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

CRIMINAL APPEAL NO.AAU 163 of 2019
[In the High Court at Suva Case No. HAC 310 of 2017]

BETWEEN : **STATE**

Appellant

AND : **EPELI TALAKUBU**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. E. Samisoni for the Appellant**
: **Mr. J. Rabuku for the Respondent**

Date of Hearing : **05 August 2021**

Date of Ruling : **13 August 2021**

RULING

[1] The respondent had been indicted in the High Court at Suva on one count of murder contrary to section 237 of the Crimes Act, 2009 and another count of criminal intimidation contrary to section 375 (1) (a) (i) and (iv) of the Crimes Act, 2009 committed on 08 October 2017 at Nasinu in the Central Division.

[2] The information read as follows:

Count 1

Statement of Offence

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

Particulars of Offence

> ***EPELI TALAKUBU*** *on the 8th of October 2017, at Nasinu in the Central Division, murdered MASI KALARO.*

Count 2

Statement of Offence

> ***CRIMINAL INTIMIDATION****: Contrary to section 375 (1) (a) (i) and (iv) of the Crimes Act 2009.*

Particulars of Offence

> ***EPELI TALAKUBU*** *on the 8th of October 2017, at Nasinu in the Central Division, without lawful excuse, threatened SAMUELA TABUAVOU with a chopper with intent to cause alarm to the said SAMUELA TABUAVOU".*

[3] After the summing-up, the assessors had expressed a unanimous opinion that the respondent was not guilty of murder but guilty of manslaughter and criminal intimidation. The learned High Court judge had agreed with the assessors' opinion, convicted him for manslaughter and criminal intimidation and sentenced him on 31 October 2019 to 03 years of imprisonment (one year to be served forthwith and remaining two years suspended for 03 years after the appellant's release upon serving one year) and 06 months of imprisonment on criminal intimidation: both sentences to run concurrently.

[4] The appellant had lodged a timely appeal against conviction and sentence (29 November 2019) and filed written submissions on 05 October 2020. The respondent too had filed written submission on 05 January 2021. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or via Skype.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence 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) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry 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)].

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011) and they are whether the sentencing judge had:

(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.

[7] The appellant's grounds of appeal against conviction and sentence are as follows:

*'**Conviction***

a) THAT the Learned Trial Judge erred in law and in fact when he convicted the Respondent for Manslaughter instead of Murder when the evidence proved that the conduct of the Respondent was more than to cause serious harm.

b) THAT the Learned Trial Judge failed to give reasons for convicting the Respondent on the lesser charge of Manslaughter.

Sentence

c) THAT the Learned Trial Judge erred in fact and in law when he imposed a sentence which was manifestly lenient.

[8] The Trial Judge had summarised the appellant's case in the summing-up as follows:

> 21. *The prosecution's case was as follows. On 8 October 2017, the deceased, Mr. Masi Kalaro (MK) was 41 years old, married with 3 children. The accused, Mr. Epeli Talakubu (DW1) was approximately 47 years old, previously married with 3 children. On 8 October 2017, DW1 was in a de facto relationship with MK's younger sister, Ms. Salasieli Molidegei (DW2). They had been together for the previous 8 years, and had a young son, Sevuloni, who was approximately 1 year 3 months at the time. MK's family and DW1's family live in Batiniwai Settlement, Caubati and are neighbors. They are also brothers-in-law and are very close to each other.*
>
> 22. *According to the prosecution, on 8 October 2017 (Sunday) before lunch, Epeli, his wife DW2, MK, Losalini, Alumeci, Kaminieli (PW2), Virisila and Samuela (PW1) were drinking liquor in Epeli's house. They started off drinking Woodstock liquor and then drank three cartons of long neck Fiji Gold beer. They were sitting on a rug in Epeli's house on the floor, and were drinking using the "taki" style. According to the prosecution, the problem appeared to have started when Epeli's young son, Sevuloni, was brought into the party by his mother, DW2. MK objected to the same, because the child might be exposed to cigarette and liquor smells. According to the prosecution, Epeli did not object to his son being present.*
>
> 23. *According to the prosecution, the male members of the drinking party were drunk. It was said that MK and Epeli began to head-butt each other. According to the prosecution, MK and Epeli wanted to fight each other. However, Samuela (PW1) stopped the two by separating them. MK went out of the house and later returned. When he returned, he went and got hold of a bucket which contained 6 or 7 full long neck bottles of Fiji Gold beer. <u>According to the prosecution, Epeli tried to stop him, and took a bottle out of the bucket. According to the prosecution, he allegedly smashed the bottle on a table, and with the broken bottle allegedly stabbed MK twice on the left chest and the left neck.</u> The stab to the chest allegedly severed an artery, leading to excessive blood loss, resulting in MK's death at 5.35 pm on the same day. According to the prosecution, the accused allegedly intended to cause MK's death, or was reckless in causing the same. After the above, according to the prosecution, the accused allegedly threatened to chop PW1 with a chopper, without any lawful excuse.*

[9] The Trial Judge had summarised the defence case in the summing-up as follows:

> 26. *The accused's case was as follows. The accused (DW1) in his sworn evidence, admitted he was at the crime scene, his house, at the material time. He admitted, he was drinking liquor with his wife (DW2), the*

deceased (MK), MK's wife, Samuela (PW1), PW1's wife, Kaminieli (PW2) and PW2's wife, at the material time. DW1 said, it was a family drinking party. They started drinking after 11 am on 8 October 2017, a Sunday. DW1 said, the family enjoyed themselves while drinking. They were drinking using the "taki" style. They started off drinking Woodstock liquor and went on to drinking Fiji Gold. DW1 appeared to say that everyone was drunk as the party went on. DW1 said, MK went out the house, and brought in a neighbor, Aseri (DW3) to join them. DW1 said, MK went and brought his child to the party, and gave him to his wife (DW2).

27. *According to DW1, the problem started when Samuela (PW1) kissed his baby, Sevuloni, and told him that Sevuloni would not be registered in DW1's "vola ni kawa bula", but in DW2's family's "vola ni kawa bula". DW1 appeared to say he was not happy with this and questioned PW1. He said, PW1 came and held his collar. DW1 said, at that particular moment, MK came and tried to take the bucket containing 6 long neck full bottles of Fiji Gold. DW1 appeared to say, he disagreed with MK's action, as he was the barman during the drinking party. DW1 said, he tried to stop MK take the bucket of beer bottles. DW1 said, he tried to grab the bucket, but instead grabbed a beer bottle from inside the bucket.*

28. *DW1 said, the beer bottle broke. DW1 said, at the same time, MK was bending down to pick up the bucket full of beer bottle. DW1 said, PW1 was still holding his collar. DW1 said, he suddenly raised both his hands up, apparently to stop MK taking the bucket of beer bottles. DW1 said, he didn't realize he was still holding the broken beer bottle. DW1 said, everything happened so fast, and <u>he didn't realize that the broken bottle he was holding had struck MK in the left chest</u>. <u>DW1 denied stabbing MK in the left neck.</u> DW1 denied threatening PW1 with a chopper. He denied threatening to kill PW1 with a chopper, at the material time. DW1 said, he did not intend to stab MK with the broken beer bottle, nor was he reckless in stabbing MK with the same. <u>DW1 said, the stabbing of MK, at the material time, was nothing but an accident.</u>*

<u>01st ground of appeal</u>

[10] The appellant submits that the Trial Judge had mostly accepted the defence version on the main disputed issue namely whether the attack on the deceased was accidental as claimed by the respondent or deliberate as presented by the appellant. According to the appellant, the Trial Judge had seemingly discounted the respondent having broken the bottle and stabbed the deceased twice. The appellant also submits that the respondent's version of 'accident' could not be credible in the light of the evidence of

PW1 and PW2 who both spoke to the respondent stabbing the deceased twice on the left neck and left chest which evidence was supported by the uncontested testimony of the pathologist who had confirmed 02 stabs caused with significant force suggesting that the blows were deliberate rather than accidental.

[11] However, it appears from the judgment that the Trial Judge while accepting the assessors' opinion that the respondent was guilty of 'manslaughter' and not murder, had believed the evidence of PW1 and PW2 that the respondent had indeed stabbed the deceased:

> 6. *The prosecution's case was obviously built on the evidence of Mr. Samuela Tabuavou (PW1), Mr. Kaminieli Matayabone (PW2) and Doctor James Kalougivaki's (PW5) evidence. <u>I accept the evidence of Samuela and Kaminieli that the accused stabbed the deceased with a broken beer bottle on the left chest, at the material time.</u> I accept their evidence that they saw blood coming from the deceased's chest after the stabbing. <u>I find that on the above issue, PW1 and PW2's evidence were credible, and I accept the same</u>. This evidence satisfied the first element of murder and manslaughter, as described in paragraphs 10 (i) and 17(i) of my summing up.*
>
> 7. *On the second element of murder and manslaughter, as described in paragraphs 10 (ii) and 17 (ii) of my summing up, I accept the evidence of Doctor James Kalougivaki (PW5). He said, the deceased died as a result of the injury to his left chest. He said, the deceased died as a result of excessive blood loss due to the complete cut to the major artery from the heart that supplied blood to the left side of the chest and upper limp, due to sharp force or trauma. PW5 said, it was highly likely that the use of a broken beer bottle may amount to "sharp force injury or trauma". Given PW5's above evidence, I find and accept that when the accused stabbed the deceased on the left chest, he thereby caused his death, as a result of the deceased's abovementioned injury.*

[12] Nevertheless, the trial had agreed with the assessors' opinion on manslaughter based on what he thought was their conclusion on the fault element namely that the respondent had only intended to cause serious harm or was reckless in causing serious harm to the deceased as opposed to him having intended to cause death or been reckless as to causing the death of the deceased:

> 8. *<u>On the third element of murder, as described in paragraph 10 (iii) (a) or (b) of my summing up, I am guided by the three assessors' opinion. They</u>*

appear to find that the accused did not intend to kill nor was he reckless in causing the deceased's death, when he stabbed him with a broken beer bottle. ***The assessors appeared to have found that the accused, at the material time, when he stabbed the deceased with the broken beer bottle, intended to cause him serious harm, or was reckless in causing him serious harm, the third element of the offence of manslaughter. I accept the three assessors' opinion on the above issue,*** *and in my view, it was credible evidence, given the totality of the evidence.*

[13] The Trial Judge had fully placed all the material evidence before the assessors including medical evidence and addressed the assessors on the fault element of murder as follows:

> *39. If the prosecution had made you sure that Epeli's alleged stabbing of Masi's chest caused his death, then you must consider the third element of murder. Please, take on board the directions I gave you in paragraphs 13, 14 and 15 hereof. The first question you have to ask yourselves become: Did Epeli intend to kill Masi when he allegedly stabbed him in the chest with a broken beer bottle? On this issue, you will have to examine Epeli's conduct at the time, that is, what he said and did, and the surrounding circumstances, to make reasonable inferences on whether or not he intended to kill Masi, at the material time. You have heard the details of Samuela (PW1), Kaminieli (PW2) and Doctor Kalougivaki's evidence of what allegedly occurred, Why the dispute over the child? Why the argument over the bucket of beer? Why the breaking of the beer bottle? Why didn't Epeli drop the broken beer bottle immediately? If you accept PW1's evidence, why smash the beer bottle on the table? If you accept PW1 and PW2's evidence, why stab Masi in the left chest? The answers to the above questions will tell you whether or not Epeli intended to kill Masi, at the material time. If you find that he did, the prosecution would have proven murder against the accused. If otherwise, you will have to find the accused not guilty as charged for murder. It is a matter entirely for you.*
>
> *40. If you are sure Epeli did not intend to kill Masi, when he allegedly stabbed him in the left chest, you will have to consider whether or not, Epeli was reckless when he allegedly stabbed Masi in the left chest. On this issue, take on board my directions in paragraph 15 hereof. You will have to ask yourselves the following questions. Was Epeli aware of a substantial risk that Masi would die if he allegedly stabbed him in the left chest with a broken beer bottle? If he was aware of the substantial risk, did he nevertheless take the risk? If you accept PW1 and PW2's evidence, he allegedly took the risk. Was it unjustifiable to take the risk? Your answers to the above question will decide whether or not he was reckless when he allegedly stabbed Masi with a broken beer bottle. If you find he was reckless, the third element of murder would have been satisfied. If*

otherwise, the third element of murder was not satisfied. How you decide the above is a matter entirely for you.

41. *If you find the prosecution had satisfied all the 3 elements of murder as described above, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.*

[14] The Trial Judge had earlier addressed the assessors on manslaughter as follows:

17. *'If you find the accused not guilty of murder, you may in the alternative, consider the lesser offence of "manslaughter". A person, as a matter of law, may be convicted of the lesser offence of "manslaughter", although he was not formally charged with the same. The first and second element of "manslaughter" are similar to that of "murder", as described in paragraphs 10 (i) and 10 (ii) hereof. The only difference between the two offences are their fault elements. In "manslaughter", the prosecution must prove beyond reasonable doubt, the following elements:*

(i) that the accused did a willful act; and
(ii) that willful act caused the death of the deceased; and
(iii) at the time of the willful act, the accused either;
(iv) Intends the willful act to cause the deceased serious harm; or
(v) Is reckless as to causing serious harm to the deceased.

[15] Therefore, given proper directions on facts and law the assessors had found the respondent only guilty of manslaughter. The Trial Judge agreed with them *inter alia* having directed him according to the summing-up.

[16] The question is whether it was not open to the assessors and the Trial Judge to have found the respondent guilty of manslaughter. In other words, whether the verdict of manslaughter was unreasonable or cannot be supported having regard to the evidence.

[17] Upon examining the summing-up and the judgment, I am of the view that upon the whole of the evidence it was open to the assessors and the Trial Judge to be satisfied and have found the respondent guilty of manslaughter beyond reasonable doubt (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The**

Queen (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992). I cannot say that the assessors and the Trial Judge 'must', as opposed to 'might', have not entertained a reasonable doubt about the respondent's guilt on murder though arguably a verdict of murder too might have been possible had the assessors and the Trial Judge taken that view.

[18] While it was still open to the assessors and the Trial Judge to have convicted the respondent of murder, I cannot say from the evidence that it was inevitable, in the sense that it was not open to the assessors or the judge not to have found him guilty of manslaughter instead of murder. Therefore, I cannot conclude that there has been a substantial miscarriage of justice either [see **Baini v R** (2013) 42 VR 608; [2013] VSCA 157 and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021)] by the verdict of manslaughter.

[19] Accordingly, I conclude that there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[20] The appellant argues that had failed to give reasons for convicting the respondent on the lesser charge of manslaughter.

[21] The Court of Appeal in **Fraser v State** [2021]; AAU 128.2014 (5 May 2021) having considered several past decisions, expressed the Trial Judge's function when he agrees with the assessors as follows:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the*

*latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]*

[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

*[26] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016.'*

[22] I do not think that in the light of the above propositions of law read with the summing-up and the judgment, the Trial Judge's decision to accept the assessors' opinion could be found fault with.

[23] Therefore, in my view there is no reasonable prospect of success in this ground of appeal.

03rd ground of appeal (sentence)

[24] The appellant argues that the sentence imposed by the Trial Judge is manifestly lenient and not reflective of the seriousness of the offending. The appellant however

admits that the Trial Judge had correctly considered the tariff for manslaughter as between suspended sentence and 12 years of imprisonment.

[25] The appellant submits that the offending warranted a sentence in the middle range, if not the higher range of the sentencing tariff given the extreme violence and minimal provocation. In fact, the Trial Judge had considered extreme violence used by the responded as one of the aggravating factors and added 03 years to the starting point of 05 years. The Trial Judge had deducted 03 years for traditional reconciliation. Thus, it is clear that the Trial Judge had given a lot of and perhaps undue weight to the traditional apology said to have been offered by the respondent and accepted by the deceased's family in the *'i-taukei cultural context'*. After affording discounts for the period of remand and previous good character the final sentence had been reduced to 03 years out of which also 02 years were suspended for 03 years upon completing the 01 year imprisonment.

[26] In **Hill v State** [2018] FJCA 123; AAU109.2015 (10 August 2018) the Court of Appeal remarked that tariff range for manslaughter is very wide and provides little guidance to a sentencing judge:

> *'[22] It has to be accepted that the tariff range for Manslaughter is one of the widest in the criminal justice system. The reason for the width of the tariff is that cases of Manslaughter vary widely. Both Counsel agree that the tariff range is broad and provides little guidance to a sentencing judge.*
>
> *[23] Types of Manslaughter can encompass involuntary manslaughter, by an unlawful act which requires proof that the accused caused the death of another by an unlawful act (unlawful act manslaughter) or Manslaughter by gross negligence (criminal negligent manslaughter). In the former category there must be proof of an unlawful act carrying with it a risk of causing death to others. In the latter category there must be proof that the accused did an act, albeit lawful, in a way which was grossly negligent which caused the death of the deceased, and which involved a high degree of negligence requiring criminal sanction [**State v Toka** [2003] FJ Law Rp. 45; [2003] FLR 345 (19 September 2003)]. The motor manslaughter cases generally fall into the latter category.'*

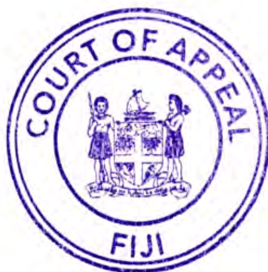
[27] The appellant submits that this case falls into the category of cases where death is a result of an unlawful act as opposed to a negligent act and therefore higher sentence in the upper part of the tariff range is called for. The appellant also suggest that this is a fit case for a guideline judgment on sentencing for manslaughter.

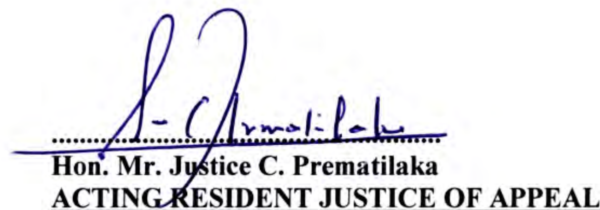
[28] I tend to agree with most of the appellant's submissions. Apart from the sentencing guidelines which could be given if the appellant takes procedural steps to seek a guideline judgment as per the provisions of the Sentencing and Penalties Act, I think the question as to what role traditional apologies or any other cultural practices may play and weight that should be attached to such considerations in the sentencing process is also a matter that is worth being considered by the full court or by the Supreme Court as criminal law deals with matters between the state and the individual and not between two individuals in the society. Interest of justice in criminal law includes the interest of the public at large and not only between the parties [see **Togava v State (Majority Judgment) [1990] FJCA 6; AAU0006u.90s (10 October 1990)]**.

[29] In the circumstances, I am inclined to grant leave to appeal against sentence.

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.





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