IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0078 OF 2013
High Court Criminal Case No. HAC 45 of 2013

BETWEEN : **NILESH CHAND**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Mr. Iqbal Khan for the Appellant**
Mr. Burney. L. J. with Sharma. N for the Respondent

Date of Hearing : **15 November 2019**

Date of Judgment : **28 November 2019**

JUDGMENT

Gamalath, JA

[1] I have read in draft the judgment of Prematilaka J and I am in agreement with his reasoning and conclusions to 1 and 2 only.

Prematilaka, JA

[2] This appeal arises from the conviction of the appellant on two counts of murder contrary to section 237 (a), (b) and (c) of the Crimes Act, 2009. The Information dated 29 July 2013 alleged that the appellant (first accused) and another (second accused) between 05 and 07 July 2013 at Korosoma, Seaqaqa in the Northern Division murdered Abhikesh Kumar (first count) and Samuel Vikashnand Vaciseva Seru (second count).

[3] On 01 August 2013 the appellant had appeared in the High Court of Suva represented by his counsel Mr. A. Sen of Messrs Maqbool & Company who had *inter alia* informed court *'Don't want to waste time and 1st Accused wishes to plea (sic).'*, *'I told him the consequences'*, *'I have read the disclosures'*, *'I explained the possibility of lesser charge'* and *'I have advised him from the beginning and he wants to plea (sic).*' Thereafter, on 06 August 2013 the appellant represented again by his counsel Mr. A. Sen had pleaded guilty to both counts. On 08 August 2013, the appellant represented once again by his counsel Mr. A. Sen had admitted the summary of facts and the learned High Court Judge had found him guilty and convicted him on both counts. On the same day his counsel Mr. A. Sen had pleaded in mitigation on behalf of the appellant and is supposed to have filed sentencing submissions as well. However, those submissions are not available in the copy record or in the file at the Court of Appeal registry. The learned High Court Judge had on 09 August 2013 in the presence of Mr. A. Sen, his counsel had sentenced the appellant to life imprisonment on both counts to run concurrently and set a minimum term of 25 years to be served before pardon may be considered.

[4] Mr. Amrit Sen of Messrs Maqbool & Company had filed a timely application for leave to appeal only against the sentence on 21 August 2013 pursuant to section 26(1) of the Court of Appeal Act. Thereafter, the same counsel of Messrs Maqbool & Company had filed written submissions dated 19 August 2014 (but filed on 22 August 2014) on behalf of the appellant against the sentence. Earlier, the appellant in person had tendered a written document to the Court of Appeal dated 19 August 2013 containing what can be regarded as submissions in mitigation. The State too had tendered written submissions dated 02 October 2014 on the appeal against sentence.

[5] Thereafter, the appellant had got a letter containing grounds of appeal against conviction and sentence filed by the Medium Correction Centre on 02 January 2015 which is the first intimation that the appellant was appealing against the conviction as well and therefore, his application for leave to appeal against conviction was late by nearly 01 year and 04 months.

[6] Notice of change of solicitors dated 26 March 2015 had been filed on 30 March 2015. However, it is said in an undated (only the year 2016 is mentioned) and unsigned written submissions under the hand of Messrs Kohli and Singh that the notice of change of solicitors had been filed on 10 August 2015. The new solicitors Messrs Kohli and Singh had on 10 August 2015 filed amended proposed grounds of appeal dated 07 August 2015 containing a single ground each against conviction and sentence. An affidavit dated 10 August 2015 by the appellant can also be found in the copy record which seems to have been intended to support the sole ground of appeal against conviction. There is also an undated (except the year 2016) and unsigned written submissions under the hand of Messrs Kohli and Singh filed of record which appears to have been based on the amended proposed grounds of appeal and the appellant's affidavit, which *inter alia* had sought enlargement of time to appeal. Thus, it is clear that Messrs Kohli and Singh were aware that an extension of time had to be obtained at least in respect of the appeal against conviction.

[7] After the single Judge Ruling refusing leave to appeal against conviction and sentence on 01 March 2016, the appellant had in person filed two applications dated 07 March and 07 May 2016 to renew those grounds of appeal. Notice of change of solicitors dated 23 March 2016 had been filed on 24 March 2016 by Messrs Iqbal Khan & Associates who had filed a renewal application dated 24 March 2016 on the aforesaid single ground of appeal against conviction and six grounds of appeal against sentence including the single ground of appeal urged at the leave stage. Messrs Iqbal Khan & Associates had filed written submissions dated 17 May 2019 and a response to the respondent's submissions on 19 November 2019 was tendered after the appeal hearing. The State relies on the written submissions dated 12 February 2016 filed for the leave to appeal hearing.

[8] Both counsel made oral submissions and Mr. Iqbal Khan who appeared for the appellant informed this Court at the hearing that he would not pursue the additional grounds of appeal against sentence filed after the single Judge Ruling and has confirmed that position in his written response dated 19 November 2019.

Grounds of appeal

[9] Accordingly, the grounds of appeal that are before this Court in this appeal are only those before the single Judge at the leave hearing. They are as follows.

> *'1. That the plea of the Appellant was equivocal and involuntary and he was pressured into pleading guilty to the offence of murder.*
>
> *2. That the learned Judge erred in law in failing to correctly apply judicial discretion to set a minimum non-parole term to be served by the Appellant before he could apply for a pardon.'*

[10] However, as pointed out earlier the appellant's application for leave to appeal against conviction is belated and the single Judge had inadvertently overlooked that fact and simply refused leave to appeal on the assumption that it was a timely application. Therefore, the appellant will have to obtain extension of time (in which event leave to appeal will have to be automatically granted) in respect of his ground of appeal against conviction. If extension of time is granted, leave to appeal would also be granted and the ground of appeal already before this Court against conviction would be considered in appeal. On the other hand, the appellant's application for leave to appeal against sentence is timely and properly considered as such at the leave hearing and the refusal of leave against sentence by the single Judge would be considered by this Court for leave to appeal and if leave is granted then the appeal against sentence would be determined in the same proceedings.

[11] Before proceeding to consider the ground of appeal against conviction for extension of time it is pertinent to set out the facts relating to the case. The killing of the deceased is clearly premeditated and most brutal. Few murders can get crueller. They can be stated as succinctly summarised by the sentencing judge and the single Judge of this Court as follows.

1. *'The two victims of these murders were Abhishek (aged 20, a F.N.U. student) and his friend Samuel (aged 17, a student at Dreketi High School). For some time Abhishek had been having a romantic but platonic relationship with a young lady called Subashni (18 years) who happened to be the accused's niece and was living with the accused's family.*

2. *On the 5th July 2013 at about 7.45pm the accused, a 31 year old farmer of Matasawalevu, Dreketi drove to Abhishek's home in Wailevu and picked up the two young men. The accused was together with another who became the second accused in the case. The four of them drove to Labasa, bought a carton of beer and then proceeded to Korosomo, Seaqaqa to drink the beer.*

3. *The accused knew that Abhishek had been texting and phoning his niece and he was most unhappy about it. The accused had taken Subashni's sim card from her phone and using it in his own phone placed a miss-call to Abhishek on their way to Korosomo. As soon as the call was received on Abhishek's phone he showed it to the accused telling him that there was a missed call from Subashni. The accused then got angry saying that this now confirmed that they were having a relationship. He was angry with Samuel as well because he attended the same school as Subashni and the accused thought he was acting as a messenger for Abhishek.*

4. *They drove up to Korosomo and at Long Bay they stopped and parked. The four got out and started to drink the beer. The accused then asked Abhishek why Subashni had called and picking up a full bottle of beer, he, with full strength, struck the face of Abhishek with it. Abhishek fell to the ground. The accused went to the car and pulled out a cane knife. He sat on Abhishek's chest and slashed his neck with the knife several times until Abhishek was motionless.*

5. *After cutting Abhishek's neck the accused then jumped on to Samuel and slashed both his arms with the knife. He then cut the boy's neck from the back, severing the spinal cord from his neck. The accused and his companion then got back into the vehicle and left the scene.*

[12] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.

[13] In ***Rasaku*** the Supreme Court held

> **'***[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasised in Ratnam v Cumarasamy [1964] 3 All ER 933 at 935 at 935:*
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> *The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.*

[14] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
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> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[15] In ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[16] I shall now consider each of the above factors.

Reasons for the failure to file within time

[17] The appellant's affidavit dated 10 August 2015 does not explain as to why there was a delay of over nearly 01 year and 04 months in filing his application for leave to appeal. No explanation has been forwarded at all to this Court as to the reason for the delay. There was no reason for the appellant not to have filed a timely application for leave to appeal against conviction in the same manner as he did within time against his sentence.

The length of the delay

[18] As already pointed out the appellant's letter containing four grounds of appeal against conviction (and one against sentence) filed in the Court of Appeal registry on 02 January 2015 was the first time the appellant raised grounds of appeal against conviction and therefore, his application for leave to appeal against conviction was late by nearly 01 year and 04 months which is substantial and unacceptable.

Is there a meritorious ground of appeal or a ground of appeal that will probably succeed?

[19] The applicable test under this heading is 'real prospect of success' as formulated in **Nasila v State** AAU0004 of 2011: 6 June 2019 [2019] FJCA 84 which *inter alia* stated as follows.

> *'[23] ……. therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal. If not, an appeal with a very substantial delay such as this does not deserve to reach the stage of full court hearing.*
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> *[24] The test of 'real prospect of success' would help achieve the criteria for enlargement of time as set out by the Supreme Court in **Rasaku** as follows*
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> *'[19] **Enlargement of time has generally been permitted by courts only exceptionally**, and only in an endeavor to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court.'*
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> *[25] Otherwise, belated and unmeritorious appeals would consume the limited resources of the appellate court at the expense of timely and meritorious appeals which have successfully passed the threshold for leave to appeal and in such cases some of the appellants may be forced to serve the full sentence before their appeals finally reach the full court, as the roll of the court may already be clogged with underserving cases.*

Ground of Appeal against conviction

[20] The ground of appeal against the conviction under the above heading that would be considered at this stage is as follows:

> *'That the plea of the Appellant was equivocal and involuntary and he was pressured into pleading guilty to the offence of murder*.'

[21] It would be pertinent to look at the reasons given in the single Judge Ruling dated 01 March 2016 to refuse this ground of appeal as it deals admirably with the core issue before this Court.

> *'[4] The appellant's contention is that he pleaded guilty to the charges under pressure from his trial counsel, Mr Sen. The appellant has filed an affidavit in which he has stated that Mr Sen was engaged by his father and one of the conditions for the payment of counsel's fees was to plead guilty. The appellant's father did this to save the family from embarrassment of a trial. Neither Mr Sen nor the appellant's father filed any affidavit to support these contentions.*
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> *[5] The principles governing an appeal against conviction arising from a guilty plea were explained by the court in* ***Nalave & Marama v State*** *unreported Criminal Appeal No. AAU004 & AAU005 of 2006; 24 October 2008 in paragraphs 24-25 as follows:*
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> *"It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153,* ***R v. Vent*** *(1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (****Meissner v The Queen*** *[1995] HCA 41; (1995) 184 CLR 132.*
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> *In* ***Maxwell v The Queen*** *(1986) 184 CLR 501, the High Court of Australia at p. 511 said:*
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> *The plea of guilty must however be unequivocal and not made in circumstances suggesting that it not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered."*

[6] I have reviewed the trial judge's file notes of 6th and 8th August 2013. There is nothing in the court record to suggest that the appellant did not exercise his free will when he pleaded guilty to the charges. The appellant was represented by Mr Sen, who is considered a senior practitioner in Labasa. The trial judge had no reason to question Mr Sen's professional judgment. The facts supported the charges and there were no evidential basis for any defence such as provocation available to the appellant. ***There is no air of reality in the appellant's claim that he was pressurised by Mr Sen to plead guilty to the charges****. Firstly, the appellant has not made any formal complaint against Mr Sen to the Legal Practitioners Unit regarding the alleged professional misconduct. Secondly, the initial notice of appeal was filed by Mr.Sen, who appealed against sentence only. This shows that the appellant was willing to retain Mr Sen as his counsel after pleading guilty. It was only when the appellant changed counsel, he contended that his plea was involuntary and equivocal. In these circumstances, there is no arguable ground to suggest the guilty pleas were equivocal, and therefore, leave to appeal against conviction should be refused.'*(emphasis added*)*

[22] In **Masicola v State** AAU73 of 2015: 10 May 2019 [2019] FJCA 64 the appellant had pleaded to all three counts and Calanchini P sitting as a Single Judge considering leave to appeal against conviction said

*'[3]……. The first principle is that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (**Nalave –v- The State** [2008] FJCA 56; AAU 4 and 5 of 2006, 24 October 2008). Equivocation may be evidenced by ignorance, fear, duress, mistake or even the desire to gain a technical advantage (**Maxwell –v-R** [1996]) 184 CLR 501. …….*
'[4]……. At the trial the appellant pleaded guilty to all three counts. He was represented by Counsel. With both the appellant and Counsel present in court the prosecution read out a detailed summary of the facts. Through his counsel the appellant admitted the summary of facts.'
'[9] It does not follow that a judge is necessarily prevented from assessing whether a plea of guilty is equivocal when an accused person is represented by counsel. Furthermore it does not follow that a plea of guilty by an accused person who is represented by counsel should be regarded always as an unequivocal plea. [10] The issue in this application is whether the judge, on the basis of the agreed summary of facts, was entitled to conclude that the guilty plea was unequivocal….

[23] I have already quoted in paragraph 03 above the proceeding in the High Court from 01 to 09 August 2013. There is absolutely no evidence of equivocation evident on the face of the record in the process leading to the appellant's plea of guilty and thereafter admitting the summery of facts put to him.

[24] His first ever intimation of challenging the conviction filed on 02 January 2015 contains only one allegation against his counsel *i.e.* that his counsel Mr. Sen had informed him that upon guilty plea the count of murder would be reduced to manslaughter.

[25] There is no tangible basis whatsoever to reduce the charge from murder to manslaughter on the summery of facts and in the context of what had been recorded on 01 August 2013 this is what appears to have been the logical effect of Mr. Sen's statement to court that he had 'explained the possibility of a lesser charge' as another reason why the appellant was ready to plead to the count on the information. It seems that the counsel had considered upon reading the disclosures whether there existed any possibility of having the count reduced from murder to manslaughter and informed the appellant of it before the decision was taken to inform court of his willingness to plead to the count of murder on the information. Therefore, I do not think that there is any merit on the allegation by the appellant that his counsel had told him that upon his plea of guilty the count would be reduced to manslaughter. This is clearly an afterthought on the part of the appellant after serving his sentence for more than 01 year and 04 months. In any event, the appellant had pleaded to the count on the information put to him on 05 August 2013 and not to any reduced charge as no basis for any reduced charge was mentioned in the summery of facts at all.

[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).

[27] Therefore, in the light of the above judicial pronouncements, I cannot see anything wrong in Mr. Sen's advising the appellant that on the facts of the case he stood little chance of success in challenging the prosecution to prove the case of murder and the decision to plead guilty would have been considered the wise option. Further, the defense counsel would in probability have informed the appellant that a plea of guilty would be viewed favorably by the trial judge in fixing the minimum serving period. It is only logical for the defense counsel and the appellant to have thought of getting a lesser minimum serving period upon tendering an early plea of guilty. It would be grossly unfair by the defense counsel to draw an inference of having pressured the appellant in the absence of any material, for he has no opportunity of responding to that allegation in the appeal before this court.

[28] In addition, after tendering the plea of guilty on 06 August 2013 and prior to conviction on 08 August or sentencing on 09 August, the appellant had ample opportunity to state to the trial judge that his plea was equivocal, involuntary and made under pressure and moved to withdraw the plea of guilty. If that was the case he could still, at the discretion of court, have withdrawn the guilty plea before the sentence was imposed (vide **Plummer** [1902] 2 K.B 339, 347, 349, **R. v. McNally** [1954] 1 W.L.R 933; 38 Cr. App. R.90, **R v. Popovic** [1964] Qd. R. 561,565, **S. (An Infant) v. Recorder of Manchester** [1970] 2 WLR 21; [1969] 3 All E. R. 1230, [1971] AC 481) However, he had not raised any concern with the summery of facts after pleading guilty, which clearly indicated that he was being charged for murder. It is clear from the proceedings that the trial judge had no reason to doubt that the appellant had not been made aware of the offence which he was charged with and that he was voluntarily admitting the summery of facts. In the circumstances, I am not inclined to accept the appellant's allegation that he pleaded guilty because *inter alia* Mr. Sen had informed him that upon guilty plea the count of murder would be reduced to manslaughter.

[29] However, 07 more months after the appellant made the above allegation against his counsel Mr. A. Sen, the change of solicitors of the appellant had been effected either on 30 March or 10 August 2015 and Messrs. Kohli & Singh on the same day had filed amended proposed grounds of appeal (dated 07 August 2015) containing the single ground of appeal against his conviction (and one against sentence) considered at the leave to appeal hearing and now being urged before this Court. To go with the amended

proposed grounds of appeal, an affidavit dated 10 August 2015 from the appellant *inter alia* containing a plethora of allegations against his former counsel Mr. A. Sen and the appellant's father aimed at supporting the newly formulated ground of appeal had been tendered.

[30] For the purpose of this appeal it is necessary to reproduce the relevant paragraphs of the appellant's affidavit, for they form the basis of the ground of appeal against conviction (urged at the hearing of this appeal) filed on 10 August 2015 and the written submissions filed in support of that ground of appeal by Messrs. Kohli & Singh (undated except the year 2016 and unsigned). Notice of Appeal filed by Messrs. Iqbal Khan & Associates on 30 March 2016 (dated 24 March 2016) and their written submissions dated 17 May 2019 but filed on 24 May 2019 are also based on the appellant's affidavit.

[31] On 24 March 2016 the appellant's appeal had changed hands from Messrs. Kohli & Singh to Messrs. Iqbal Khan & Associates. However, the Notice of Appeal filed by Messrs. Iqbal Khan & Associates and their written submissions contain the same allegations against Mr. A. Sen as contained in the appellant's affidavit dated 10 August 2015. The second set of written submissions of Messrs. Iqbal Khan & Associates dated 01 November 2019 (filed on 05 November 2019) also contain the same allegations against the same counsel who appeared for the appellant at the trial stage. The oral submissions of Mr. Iqbal Khan who appeared for the appellant at the hearing of this appeal before this Court were also based on those written submissions.

[32] Clearly the new round of allegations against the appellant's former counsel Mr. A. Sen (and the appellant's father) had coincided with the first change of lawyers on 30 March or 10 August 2013.

[33] The new allegations made by the appellant in his affidavit which are most relevant to the ground of appeal against conviction are as follows.

> *'(i) After the incident everyone in our village started talking about my affair with my niece and that I had killed Abishek because of that.*

(ii) *My father questioned me and informed me not to admit anything regarding the affair as it will bring disrepute to the family in the community we were living in. My father was well known in the community and was regarded very highly by the people in the community.*

(iii) *My wife and my children were staying with my father and I depended on my father to support them as I was in custody. My father informed me that should I admit to the affairs it will bring disrepute to him and that he would disown me and would not look after my wife and children.*

(iv) *My solicitor Mr Sen was a very close family friend and used to visit our family home very often. He was a very close friend of my father.*

(v) *I verily believe that my father did not wish me to disclose to police my affair with Subhashni. I verily believe that he was shocked to hear about my affair with my niece and was more concerned about the family reputation that my welfare.*

(vi) *He promised to pay my solicitors fees and to look after my family should I go to prison only if I pleaded guilty.*

(vii) *I am informed and verily believe that my solicitor was also very concerned about the reputation of my father rather than my welfare.*

(viii) *I verily believe that my father was concerned that should the case be defended than the truth about my affair with my niece will come out in court and that the public will laugh at my father.*

(ix) *I am informed and verily believe that it was in my father's interest that I plead guilty to the charges so that no one comes to know about my affair with my niece.*

(x) *I verily believe that those were the instructions of my father to my then counsel. I am informed and verily believe that when I was taken in custody my counsel called in to see me. When my counsel arrived he spoke to me in the presence of police and did not request police to allow him to speak to me in private. I am informed and verily believe it is most unusual for a counsel of his experience to speak to his client in the presence of police.*

(xi) *I am informed and verily believe that this was done so that my caution interview could not later be challenged. I am informed and verily believe that in the caution interview on page 2 of the English translation it is recorded :*

"Time: 1821 hrs Mr Amrit Sen and Nilesh Chand had a conversation in the presence of DC 3540 Sanjeet and D/Cpl 2480 Nadan and IP Lomani and Nilesh Chand admitted the fact in the presence of Mr Sen that he had committed the murder and Mr Sen gave him the opportunity whether he wanted to speak in private but he refused."

(xii) *I deny that I was asked whether I wanted to speak to my solicitor in private as recorded above.*

(xiii) *I verily believe that on the day of the interview at 2125 hours my solicitor called in and wished to speal to me privately and was allowed to do so. I now realize why my solicitor did not wish to speak to me in private when he first came to visit me.*

(xiv) *After I was charged my solicitor did not visit me or discuss the case with me other than talking to me in the Court.*

(xv) *My solicitor told me that I had no defence and that I should plead guilty.*

(xvi) *The only time he spoke to me was in court on the days that I appeared in court. He told me that the only way he could help me was for me to plead guilty to the offence. He told me that these were my father's instructions.*

(xvii) *He informed me that he would not have done anything to with the case unless I pleaded guilty.*

(xix) *He also assured me that should I plead guilty I will be sentenced to around 7 years of imprisonment just like in manslaughter cases.*

(xx) *I am informed and verily believe that the lease that could have been done was to make representation to the Director of Public Prosecutions office seeking reduction in charges and offering a plea of guilty to the reduced charges.*

(xxi) *I am informed and verily believe that the first victim Abishek Kumar lived right across my solicitor's home in Wailevu and his father Ashok Kumar is a good friend of his.*

(xxii) *I am informed and verily believe that my solicitor would have been embarrassed to conduct the trial as he would be blamed for assisting me who had caused the death of Abishek Kumar, his friend's son.*

(xxiii) *I am informed and verily believe that my former solicitor could not have defended me as he was very close to the victim's family.*

(xxiv) *I verily believe that my interest has been compromised due to the conflicting interests of the victim's family and my interest.*

(xxv) I am informed by my present counsel that when he had taken over the appeal in this case he informed my former counsel of the same and my former counsel said words to the effect 'just as well you have taken over because of the victim's family live right across my house and they visit us daily. I could not have done the appeal'

(xxvi) I did not intend to plead guilty to murder as charged but was forced to do so. I did not give any instructions that I would like to plead guilty to murder.

(xxvii) Because of the pressure from my father and my solicitor I had no choice but to plead guilty.

(xxviii) I am informed and verily believe that the disclosures had the statement of Subhashni wherein she had stated that we were having affairs from May, 2013. This crime took place when I was in love with Subhashni and was provoked by Abishek who challenged me that Subhashni loved him. It was only when I was in the vehicle and called his number from Subhashni's sim card that he boasted to me that Subhashni was calling him that I lost control of my temper and struck him with a beer bottle that I was holding at that time. Within that short period where I could not control my anger I caused the death of Abishek and his messenger.

(xxix) I am informed and verily believe that if I had defended this case the issue of provocation could have been raised and if successful I would have been convicted of the lesser offence of manslaughter.

(xxx) I am informed and verily believe that even after my guilty plea my solicitor made a written submission asking the Court to fix the minimum non parole period of 15 years whereas he could have asked for a lesser non parole period and leaving it to the court to decide.

(xxx) I pray to this Honourable Court for an order that ***leave be granted for enlargement of time to appeal*** *and annexed herewith and marked with letter D is a copy of the proposed amended grounds of appeal.*

[34] The summary of the above allegations against the appellant's father and his former counsel Mr. A. Sen is that the father wanted to safeguard the family honour and therefore, put pressure on the appellant to plead guilty in order to prevent his affair with his niece coming to public knowledge at a contested trial. The father further agreed to pay the lawyer's fees and look after the appellant's family in the event of him having to go to prison. The father then entrusted the appellant's case to Mr. Sen, his close friend with those instructions. Mr. Sen visited the appellant at the police station but spoke to

him in the presence of the police officers without requesting that he be allowed to speak to the appellant in private which is most unusual of a counsel of his experience. Mr. Sen did that in order to ensure that the appellant's confessional statement could not be challenged at the trial. After the appellant was charged Mr. Sen did not see him to discuss the case except in court where he had told the appellant that the only way he could help him was for him to plead guilty or he would otherwise not have anything to do with the case. Mr. Sen had allegedly assured that if the appellant were to plead guilty he would obtain for him a sentence of 07 years imprisonment like in a manslaughter case. It is alleged that Mr. Sen also failed to get the Director of Public Prosecutions to bring the charge down to manslaughter and then got the appellant to plead to the reduced charge. Appellant's affidavit further states that Mr. Sen lives in front of the house of one the victims, Abhishek Kumar and he is a good friend of that victim's father, Ashok Kumar and therefore, could not have defended the appellant due to this conflict of interest. As a result the appellant's interests had been allegedly compromised by Mr. Sen. When the appellant's counsel appearing for him at the time he filed his affidavit dated 10 August 2015 (Mr. A. Kohli of Messrs. Kohli & Singh appears to be that counsel) spoke to Mr. Sen he had told that counsel that Mr. Sen could not have done the appeal as the said victim's family living right across his house visits Mr. Sen daily. The appellant did not intend to plead guilty to murder but was forced to do so by his father and Mr. Sen who acted as his counsel at the trial stage who allegedly assured the appellant a sentence of around 07 years. The appellant gave no instructions to Mr. Sen that he was willing to plead guilty to murder and if defended properly issue of provocation could have been raised and he would have been convicted for the lesser offence of manslaughter. Mr. Sen should have asked for a lesser non-parole period than 15 years in his sentencing submissions.

[35] However, I note that at paragraph 31(t) of the appellant's affidavit he has stated that *'after the incident everyone in our village started talking about my affair with my niece and that I had killed Abhishek because of that'* indicating that his affair had already become public knowledge. I also note from the appellant's caution interview that the appellant had indicated to the police that he wished to see his lawyer Mr. Amrit Sen and the police had contacted him by phone. Mr. Sen had arrived at the police station and spoken to the appellant in the presence of the police where the latter had admitted to

committing the murders. When Mr. Sen offered to speak to him in private the appellant had refused the request which the appellant has denied in his affidavit. I also find from the appellant's charge statement that Mr. Sen had visited the appellant and spoken to him in private at the police station. I also wish to place on record at this juncture that there is no affidavit by the appellant's father or by Mr. Sen stating their position regarding the appellant's allegations. It is also clear that the appellant's first Notice of Appeal against sentence had been filed against sentence by Mr. A. Sen of Messrs. Maqbool & Company on 21 August 2013 after 11 days from the sentence. The appellant seems to have had enough trust on his trial lawyers to attend to his timely appeal against sentence.

[36] No doubt the allegations made against Mr. Sen who is considered to be a senior practitioner in Labasa (according to the leave Ruling) are very serious. If true, they may constitute acts or omissions amounting to malpractice, professional misconduct, conduct unbecoming of a lawyer etc. In this instance these allegations made by the appellant have been made the foundation of his ground of appeal against conviction by the appellant's subsequent lawyers Mr. A. Kholi of Messrs. Kholi & Singh and Mr. Iqbal Khan of Messrs. Iqbal Khan & Associates who appeared at the leave to appeal hearing and at the appeal hearing respectively for the appellant.

[37] There does not appear to be any judicial guidance in Fiji at present dealing with the issue of criticism of former trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal urged on behalf of the appellant. Therefore, guidance should be sought from other jurisdictions and it appears that in United Kingdom the procedure to be adopted in criminal cases involving criticism of former counsel is set out exhaustively in **Regina v Michael Patrick Doherty Susan McGregor** [1997] EWCA Crim 556; [1997] 2 Cr. App. R 218 which, in my view could be safely adopted in Fiji. They are as follows.

> *'Following decisions of this court in R v Clarke and Jones , 29th July 1994, and R v Bowler , 5th May 1995, in both of which criticisms were made of trial counsel, guidance was given in December 1995 by the Bar Council with the approval of the Lord Chief Justice about the procedure to be adopted in criminal cases which involve criticism of former counsel. In the context of the present appeal we highlight this guidance and add some further observations which, together with*

the guidance, also apply when criticism is directed at former solicitors. ***The guidance provides:***

"1. Allegations against former counsel may receive substantial publicity whether accepted or rejected by the court. Counsel should not settle or sign grounds of appeal unless he is satisfied that they are reasonable, have some real prospect of success and are such that he is prepared to argue before the court (Guide to proceedings in the Court of Appeal Criminal Division para 2.4). When such allegations are properly made however, in accordance with the Code of Conduct counsel newly instructed must promote and protect fearlessly by all proper and lawful means his lay client's best interests without regard to others, including fellow members of the legal profession.

2. When counsel newly instructed is satisfied that such allegations are made, and a waiver of privilege is necessary, he should advise the lay client fully about the consequences of waiver and should obtain a waiver of privilege in writing signed by the lay client relating to communications with, instructions given to and advice given by former counsel. The allegations should be set out in the Grounds of Application for Leave to Appeal. Both waiver and grounds should be lodged without delay; the grounds may be perfected if necessary in due course.

3. On receipt of the waiver and grounds, the Registrar of Criminal Appeals will send both to former counsel with an invitation on behalf of the court to respond to the allegations made.

4. If former counsel wishes to respond and considers the time for doing so insufficient, he should ask the Registrar for further time. The court will be anxious to have full information and to give counsel adequate time to respond.

5. The response should be sent to the Registrar. On receipt, he will send it to counsel newly instructed who may reply to it. The grounds and the responses will go before the single judge.

6. The Registrar may have received grounds of appeal direct from the applicant, and obtained a waiver of privilege before fresh counsel is assigned. In those circumstances, when assigning counsel, the Registrar will provide copies of the waiver, the grounds of appeal and any response from former counsel.

7. This guidance covers the formal procedures to be followed. It is perfectly proper for counsel newly instructed to speak to former counsel as a matter of courtesy before grounds are lodged to inform him of the position."

[38] The Lord Justice Judge continued in ***Michael Patrick Doherty Susan McGregor*** by way of further observations which together with the above guidance should apply when criticism is directed at former counsel or solicitors in appeal. I take the liberty to quote the relevant passages *in extenso.*

'Nothing in Clinton (1993) 97 Cr. App.R. 320, [1993] 1 W. L. R. 1181 or the subsequent authorities suggests that grounds of appeal based on the criticism of trial counsel may be sustained on the basis that new counsel, with the luxury of hindsight and without the responsibility for conducting the trial in accordance with his client's instructions, feels able to argue that the conduct of the case might reasonably have been different. Unless in the particular circumstances it can be demonstrated that in the light of the information available to him at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced. In Clinton itself it was emphasised that the circumstances in which the verdict of a jury could be set aside on the basis of criticisms of defence counsel's conduct would "of necessity be extremely rare." In fact fresh counsel are becoming all too ready to formulate criticisms of trial counsel by adopting some of the language used in Clinton and Fergus without carefully analysing the difficulties which faced counsel under the immediate pressure of the trial process, and without approaching the instructions given by the client to fresh counsel, after conviction, with a reasonable degree of objectivity. Unless these features are kept firmly in find it is difficult to see how fresh counsel could decide that grounds of appeal based on criticisms of trial counsel could possibly be "reasonable" and enjoy "some real prospect of success".

Moreover, counsel's duty fiercely to promote and protect his lay client's interest (which we endorse) and the fact that he is prepared to argue the appeal, do not of themselves justify the conclusion that the grounds of appeal are "reasonable" and have "some real prospect of success". The distinctions between these various considerations should not be elided.

Finally, in cases where the allegations against counsel are based on alleged non-compliance with or disregard of the client's express instructions (whether as to fact or about the conduct of the case) unless the client has significant educational impairment, it is difficult to envisage circumstances in which fresh counsel may regard it as "reasonable" to draft grounds of appeal without at the very least being in possession of a signed statement of the facts alleged by the client together with an unequivocal signed waiver of privilege. The client should also be advised that allegations based on what has allegedly passed or failed to pass between the client and trial counsel are unlikely to carry any weight with the court unless they are supported by oral testimony.

The precise complaint should be spelt out with clarity in the grounds of appeal. The grounds, together with the waiver of privilege and where appropriate the statement of facts and any request for former counsel to provide documents or similar material, should be lodged with the Registrar without delay. He will supply all relevant material to trial counsel who should then respond in accordance with the guidance.

The purpose of the "courtesy" referred to in the guidance is to inform trial counsel of the allegations which are to be made. It is not to be treated as an opportunity to cross-examine or interrogate him, whether before the grounds of appeal and necessary documents have been lodged with the Registrar, or after counsel has responded. Where there is a factual dispute between a client and former counsel both the appellant and counsel may be required to give evidence so that, unless agreed, issues of fact may be resolved. The opportunity for cross-examination arises at that stage.

[39] For easy reference and convenience, the above guidelines may be summarized as follows

(i) When allegations are made against former counsel, the new counsel should not settle or sign grounds of appeal unless he is satisfied that they are reasonable, have some real prospect of success and are such that he is prepared to argue before court. However, when they are properly made the new counsel must promote and protect fearlessly his client's best interests without regard even to fellow members of the legal profession.

(ii) The new counsel should not regard the allegations as 'reasonable' to draft grounds of appeal based on them unless, at the very least, he is in possession of a signed statement of facts and a unequivocal signed waiver of privilege from the client which should be obtained after advising him of the consequences of waiver. The client should also be advised that the allegations against his former counsel are unlikely to carry any weight with court unless they are supported by oral testimony.

(iii) Such grounds criticizing the conduct of defense counsel at trial should not be advanced unless the new counsel feels that in the light of the information available to the former counsel, no reasonably competent counsel would sensibly have adopted the course taken by the former counsel.

(iv) The compliant or allegations should be set out with precision and clarity in the notice of appeal or application for leave to appeal or for extension of time (grounds of appeal may be perfected later) and it should be lodged accompanied by the waiver of privilege along with the client's signed statement and any request for former counsel to provide any material etc.

in the registry without delay. It is proper for the new counsel to speak to the former counsel as a matter of courtesy before grounds are lodged to inform him of the allegations to be made against him.

(v) On behalf of the court, the registrar of the appellate court should then send to the former counsel the client's signed statement and waiver of privilege along with other relevant material inviting him to respond to the allegations made against him within a given time.

(vi) The former counsel should send his response to the registrar either within the time given or further time obtained from the registrar.

(vii) The registrar should send the response received to the new counsel who may reply to it. Then the grounds of appeal, waiver and responses would be placed before the single judge.

(viii) Where there is a factual dispute between the client and former counsel both of them may be required to give evidence and be subjected to cross-examination in court to resolve the issue of fact.

[40] It was further held in ***Michael Patrick Doherty Susan McGregor*** that the freshly instructed counsel need to analyze carefully the difficulties faced by the trial counsel under the immediate pressure of the trial process and to consider objectively instructions given post trial. Importantly, Lord Justice Judge said that the circumstances in which the verdict of a jury could be set aside on such grounds would be extremely rare.

[41] In 1997 the decision in ***Michael Patrick Doherty Susan McGregor*** was made in the wake of an increasing tendency, articulated by the Court of Appeal previously, to believe that it is only necessary to assert the fault of trial counsel to sustain an argument that the conviction is unsafe and unsatisfactory. By 2014 the situation had only deteriorated as seen from the judgment of Lord Chief Justice of England in **R v. Achogbuo** [2014] EWCA Crim 567; [2014] WLR (D) 137 where alleged incompetence of trial advocate and solicitor was urged, the Court held *inter alia* as follows and asked the Registrar to refer the matter to the Solicitors Regulation Authority.

'16. *Of late it has become the habit for a number of cases to be brought on appeal to this court on the basis of incompetent representation by trial solicitors or trial counsel. ... many such cases proceed without any enquiry being made of solicitors and counsel who acted at trial. This means that the lawyer who brings such an application acts on what [are], ex hypothesi,* ***the allegations of a convicted criminal*** *... For a lawyer to put forward such allegations based purely on such a statement, without enquiry, is in our view impermissible. Before applications are made to this court alleging incompetent representation which is based upon* ***an account given by a convicted criminal****, we expect lawyers to take proper steps to ascertain by independent means, including contacting the previous lawyers, as to whether there is any objective and independent basis for the grounds of appeal.*'

'17. As long ago as 1997 in R v Doherty Susan McGregor [1997] 2 Cr App R 218, this court drew attention to the fact that it was proper for fresh representatives as a matter of courtesy to speak to former counsel before grounds of appeal are lodged. Today circumstances have changed. The frequency of this kind of appeal makes it clear to us that ***counsel and solicitors would be failing in their duty to this court*** *if they did not make enquiries which would provide an objective and independent basis, other than complaints made by the* ***convicted criminal****, as to what had happened.'*

'*20….. The court expects not only the highest standards of disclosure but also strict compliance with the duties of advocates and solicitors. It is the fundamental duty of advocates and solicitors to make applications to this court after the exercise of due diligence.* ***In cases where the incompetence of trial advocates or solicitors is raised, the exercise of due diligence requires, having made enquiries of trial lawyers said to have acted improperly, taking other steps to obtain objective and independent evidence before submitting grounds of appeal to this court based on incompetence****.*' (emphasis added)

[42] ***Achogbuo*** was followed by **Regina v. McCook** [2014] EWCA Crim 734 where Lord Chief Justice said

'*This case illustrates ... two matters. First, it is always desirable to consult those who have acted before in a case where fresh counsel and solicitors have been instructed. In R v Achogbuo ... we stated that it was necessary to do so [1] where criticisms of previous advocates or solicitors were made, or [2] grounds were to be put forward where there was no basis for doing so other than what the applicant said. Second, it is clear from this case that [3] we must go further to prevent elementary errors of this kind.* ***In any case where fresh solicitors or fresh counsel are instructed, it will henceforth be necessary for those solicitors or counsel to go to the solicitors and/or counsel who have previously acted to ensure that the facts are correct, unless there are in exceptional circumstances good and compelling reasons not to do so.*** *It is not necessary for us to enumerate such exceptional circumstances, but we imagine that they will be very rare.*' (emphasis added)

[43] Finally I may quote from **R v. James Lee** [2014] EWCA Crim 2928 where the Court of Appeal (Criminal Division) said on the same issue advancing the positions taken up in ***McGregor***, ***Achogbuo*** *and* ***McCook*** even further as follows.

> *'8. In Doherty & McGregor [1997] 2 Cr App R 218, it was made clear that it was perfectly proper for counsel newly instructed to speak to former counsel as a matter of courtesy before grounds were lodged but counsel were provided with a discretion in the matter. More recently the position has been taken further in a series of decisions of this court, and in particular in R v Davis and Thabangu [2013] EWCA Crim 2424, R v Achogbuo [2014] EWCA Crim 567 and R v McCook [2014] EWCA Crim 734. Thus these decisions make it clear that fresh lawyers recently appointed must take steps to ensure that they are fully appraised of all that occurred while the case was in the hands of previous lawyers in so far as that is relevant to the new proceedings.*
>
> *'9. Where an allegation of actual implicit incompetence is made, enquiries should be made of those prior lawyers, said to have acted improperly, and* ***it is equally important that other objective independent evidence should be sought to substantiate the allegations made****. These principles apply not only where there is an allegation of previous lawyers have erred or failed in some way but also in any case where it is essential to ensure the facts are correct: see McCook in paragraph 11.*(emphasis added)

[44] Therefore, it is no more a matter of courtesy for the fresh lawyers to speak to the former lawyers before allegations against them are made in appeal but it is essential to do so and if not, the fresh lawyers would be failing in their duty towards court and not being content with that they must also go further and look for objective and independent evidence to substantiate the allegations against the former lawyers before such allegations are made the foundation of an appeal. Generally the fresh lawyers must take all steps to inform themselves of all that had happened when the matter was handled by the former lawyers.

[45] It is clear that in the appeal before us other than the affidavit of the appellant there is absolutely no material to substantiate the allegations made against the appellant's former counsel Mr. A. Sen. There is nothing to demonstrate that Solicitors Kohli & Singh who had been appointed as the appellant's lawyers and Mr. A. Kohli, the counsel retained by them consequent to the notice of change of solicitors dated 26 March 2015 or Iqbal Khan & Associates and its counsel Mr. Iqbal Khan retained by them consequent to the notice of change of solicitors dated 23 March 2016 have made even an attempt to speak to the appellant's former lawyers and obtain their response to the allegations and further to seek

objective and independent evidence to substantiate the allegations against the former lawyers. Both, Kohli & Singh along with its counsel Mr. A. Kohli who appeared for the appellant at the leave stage and Iqbal Khan & Associates and its counsel Mr. Iqbal Khan who represented the appellant at the appeal hearing have failed in their duty towards this Court. As stated in ***McGregor*** the allegations against Maqbool & Company and its counsel Mr. A. Sen may have received substantial publicity whether they are accepted or rejected by court or whether they are true or not, causing damage to their professional reputation. There is nothing to indicate that the fresh lawyers have acted even remotely in keeping with the guidelines set out in ***McGregor*** before settling the ground of appeal against conviction based on the allegations against the former lawyers by the appellant.

[46] The allegations contained in the appellant's affidavit may or may not be true. The affidavit may be self-serving or not. However, it is clear that it has come into existence with the change of lawyers after a substantial delay on 10 August 2015. ***Achogbuo*** was part of the copy record and should have been known to the appellant's counsel at the appeal hearing. A copy of ***McGregor*** was handed over to the appellant's counsel by the counsel for the State at the appeal hearing and the former wanted time to study it and respond in writing. This Court granted that request. The counsel for the appellant filed his written response on 19 November 2019 and he has admitted therein the legal proposition in ***Michael Patrick Doherty Susan McGregor*** but still wanted this Court to *'take serious consideration'* of the appellant's affidavit *vis-à-vis* the ground of appeal against conviction. In fact the appellant in his affidavit alleges failure and shortcoming of his trial counsel even in the matter of sentence in terms of urging the minimum serving period.

[47] It would be naïve to expect this Court to act upon totally unsubstantiated and belated affidavit of the appellant alone in upholding the allegations against his trial lawyers in the light of clear principles of law enunciated in ***McGregor***, ***Achogbuo***, ***McCook*** and ***Lee***. Nevertheless, considering the continuous insistence of the counsel for the appellant even after he had admitted the legal propositions in ***McGregor*** that this Court should act on the appellant's affidavit alone, I think this Court would be failing in its duty if it does not request (as was done in ***Achogbu)*** the Chief Registrar to consider whether or not the appellant's trial lawyers and/or subsequent lawyers have acted in such a manner as to be liable to face proceedings under the Legal Practitioners Act and if so, to take steps

accordingly and also if it does not request the Chief Registrar to refer the matter to the Fiji Law Society for necessary action, if deemed appropriate.

[48] Coming back to the ground of appeal against conviction on the issue of alleged failings of the trial counsel, **Archbold Criminal Pleadings, Evidence and Practice 2018 at page 1272** sheds more light as follows.

> *'Before an application for leave to appeal against conviction is made, where the ground of appeal is the alleged failings of the defendant's legal representatives at trial, proper inquiries must be made of those representatives; it was impermissible to proceed on the word of the defendant alone; where appropriate inquiries had not been made, the power of the court to dismiss the application as being frivolous or vexatious under section 20 of the CAA 1968 (post, s 7 – 180) would be exercised more frequently. R v A (EO) [2014] 2 Cr App R 7 CA In R v. McCook (Practice Note) [2016] 2 Cr App R 30, CA, the Court went further and said that, in any case where fresh solicitors or counsel are instructed, it would henceforth be necessary for those solicitors or counsel to go to the solicitors and / counsel who acted at trial to check the facts, unless there are, in exceptional circumstances, good and compelling reasons not to do so.*(emphasis added)

[49] On the same subject, **Blackstone's Criminal Practice 2011** at page 1612 helpfully states as follows.

> *'Guidance as to the procedure to be followed by a advocate when dealing with an appeal involving criticism of counsel was issued by the Bar Council and approved by Lord Taylor CJ in December 1995. The guidance was quoted with approval by Judge LJ in Doherty [1997] 2 Cr App R 218, and the importance of advocates following that that guidance was emphasized in Nasser (1998) The Times, 19 February 1998. Paragraph A2-72 of the Guide to Commencing Proceedings in the Court of Appeal Criminal Division (2008), describes the waiver procedure which is required of an applicant when grounds of appeal criticizing the conduct of lawyers are advanced.*

[50] **Blackstone's Criminal Practice 2011** at page 2001 states that counsel should not settle or sign grounds of appeal unless they are reasonable, have some real prospect of success and are such that he is prepared to argue before court. Counsel should not settle grounds he is unable to support just because he is 'instructed' to do so by his lay client. It is not unknown for counsel to be criticized for grounds of appeal which the Court of Appeal considers improper. In **Morson** (1976) 62 Cr App R 236, grounds of appeal drafted by counsel suggested that the summing-up was unfair and amounted to a direction to

convict. Scarman LJ said that the description of the summing-up was a travesty and that the court deplored the fact that the ground of appeal was put forward.

[51] In **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial later appears to have been mistaken or unwise. This would be the case even if the decision or action was contrary to the accused's wishes. Taylor J said in **Gautam [**1988] Crim LR 109

> *' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'*

[52] I am certain that in this case it cannot be said that no reasonably competent counsel would sensibly have adopted the course taken by the appellant's trial counsel. It was held in **Clinton** (1993) 97 Cr.App.R.320, [1993] 1 W.L.R.1181 that the circumstances in which the verdict of a jury could be set aside on the basis of criticisms of defense counsel's conduct would *"of necessity be extremely rare"*. I am sure that this is not one of those rare cases.

[53] Still on the ground of appeal against conviction, **Blackstone's Criminal Practice 2011** at page 1612 states on involuntary pleas that

> *'A plea of guilty must be entered voluntarily. If, at the time he pleaded, the accused was subject to such pressure that he did not genuinely have a free choice between 'guilty' and 'not guilty', then his plea is a nullity (Turner [1970] 2 QB 321). On appeal the Court of Appeal will have the same option as it has when a plea is adjudged ambiguous….'*

[54] The Court of Appeal in ***Turner*** (supra) also directed that *'the accused having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty…… - plea of guilty under pressure, accordingly all that follows thereafter was a nullity…'*

[55] Gates J, (as His Lordship then was) in **State v Saukova [**2000] FJLawRp 1; [2000] 1 FLR 135 (6 July 2000) in exercising revisionary powers examined the caution interview of the appellant and stated

> '*It is essential that there be no equivocation in the Accused's admission of the truth of the facts relied upon by the prosecutor in support of the charge see* ***AbduI Aziz Khan v. Reginam*** *[1967] 13 FLR 79at 81G. The plea should be in clear, unambiguous, and unmistakable terms* ***R v. Golathan*** *(1915) 11 Cr. App. R 79;* ***R v. Le Comte*** *[1952] NZLR 564*

[56] I have quoted the relevant proceedings relating to the appellant's plea of guilty in court in paragraph 03 above and do not find anything to suggest that the appellant's plea of guilty was equivocal or involuntary weighed against the above authorities. The appellant in his submissions (filed by himself) on his sentence appeal dated 19 August 2013 tendered to the Court of Appeal has not made any reference to him having pleaded guilty involuntarily. There is nothing other than the appellant's affidavit filed belatedly with the change of lawyers to substantiate his allegation that he had been pressured by the trial counsel and the appellant's father to plead guilty to murder in the expectation of a sentence for manslaughter.

[57] **Archbold Pleadings, Evidence & Practice in Criminal Cases** 39th Edition at page 158 states that *' If the defendant pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded, and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment.'*. It is clear that what the trial judge had done was exactly that by giving the appellant sufficient time even to change his mind, if he so wished and the trial judge cannot be faulted in the manner in which the appellant's plea was taken, then convicted on his own plea and finally sentenced.

[58] Accordingly, I am not convinced that the appellant's plea of guilty is caught up within the legal definitions of equivocal or involuntary pleas. Therefore, as for this appeal I conclude that the ground of appeal against conviction based on criticism of trial counsel's conduct has no real prospect of success.

If time is enlarged, will the Respondent be unfairly prejudiced?

[59] The respondent in this appeal is the State and it cannot be said that the State would be unfairly prejudiced as a result of an extension of time. However, in a purely hypothetical scenario, in the case of a retrial a long delay over 06 years (offences committed in July 2013) could mean that there is a possibility that some of the vital witnesses for the

prosecution including the police officers may not be available due to reasons such as oversees duty etc. which will hamper the conduct of the prosecution and unfairly prejudice the State.

[60] In the circumstances, I refuse to grant enlargement of time as far as the ground of appeal against conviction is concerned.

Ground of appeal against sentence

'That the learned Judge erred in law in failing to correctly apply judicial discretion to set a minimum non-parole term to be served by the Appellant before he could apply for a pardon.'

[61] The ground of appeal against sentence is timely but leave to appeal had been refused by the single Judge and therefore it has been properly renewed for leave to appeal before the full court. Thus, the appellant should satisfy the appropriate test for leave to appeal with regard to the sole ground of appeal against sentence.

[62] In **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 the Supreme Court set out the guidelines to be followed for leave to appeal when a sentence is challenged in appeal. They are as follows

> *'[19] 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] HCA 40; (1936) 55 CLR 499 and adopted in **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*
>
> *[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for*

leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** *case.'*

[63] The learned High Court Judge has dealt with fixing the minimum time to be served in the following words.

> *'[10] The only sentence that I can pass by law is life imprisonment and that is the sentence I now pass for each of these two murders. Those terms will be served concurrently.*
>
> *[11] I do have the discretion to set a minimum term before pardon can be considered and Counsel for the accused has addressed me in detail on that point and has in addition filed written submissions.*
>
> *[14] This accused has taken the lives of two very young men who had never even reached their prime, all in a fit of anger over a relationship that he perceived one of the deceased was having with his niece. The young men did not expect that sharing an evening beer would result in their violent deaths The accused had in his interview with the Police told them that he set out that evening with an intention to end Abhishek's life because of the relationship with Subashni. I find it as highly aggravating feature of this case that the accused resorted to subterfuge to trick the elder deceased into thinking that Subashni was trying to call him and on the excuse of that launched his murderous attack on the boys. Whilst the two sentences are to be served concurrently, it is also a valid aggravating feature in considering a minimum term that the accused took two lives that evening.*
>
> *[15] I take into account the accused's early guilty plea; I take into account his co-operation with the authorities; I take into account his clear record and I take into account his reported remorse: however the sheer horror of these frenzied, unprovoked and unjustified intentional murders of two very young men must attract a minimum term of 25 years and that is the minimum term I impose.'* (emphasis added)

[64] Section 237 of Crimes Decree prescribes the penalty of mandatory sentence of imprisonment for life with a judicial discretion to set a minimum term to be served before pardon may be considered for the offence of murder.

[65] The single Judge refused leave to appeal against sentence on the following basis.

> *'[8] In my judgment, there is no arguable error in the sentencing discretion of the learned Judge to arrive at a minimum term of 25 years. The murders were dreadful and a minimum term of 25 years was justified on the facts of this case. For these reasons, leave to appeal against sentence should be refused.*(emphasis added)

[66] In **Balekivuya v State** AAU0081 of 2011: 26 February 2016 [2016] FJCA 16 the Court of Appeal held that specific sentence provision of section 237 of the Crimes Decree displaces the general sentencing arrangements set out in section 18 of the Sentencing and Penalties Decree when the sentence is mandatory life imprisonment for murder.

[67] Further the decision of the Court of Appeal in **Tapoge v State** AAU121of 2013: 30 November 2017 [2017] FJCA 140 and the decision of the Supreme Court in **Tapoge v State** CAV022 of 2018 & CAV023 of 2017: 26 April 2018) [2018] FJSC 8 seem to justify the imposition of the minimum term of 25 years to be served by the appellant. The Supreme Court quoted the following paragraph from the Court of Appeal decision

> *'[49] There is no merit in the complaints of the Appellant against their minimum terms. The minimum term is not an additional sentence. The sentence is life imprisonment. The minimum term is fixed to make the offender remain in prison before any possibility for a pardon can be considered by the President on the recommendation of the Mercy Commission under section 119 of the Constitution. In other words, the offender must serve the minimum term and cannot be pardoned or released before the expiration of the minimum term. The minimum term affects the eligibility timeframe for the possibility of a pardon or release. The minimum term by no means guarantees a pardon or a release. An offender may not be pardoned or released and may spend life in prison even after the completion of the minimum term.'*

[68] Given that the appellant had acted in a premeditated and totally unprovoked and senseless manner showing scant disregard for the preservation of human life driven only by jealousy, he deserves deterrence in the form of a very substantial minimum period of incarceration. A survey of previous sentences over a long period of time shows that the courts have imposed minimum serving periods ranging from around 10 years to 25 years with exceptions at the lowest and highest ends, depending on the facts and the gravity of circumstances of each and every case in addition to the mandatory life sentence for murder. I cannot see anything wrong with the 25 years imprisonment as the minimum period the appellant must serve before pardon may be considered in the face of the horrific acts of the appellant that speak for themselves. They shock the conscience of any human being. He is clearly a danger to the society and must be kept in imprisonment for at least 25 years.

[69] Therefore, there is no sentencing error within the parameters set in ***Naisua*** and I would not grant leave to appeal on the sole ground of appeal against sentence and therefore, leave to appeal is refused.

Bandara, JA

[70] I agree with reasoning, conclusions and orders reached by Prematilaka JA.

The Orders of the Court are:

1. Extension of time on conviction is refused.
2. Leave to appeal on sentence is refused.
3. Chief Registrar is requested to consider whether or not the appellant's trial lawyers and/or subsequent lawyers have acted in such a manner as to be liable to face proceedings under the Legal Practitioners Act and if so, to take steps accordingly and also to refer the matter to the Fiji Law Society for necessary action, if deemed appropriate.