that the Appellant had shown lack of remorse which caused witnesses to go through the ordeal.

[3] The only incriminating evidence against the appellant was his confession made to police under caution. At trial, the appellant challenged the admissibility of his confession on the ground that he was assaulted by the police during interrogation. The appellant did not expressly raise oppression as a ground to challenge the admissibility of his confession in the court below. The appellant was represented by counsel at trial. Mr. Savou could not explain why the appellant's trial counsel did not raise oppression as a ground to challenge the admissibility of the appellant's confession. If it was raised, the prosecution would have led evidence to rebut the ground alleging oppression. In my judgment, by not raising the issue in the trial court, the appellant has effectively waived the ground and is barred from raising it for the first time on appeal.

[4] As for the objections raised to the admissibility, the trial judge held a voir dire to determine admissibility. After hearing the evidence on voir dire, the trial judge ruled the confession admissible by applying the correct principles. The trial judge gave detailed written reasons for his decision to admit the appellant's confession in evidence. He made appropriate findings of fact, by accepting the evidence of the prosecution witnesses and rejecting the evidence of the appellant and his witness. I am not convinced that that the trial judge had made a completely wrong assessment of the evidence for the appellate court to interfere with findings of fact (***Ram & Ors v State*** unreported Cr App No AAU0017/04; 29 July 2005). Ground 1 is unarguable.

[5] In ground 2, the appellant contends that the directions on recklessness lacked fairness and objectivity. The impugned directions are in paragraph 10 of the summing-up:

> "So conduct can be anything such as stabbing, strangling, poisoning; or in our case slashing with a knife, and if that conduct causes the other person to die, then the third element comes into play. The State in this case are saying that Lepani engaged in the conduct of slashing Susana so violently that it caused her death. They also say that he was not necessarily intending to kill her but that he was reckless in causing her death. Now a person is reckless with respect to causing death if he is aware of a substantial risk that death will occur by his actions and having regard to the circumstances known to him, it is unjustifiable to take that risk. So in our case you must find proved that Lepani engaged in conduct that caused Susana's death and that he knew that there was a risk that what he was doing might kill her and also that he was not justified in taking that risk. You might think that a knife cut so strong and deep as to sever the respiratory organs and the vertebrae must have been recklessly administered as to whether it would cause her death or not, and that Lepani was aware of that risk and had no justification for it."

[6] The error alleged in ground 2 is taken out of context. When paragraph 10 is read as a whole, the directions on recklessness are balanced and fair. Ground 2 is unarguable.

[7] The error alleged in ground 3 is that the trial judge failed to give directions on circumstantial evidence. Although there was some circumstantial evidence that supported the charge, the prosecution's case did not depend upon circumstantial

evidence. For that reason, there was no need to give directions on circumstantial evidence.

[8] In his evidence the pathologist said the neck injury sustained by the deceased 'would have caused nearly instant death'. Counsel for the appellant contends that this opinion contradicts the evidence of Salote and Mataiasi who said that the deceased uttered the name 'Lepani' before she died. I find no contradiction in the evidence because the pathologist's opinion was that the injury would have caused nearly instant death and not instant death as alleged in ground 4. Ground 4 is unarguable.

[9] Life imprisonment for murder is a fixed sentence by law. There is no right of appeal against life imprisonment for murder. The minimum term of 18 years is within the range for hacking a defenceless woman to death with a knife. I am not convinced that the Full Court would impose a lesser minimum term. Sentence appeal is unarguable.

Result

[10] Leave to appeal against conviction and sentence refused.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for Appellant
Office of the Director of Public Prosecutions for State