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

CRIMINAL APPEAL NO.AAU 163 of 2016
[In the High Court at Suva Case No. HAC 149 of 2015]

USAIA KILAIVERATA
Appellant

AND:

THE STATE
Respondent

Coram	:	Prematilaka, JA
Counsel	:	Mr. T. Lee for the Appellant
	:	Mr. L. J. Burney for the Respondent
Date of Hearing	:	12 May 2020
Date of Ruling	:	15 May 2020

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of murder contrary to section 237 of the Crimes Decree, 2009 on 04 April 2009 at Suva in the Central Division.

[2] The information on the count of murder was as follows.

Statement of Offence

MURDER*: Contrary to Section 237 of the Crimes Decree No. 44 of 2009*

Particulars of Offence

USAIA KILAIVERATA *on the 4th day of April, 2015, at Suva in the Central Division, murdered* ***LOSANA McGOWAN****.*

[3] After full trial, the assessors had expressed an opinion of guilty against the appellant for murder on 28 October 2016. The learned High Court judge had agreed with the assessors and convicted the appellant of murder in his judgment on 01 November 2016. He was sentenced on 03 November 2016 to life imprisonment with a minimum serving period of 18 years.

[4] The appellant being dissatisfied with the conviction and sentence imposed had by himself filed a timely notice of appeal on 14 November 2016 containing five grounds of appeal against conviction and one ground of appeal on sentence. Several additional and further grounds of appeal against conviction had been tendered on 09 March 2017, 21 March 2017, 22 June 2017 and 17 October 2018. Notice of abandonment of appeal against sentence had been submitted to court on 26 April 2016 which is yet to be considered by the Full Court. Subsequently, the Legal Aid Commission had filed an amended notice of appeal against conviction on 29 July 2029 seeking leave to appeal on 03 very broadly formulated grounds of appeal along with written submissions. The state had filed supplemental written submissions on those 03 grounds of appeal on 27 March 2020 having filed written submissions on 19.03.2019.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87.

[6] Grounds of appeal urged on behalf of the appellant are as follows

Ground One

THAT the Learned Trial Judge erred in law and fact by failing to give reasons on why he failed to accept that the Appellant rights on detention was unconstitutional thereby causing a grave miscarriage of justice in particular:-

(i) The Appellant was kept in custody for more than the Constitutional requirement of 48 hours during the caution interview without any application by the state to extend the 48 hour allowable period; and

Ground Two

THAT the learned Trial Judge erred in law and fact by lacking to provide an adequate and proper Summing Up, in particular, to the following:-

(a) The learned trial Judge's directions on 'intention' is erroneous in law.

(b) The learned trial Judge's directions on recklessness was inadequate and lacked fairness in law.

(c) The learned trial Judge's directions on the Appellant's defence at trial was unfair since it was inadequate and improper.

(d) The learned Trial Judge erred in law by not adequately and properly directing on the law on manslaughter.

Ground Three

THAT the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at trial, in particular, to the following:-

(a) The learned Trial Judge's assessment that Appellant had taken up the defense of intoxication was erroneous in fact and law since the Appellant's defence at trial was the absence of malice aforethought to kill.

(b)The learned Trial Judge's assessment of intention was erroneous in law and fact.

(c)The learned Trial Judge's assessment of the Appellant's evidence regarding the 'deceased falling on the gas tank' was erroneous in fact.

[7] The learned High Court judge had summarized the evidence of the prosecution in the judgment as follows.

> *'6.The witness Winston Hill had been living in the apartment above the apartment that the accused was living with her partner the deceased. On 04/04/2015 early hours he had heard Usaia (the accused) calling out to open the main door and he has seen the door being opened and let Usaia in. He had heard Usaia and his partner arguing. Voice of the deceased had been high. He then had heard a loud bang, a thudding sound like a heavy drop on the wooded floor.*
> *7.Thereafter, he had also heard consistent thudding sounds like someone hitting the wall about 5-6 times. Then it had gone quiet and he had gone to sleep.*
> *8.Sgt. Apisai had recorded the caution interview statement of the accused. He said that the accused made the statement voluntarily. At the reconstruction of the crime scene, he said that the accused told him that the deceased fell down*

the steps and hit the gas tank. However, he had not written that in the statement but had noted it in a piece of paper.
9.According to the post mortem report admitted by parties the deceased had injuries on her head, chest, neck, side of the head above the ear, on upper and lower lips. All injuries are constant with blunt trauma according to the doctor.'

[8] The learned trial judge had summarized the appellant's position as follows

'12.In his caution interview statement that was admitted by the defence without any challenge, the accused had said in answer to Question 40 that although he was drunk after taking lot of alcohol he could still recall what happened and what he did.
13.According to his own caution interview statement, the accused had said that after he assaulted the deceased the deceased was bleeding from her mouth and he tried to revive her. He then had applied mouth to mouth (CPR) trying to revive but it was too late he had said.
14.This shows that the accused was aware of what he was doing and that he was in a state to form the necessary intention to commit the crime when he assaulted the deceased
15.In his caution interview statement the accused had admitted that he punched the deceased on her cheek and that she fell down facing downwards with blood coming out from her mouth. When she fell down, again he had kicked her face on the floor (Question and Answer 53).'

[9] I also find the following paragraph in the summing-up regarding the evidence of Sgt. Apisai.

'Answering questions by court the witness said that he did not record that in the statement that she fell on the gas tank, as he forgot to write. Bottom of the steps and the gas tank is shown in photograph 14, he said. He again said that during reconstruction of the scene that the accused told him that the deceased fell face down on the gas tank and that he put it in the statement. However, he admitted that it is not in the statement. Accused had told him that he tried to give CPR and tried to revive her. As soon as he realised that it's too late he had gone to the police station.'

[10] Referring to the evidence of prosecution witness Dr. James Kalougivaki the trial judge had said in the summing-up:

'60. He said that he has seen the photographs of P1 booklet before. Referring to photograph 14, he said that it is possible to cause the majority of head injuries by associated with a punch, falling down the stairs and hitting the head on the gas cylinder. He said that there is multiple head trauma and there has to be multiple blunt trauma to cause all injuries.

'66.On seeing the photographs 26 and 14, he said that there is a possibility for the injuries in P3B to be consistent with a person falling from the middle of stairs face down on a hard surface, but not all injuries but some of them. He said as suggested that it was a single fall, it is hard to explain a person having such injuries on both sides of the head extends to backwards and injuries on the face. He said it is improbable to have all the injuries by a single fall. He also said that it is very unlikely that a single fall to cause the above mentioned extensive and widespread collection of blood under the scalp.

67. The witness said that the windpipe injury can be caused by a person falling down from the steps shown in photographs 14 and 26.

01st ground of appeal

[11] This ground of appeal is based on the alleged violation of section 13(1) of the Constitution of the Republic of Fiji and the argument of the appellant is that he was held by the police for more than 48 hours since his arrest during which the cautioned statement had been recorded. The prosecution relied on the cautioned statement as part of the prosecution case. His contention seems to be that therefore the cautioned interview should not have been admitted in evidence.

[12] The appellant's cautioned statement was admitted without any challenge on his part at the trial. The possible reason may have been that he was relying on what he had stated in the cautioned statement to sustain his defense that he had no intention to kill the deceased but his intention was only to injure her in an attempt to bring his culpability to one of manslaughter. The appellant did not give evidence either.

[13] Having extensively considered several authorities and where the accused had in fact challenged the admissibility of his statement made under caution at the trial, the Court of Appeal rejected a similar argument in **Heinrich v State** [2019] FJCA 41; AAU0029 of 2017 (7 March 2019) and stated

'[32] Considering all the matters discussed above, I am of the view that though an accused in criminal proceedings against him is not prevented from making a collateral attack on his confessional statement on the bases of a breach of Article 13(1)(f) by the investigators, despite Article 44 making specific provision for enforcement of his rights under Bill of Rights, the breach of Article 13(1)(f) by itself would not be a bar for the admission of the caution interview in a court of law.'

[14] Therefore, the first ground of appeal has no reasonable prospect of success at all.

02nd ground of appeal

[15] Under appeal ground 2(a) the appellant complains that the learned trial judge's statement that *'intention need not be preplanned but necessary intention can be formed on the spur of the moment'* thereby 'clouding' the assessors' mind from considering the possibility of manslaughter was wrong.

[16] The impugned paragraph is number 15 in the summing-up.

> *'The fourth element, you may decide whether the accused intended to cause the death of the deceased when he assaulted the deceased. A person's intentions are locked up in his mind. You may take into account his conduct, in that, the number and the nature of injuries inflicted and the place in the body where the injuries were inflicted, and all the circumstances led in evidence when you decide whether the accused intended to cause the death of the deceased. May I also tell you that intention need not be pre planned but necessary intention can be formed on the spur-of-the-moment.'*

[17] The trial judge had repeated the same statement in paragraph 15 of the judgment. I cannot see how the decision in **Vosa v State** [2019] FJCA 89; AAU0084.2015 (6 June 2019) is helpful to advance the appellant's argument. Nor do I see the impugned statement to be obnoxious to any principle of law. That represents the correct view of the law.

[18] The appellant contends under sub-ground 2(b) that the direction in the summing-up on recklessness is not adequate. It is in paragraph 16 and 17.

> *'16. In the event, you find that the accused did not have the intention to kill the deceased or if you are not sure whether he had that intention, you should consider whether the accused was reckless as to causing the death of the deceased.*
> *'17. As to the recklessness, you may consider whether the accused was aware of the substantial risk that his conduct would cause death of the deceased and having regard to the circumstances whether it was justifiable for him to take the risk.'*
>
> *'19. If you find that the conduct of the accused caused the death of the deceased and that the accused had the intention to cause death, then you may find the accused guilty of murder. However, if you find that the accused did not have the intention to kill the deceased, then you go on to consider whether the accused was reckless as to causing the death of the deceased, in that whether he was aware of the substantial risk that the death will occur due to*

his conduct and in the given circumstances whether it was justifiable for him to take the risk. Prosecution must prove all the elements as I explained to you beyond reasonable doubt to find the accused guilty of murder.'

[19] I do not think that there is anything more the trial judge need to have said in this case on recklessness.

[20] The appellant's submission under appeal ground 2(c) is that the trial judge should not have 'encouraged' the assessor to consider any other inference when looking into the aspect of intention as his defense at the trial was that he had no intention to kill the deceased. However, the appellant's ground under sub-paragraph 2(c) is that the trial judge's directions on his defense were unfair in that they were inadequate and improper. Thus, the ground of appeal and the submissions do not seem to sit in harmony with each other and the submissions are somewhat difficult to comprehend.

[21] Be that as it may, the trial judge had directed the assessors on the appellant's defense as follows in the summing-up.

> *'74. Prosecution says that the conduct of the accused caused the death of the deceased and that he intended to cause her death or was reckless as to causing her death. Defence admits assaulting the deceased, however they took up the position that the deceased fell down from stairs on to the gas tank. However, that position was not taken by the accused in his caution interview statement, but defence says that the accused told that to the police officer at the scene of crime and that the police officer had written it down on a piece of paper, not in the notebook. The doctor in his evidence said that it is possible to cause the injuries from a fall on to the gas tank, but not all the injuries together, as it was suggested a single fall. You must decide which witnesses are reliable and which are not. What parts of their evidence you accept and what parts you reject? You may use your common sense when deciding on the facts. Observe and assess the evidence of all witnesses and their demeanour in arriving at your opinions.*
>
> *'75.Approach the evidence with detachment and objectivity. Do not get carried away by emotion.'*

[22] The above paragraphs should be considered in conjunction with the directions on a possible verdict of manslaughter in paragraph 20 of the summing-up. I do not see any deficiency in the above directions as far as the appellant's defense was concerned. **Vosa v State** [2019] FJCA 89; AAU0084.2015 (6 June 2019) relied by the appellant really cannot come to his aid as it was a case where the appellant had pleaded guilty

to a charge of murder and the trial judge had only the summary of facts, cautioned interview, charge statement and medical reports before him to arrive at the verdict of guilty and convict the appellant for murder. Moreover, in **Ali v State** [2020] FJCA 11; AAU31.2015 (27 February 2020) the Court of Appeal upheld a similar complaint (to that of ***Vosa***) where the appellant had pleaded to a charge of attempted murder but sent the case back to the High Court for the appellant to plead to the information without reducing the guilty verdict of murder to a lesser offence.

[23] The appellant submits under sub-ground 2(d) that the trial judge had not adequately addressed the assessors on manslaughter. I cannot comprehend how section 43 of the Crimes Act enters into the equation under this ground of appeal as submitted by the appellant's counsel. In any event the trial judge had addressed the assessors on manslaughter as follows

> *'20. Now what happens if you find that the conduct of the accused caused the death of the deceased but he did not have the intention to kill her or that he was not reckless in causing her death as I explained to you? Then you may find him not guilty for murder but guilty for manslaughter if you find that he intended that his conduct will cause serious harm or he was reckless as to a risk that his conduct will cause serious harm to the deceased.*

[24] Considering the fact that the offence of manslaughter differs from the offence of murder only in the result of the conduct (intended or was reckless as to the risk) of the accused namely 'causing serious harm' in the former as opposed to 'causing death' in the latter, the above direction makes the distinction very clear to the assessors without confusing them with an academic discourse on elements of manslaughter.

03rd ground of appeal

[25] At the outset I must place on record that the three sub-grounds cannot be related to the main theme of the third ground of appeal namely 'conviction was unreasonable and cannot be supported by having regard to the evidence' and they have to be considered as three separate grounds of appeal which may, perhaps, be due to poor drafting.

[26] Firstly, under appeal ground 3(a) the appellant argues that when his defense was that he intended only to injure the deceased the learned trial judge had addressed the assessors on intoxication in paragraph 18.

[27] It is not clear from the summary of evidence in the summing-up and the judgment that the appellant had unequivocally taken up the position that he intended only to injure the deceased. He never gave evidence at the trial. His attempt was to show that the deceased may have come by the injuries (or at least the fatal injuries) as a result of the fall on the gas tank though he admitted having assaulted her.

[28] However, it is clear that the trial judge had addressed the assessors on intoxication out of abundance of caution because in the cautioned interview the appellant had spoken to having consumed a high volume of alcohol prior to the incident and the assessors had to be directed as to how to evaluate that evidence *vis-à-vis* the element of intention. If not, there would have been a complaint by the appellant that the trial judge had not addressed the assessors on intoxication as arising from evidence. Paragraph 18 of the summing-up is as follows

> '*18. I will now direct you on the defence of intoxication. The defence says that the accused drank lot of alcohol in the evening the day before till that morning. In the caution interview statement, the accused had said that they drank about 5 draft beers at GPH, had dinner at Holiday Inn, had 3 draft beers there, they had about 16 jugs of mixed drink of tribe and rum and cola. You also heard the evidence of the doctor that the blood alcohol concentration would depend on the person. However, a drunken person may still be capable of forming the necessary intention to commit the offence. A drunken intention is in fact intention. In his caution interview statement that was produced in evidence with the agreement of the parties, the accused had said that although he was fully drunk he could recall what happened and what he did. He also had said that after he kicked the face of the deceased, when he saw blood coming out from her mouth and she did not move he applied mouth to mouth (CPR) trying to revive her but it was too late. In the circumstances, you decide whether the accused was in a state to form the necessary intention to commit the crime.*

[29] Under appeal ground 3(b) the appellant's complaint is that the learned trial judge's conclusion in paragraph 14 and 15 of the judgment on the appellant having entertained the intention to cause death was wrong. They are as follows.

> *'14.This shows that the accused was aware of what he was doing and that he was in a state to form the necessary intention to commit the crime when he assaulted the deceased*
>
> *'15.In his caution interview statement the accused had admitted that he punched the deceased on her cheek and that she fell down facing downwards*

with blood coming out from her mouth. When she fell down, again he had kicked her face on the floor (Question and Answer 53). His conduct, that he punched the deceased and also kicked the deceased after she fell down, the injuries caused to the deceased on her head, neck, chest and face are sufficient to conclude that the accused intended to kill the deceased when he assaulted her. Intention can be formed on the spur-of-the-moment.

'17. ……..Multiple blunt force trauma is consistent with the assault caused by the accused as admitted in his own caution interview statement. I find that it was far from the truth that the deceased fell on the gas tank. Accused had never said that in his statement which was admitted by the defence. Obviously, assessors have not believed the defence story that the deceased fell on the gas tank and that it was an accident. Accused had clearly admitted that after punching the deceased she fell on the floor and that he further kicked her on the face. It is sufficient for the prosecution to prove that the conduct of the accused contributed significantly to the death, it need not be the sole or principal cause of death.'

'18. I find that the prosecution has proved beyond reasonable doubt that the conduct of the accused caused death of the deceased and that he intended to cause death of the deceased. I find that the prosecution has proved all the elements of the offence of Murder beyond reasonable doubt.'

[30] The intention of the appellant has to be gathered *inter alia* from all injuries sustained by the deceased along with other associated circumstances and not just by the injuries admitted to have been caused by the appellant in his caution interview, for they were not caused by any other person. The cause of death was

(A) Disease or condition directly leading to death:

(a) Extensive Subarachnoid and Subdural Haemorrhage

(B) Antecedent causes:

(b) Severe Traumatic Head Injury
(c) Multiple Traumatic Head Injury
(d) Assault – Blunt Force Trauma

[31] Earlier, the trial judge had placed before the jury as follows in paragraph 73

'You may remember the police officer Apisai in cross examination said that when he went to the crime scene with the accused for reconstruction of the scene, that the accused told him that the deceased fell down the steps and hit the gas tank. He has not recorded that in the caution interview statement. He said that he wrote it down on a piece of paper. He also said that he cannot produce that piece of paper as he has put it somewhere. It is for you to decide whether the accused told him that or not. If you decide that in fact that the accused told him that, it is for you to decide whether it was the truth.'

[32] Thus, the trial judge had left it to the assessors to decide whether the appellant had in fact told the police officer that the deceased had fallen down the steps and hit the gas tank and if so whether it was true, for the police officer had claimed to have forgotten to record that in his cautioned statement and the appellant also seems to have not said it when giving the statement under caution. If he had said so in the charge statement he could have produced that as part of his defense.

[33] Therefore, the assessors had the right to reject the appellant's version of the deceased having fallen on the steps and hitting the gas tank and the trial judge had the right and in fact had agreed with them.

[34] Sub-ground 3(c) states that the learned judge's assessment on the 'deceased falling on the gas tank' was erroneous. The trial judge had disbelieved the 'gas tank' story for the reasons set out in paragraph 17 of the judgment. He had left it to the assessors in paragraph 73 of the summing-up and the assessors too had not believed this position which was their right.

[35] The credibility of the appellant's version of the 'deceased falling on the gas tank' was a matter for the assessors and then the learned trial judge to decide. It appears that both the assessors and the trial judge had decided that even if the appellant had told the happening of such an event to the police officer Apisai that story was not true and credible. The assessors and the judge had to consider the effect of the deceased suffering injuries as a result of such a fall if and only if they believed that to be a true incident. Therefore, Apisai's evidence that the appellant had told him of the deceased having had such a fall at the reconstruction of the crime scene does not mean what the appellant told Apisai was true. It is only the assessors and the trial judge who could decide that matter and all of them had decided that it was not a credible story.

[36] The appellant argues under sub-ground 3(d) that the evidence 'pointed' to a conviction on the lesser charge of manslaughter and the injuries would not lead to conclusive proof that the appellant had entertained an intention to cause death when he assaulted the deceased. Both the assessors and the trial judge had thought that the appellant had indeed entertained an intention to cause death or was reckless as to causing the death of the deceased, in that he was aware of the substantial risk that the

death will occur due to his conduct and in the given circumstances it was not justifiable for him to take that risk.

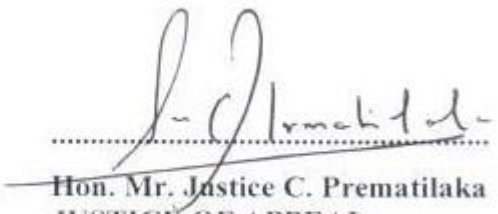
[37] On what basis the appellate court could interfere with the decision of the assessor and that of the judge in a situation like this has not been demonstrated by the appellant. In **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 the Court of Appeal said

> *'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

[38] Therefore, there is no reasonable prospect of success in the appellant's appeal against conviction.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL