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

CRIMINAL APPEAL NO.AAU 137 of 2018
[High Court at Suva Case No. HAC 47 of 2010]

BETWEEN : **NIKASIO TUPOU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Ms. J. Fatiaki for the Respondent**

Date of Hearing : **23 November 2021**

Date of Ruling : **24 November 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva on a single count of murder contrary to section 237 of the Crimes Act, 2009 committed on 04 February 2010 at Samabula, in the Central Division. The information read as follows:

'Statement of Offence

MURDER*: Contrary to Section 237 of the Crimes Act 2009.*

Particulars of Offence

NIKASIO TUPOU *on the 4th day of February 2010, at Samabula, in the Central Division, murdered Esita Kele.*

[2] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of murder. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 23 November 2018 to the mandatory life imprisonment with a minimum serving period of 12 years.

[3] The appellant had in person filed a timely appeal against conviction and sentence (12 December 2018). The Legal Aid Commission had filed amended grounds only against conviction and submissions on 10 June 2021. The State had tendered its written submissions on 26 October 2021.

[4] The trial judge had set out the agreed facts in the judgment as follows:

> ***'[22]*** *In this case several matters have been agreed by the prosecution and the defence. Therefore, those facts are considered proved beyond reasonable doubt. Accordingly, based on the said agreed facts, the identity of the accused, the date of offence and place of offence are not disputed. The conduct of the accused is also not disputed as it is stated in the Agreed Facts that the accused stabbed the deceased's stomach twice with a kitchen knife and the said knife penetrated her stomach. It is also agreed that after the deceased fled from the accused, the accused whilst in pursuit of her grabbed his cane knife and struck her with it a number of times. The deceased had then fled outside of the house and collapsed in the compound, a few meters away from the house. The fact that the said conduct of the accused caused the death of the deceased is also not disputed. This is further established by way of the medical evidence that has been presented in Court.'*

[5] The trial judge had described the evidence led against the appellant as follows:

> ***'[11]*** *The prosecution, in support of their case, led the evidence of Assistant Superintendent of Police (ASP), Eroni Ratavola, Inspector Sakeasi Busele, a Medical Officer, Dr. James J.V. Kalougivaki and witness Elia Manoa. The prosecution also tendered the following production items as prosecution exhibits:*
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> *Prosecution Exhibit **PE1A** - The caution interview statement of the accused (in the Itaukei language).*
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> *Prosecution Exhibit **PE1B** - The English translation of the caution interview statement of the accused.*

*Prosecution Exhibit **PE2** - Kitchen Knife.*

*Prosecution Exhibit **PE3** - Cane Knife.*

*Prosecution Exhibit **PE4** - Post Mortem Examination Report of the deceased.'*

[6] The prosecution had primarily relied on the admissions made by the appellant in his cautioned statement recorded by ASP Eroni Ratavola on 5 & 6 February 2010 at Samabula Police Station. Inspector Sakeasi Busele had acted as the witnessing officer during the recording of the caution interview statement.

[7] The appellant had given evidence in support of his case and called as his witness Livai Naqera Junior. The appellant's position had been that that the caution interview statement was fabricated and further that it was not read back to him. The police had given the statement for him to sign and he had done so but he was not aware of what was written in the said statement. He had also taken up the defence of provocation in his evidence stating that the encounter with the deceased and an unknown man led to the killing of the former.

[8] 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 in a timely appeal for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[9] The grounds of appeal urged on behalf of the appellant are as follows:

> *'**Grounds of Appeal***
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> ***Ground 1***
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> *THAT the Learned Trial Judge erred in fact and in law when he did not properly and independently assess the evidence of the State alluding to the fact that the appellant was never read back the record of his caution interview as such qualified the disallowance of the usage of the record of interview under the general unfairness limb.*
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> ***Ground 2***
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> *THAT the Learned Trial Judge erred in fact and in law when he did not independently assess the evidence of the defence and did not give any consideration nor any weight to the defence case and in failing to do so prejudiced the appellant and caused a grave miscarriage of justice.'*

01st ground of appeal

[10] The main contention of the appellant is that the cautioned interview was not read over to him at the end of the interview which is a breach of fairness of procedure particularly in the light of the allegation of fabrication and therefore the cautioned interview should have been disregarded. It is further contended that the trial judge had not analysed this aspect fully and independently.

[11] According to the summing-up, ASP Eroni Ratavola had testified that the caution interview statement was not read back to the accused at the end of recording it. He had said that the appellant was asked whether he wished to read the record of interview that he had given but the appellant had said that it was not necessary to read the statement back to him. Inspector Sakeasi Busele had stated that when the appellant answered the questions, they were written and read back to him at the same time and this was done in respect of each and every question and answer. The interviewing officer, the witnessing officer and the appellant had signed on the caution interview statement.

[12] Thus, there does not appear to be any contradiction between ASP Eroni Ratavola and Inspector Sakeasi Busele. ASP Eroni Ratavola had said that it was not read over to

him at the conclusion as the appellant did not wish to do so while Inspector Sakeasi Busele had stated that every question and answer was recorded and read over to him then and there.

[13] The appellant had not stated what exactly the police had fabricated. Given the agreed facts, it is not clear what answers the police had to fabricate in the cautioned interview. The question is whether the appellant challenged the entirety of his confessional statement only because he had failed to take up the narrative relating to the defence of provocation in it which he relied on at the trial.

[14] The appellant does not appear to have requested a *voir dire* inquiry probably because he was not contesting it on the basis of voluntariness. His main challenge was based on his allegation that it was not read over to him at the end. The trial judge had dealt with his complaint as follows in the judgment:

> *'**[16]** The Defence states that the caution interview statement was fabricated. Their position is that the caution interview statement was not read back to the accused. The Police had given the statement for the accused to sign and he had done so. He was not aware of what was written in the said statement.*
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> ***[17]** The prosecution says that the caution interview statement was not obtained under pressure or inducement and that the statement was not fabricated. The two police officers testified that there were no threats or force or any form of intimidation of any kind by anyone on the accused and the statement was freely and voluntarily given by him and that they correctly recorded what the accused said.*
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> ***[18]** Having carefully considered the aforesaid evidence, I am of the opinion that the caution interview statement of the accused was not fabricated by the police. In fact, there was absolutely no reason for the police to fabricate the said statement. Thus I am of the view that the caution interview statement was made voluntarily by the accused and that there was no general grounds of unfairness in the recording of the said statement. I am also of the view that the contents of the statement was true and accurate and that Court can rely and accept the statement as a true version of the incident which took place.'*

[15] Earlier the trial judge had addressed the assessors on the appellant's allegation of fabrication as follows:

> *'**[64]** In this case the prosecution is primarily relying on the admissions made by the accused in his caution interview statement.*
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> ***[65]*** *Any admission made by an accused in his caution statement is admissible and sufficient evidence to prove his guilt to a charge. However, there are some applicable principles of law in relation to this evidence. The prosecution must prove that the caution interview statement was made by the accused voluntarily and fairly. The prosecution must establish these facts beyond reasonable doubt. The issue of voluntariness and fairness is important in deciding the truthfulness of the statement and what weight and probative value should be attached to the said statement made by the accused.*
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> ***[66]*** *Whether the accused gave the statement voluntarily and fairly and whether the statement set out a set of events in relation to the offence, on which you can rely and accept, is a matter for you. Of course if you believe that the interview is false, that it was made up or fabricated by the police, you may think that you cannot put any weight on it. However, if you believe that the accused gave his caution interview statement without force or fabrication, you may think that they set out a version of the evidence which will assist you in deciding on the guilt or otherwise of the accused. However, the question of whether the said admissions are true and what weight you can put on the admissions made in the said statements is a matter of fact for you to decide.*
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> ***[67]*** *The Defence states that the caution interview statement was fabricated. The prosecution says that the caution interview statement was not obtained under pressure or inducement and that the statement was not fabricated. You have heard from the police officers that there were no threats or force or any form of intimidation of any kind by anyone on the accused and the statement was freely and voluntarily given and that they correctly recorded what the accused said. I reiterate that the truthfulness of the statement and what weight you put on the said statement made to the police is entirely a matter for you.'*

[16] A trial judge is not expected to repeat everything he had stated in the summing-up in his judgment as the summing-up is part and parcel of the judgment [vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]. The trial judge had directed himself according to the summing-up.

[17] Therefore, in the circumstances I do not see a reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[18] The gist of the second ground of appeal is that the trial judge had not adequately considered the defence evidence on provocation.

[19] This complaint appears to be devoid of any merit considering what the trial judge had stated in the judgment.

> *'**[8]** In this case the accused is taking up the defence of provocation. The basis of taking up the defence of provocation is one of sexual infidelity on the part of the deceased.*
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> ***[9]** Therefore, I explained to the Assessors the salient provisions of Section 242 of the Crimes Act. I directed the Assessors that in order for them to consider the defence of provocation they must be satisfied, from the evidence in the case, that all three elements of provocation as set out in Section 242 of the Crimes Act have been established. The three elements are:*
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> *That the accused had caused the death of the person who gave him the provocation (the deceased):*
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> *(i) in the heat of passion,*
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> *(ii) caused by sudden provocation as defined in sub-section (2) of Section 242 and*
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> *(iii) before there was time for his passion to cool.*
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> ***[10]** I further directed the Assessors that the prosecution always bears the legal burden of proving every element of the offence of Murder. However, an accused who wishes to deny criminal responsibility for Murder by relying on provocation, bears what is known as an evidential burden in relation to that matter. This is stated in Section 59 of the Crimes Act. I then went on to explain the salient provisions of Section 59 of the Crimes Act.'*

[20] The trial judge's directions on the issue of provocation are found at several paragraphs in the summing-up.

> *'**[74]** The main issue for your consideration is whether the accused's version of the events is to be believed or not and whether the accused is entitled to take up the defence of provocation. As I have informed you before, in order for you to consider the defence of provocation you must be satisfied from the evidence in the case that all three elements of provocation as set out in Section 242 of the Crimes Act have been established. The three elements are:……..*
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> ***[75]** If you believe the accused's version of events, the accused can only be found guilty of Manslaughter and not Murder.*
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> ***[76]** You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge of Murder, since the prosecution has failed to prove its case, but only guilty of the lesser offence of Manslaughter. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Murder, beyond any reasonable doubt.*
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> ***[77]** It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence and the evidence of Livai Naqera Junior also for its consistency and also the probability of their version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter.*
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> ***[78]** If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter.*
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> ***[79]** However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved in relation to the offence of Murder. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.'*

[21] Therefore, the trial judge had fairly and squarely placed the appellant's defence of provocation before the assessors. He also had reminded the assessors of the evidence of Livai Naqera Junior at paragraph 62 of the summing-up whose evidence was obviously led to support the appellant's version of provocation.

[22] Finally, the trial judge had directed the assessors as to how they should approach the defence evidence *vis-à-vis* provocation.

> ***'[80]*** *In summary and before I conclude my summing up let me repeat some important points in following form:*
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> *i. If you believe the evidence of the defence, then you must find the accused not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter;*
> *ii. If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter;*
> *iii. If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution to establish the charge of Murder;*
> *iv. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter;*
> *v. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Murder has been established beyond reasonable doubt. If so you must find the accused guilty of Murder. If not you must find the accused not guilty of Murder, but only guilty of the lesser offence of Manslaughter.'*

[23] In the end neither the assessors nor the trial judge had accepted the appellant's version of provocation, most probably because there was no credible narrative in evidence of an act of provocation, loss of self-control and proportionality of retaliation [see **Masicola v State** [2021] FJCA 176; AAU073.2015 (29 April 2021)].

[24] Therefore, in the circumstances I do not see a reasonable prospect of success in this ground of appeal.

[25] In my view, as a whole too this appeal has no reasonable prospect of success [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)] against conviction.

Order

1. Leave to appeal against conviction is refused.

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