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

**CRIMINAL APPEAL NO.AAU 0021 of 2020**
**[In the High Court at Suva Case No. HAC 051 of 2018]**

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| **BETWEEN** | : | **MERVIN RAY KETENILAGI** |
| | | ***Appellant*** |
| **AND** | : | **THE STATE** |
| | | ***Respondent*** |

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| **Coram** | : | **Prematilaka, ARJA** |
| **Counsel** | : | **Mr. M. Yunus for the Appellant** |
| | : | **Mr. L. J. Burney for the Respondent** |
| **Date of Hearing** | : | **10 December 2021** |
| **Date of Ruling** | : | **13 December 2021** |

# RULING

[1] The appellants had been indicted in the High Court at Suva on one count of manslaughter contrary to Section 239 (a) & (b) & (c) (ii) of the Crimes Act, 2009 committed on 25 January 2018 at Suva in the Central Division.

[2] The information read as follows:

***'COUNT 1***

***Statement of Offence***

***MANSLAUGHTER:*** *Contrary to Section 239 (a) & (b) & (c) (ii) of the Crimes Act 2009.*

***Particulars of Offence***

> ***MARVIN RAY KETENILAGI****, on 25th January 2018 at Suva in the Central Division, assaulted* ***SHRI CHAND*** *which caused the death of the said* ***SHRI CHAND*** *and at the time of the assault was reckless as to the risk that his conduct would cause serious harm to* ***SHRI CHAND.****'*

[3] After the summing-up, the majority of the assessors had opined that the appellant was guilty of manslaughter while one assessor's opinion was that he was guilty only of assault occasioning actual bodily harm. The learned High Court judge had agreed with the majority of assessors, convicted the appellant and sentenced him on 26 February 2020 to 06 years of imprisonment with a non-parole period of 04 years.

[4] The appellants' appeal against conviction and sentence in person had been timely. Subsequently, M Y Law had filed amended grounds of appeal and written submissions on behalf of the appellant along with an application for bail pending appeal (30 March 21 and 25 August 2021). The state too had tendered written submissions on 17 November 2021.

[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. 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) 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)].

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November

2013 [2013] FJSC 14; **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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows:

> *(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 grounds of appeal urged on behalf of the appellant are as follows:

> ***'Conviction***
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> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact he failed to properly and adequately direct the assessors and also bear in mind that there were material contradiction or inconsistencies in the version of evidence of prosecution witnesses.*
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> ***Ground 2***
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> *THAT the Learned Trial Judge erred in law and in fact when he concluded in his judgment that 'it was the conduct of the accused that hastened or accelerated the death of the victim and that it was the conduct of the accused that hastened or accelerated the death of the victim and that the accused realized the possibility of serious harm to the victim when he assaulted him' despite having no evidence that the victim had symptoms of heart attack soon after the alleged assault by the appellant.*
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> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to comprehend and failed to direct the assessors that the pathologist evidence in court contravenes her finding during the autopsy examination thus this discrepancies in her evidence tarnishes the credibility of the witnesses.*

***Ground 4***

*THAT the Learned Trial Judge erred in law and in fact when he failed to judiciously and adequately investigate the cause of death, since the pathologist opined in her evidence that the two punches by the appellant were non-fatal and that the entirety of the evidence does not reconcile with the probable cause of death.*

***Ground 5***

*THAT the Learned Trial Judge erred in law and in fact when he failed to direct the assessors and he himself failed to comprehend that the evidence of PC Rokouso is devoid of belief and unreasonable when he said that he was seated at the back seat of the car and maneuvered it towards Renwick road, then to Ellery Street at the empty Carpenters Car Park.*

***Ground 6***

*THAT the Learned Trial Judge erred in law and in fact when he failed to direct the assessors and he himself failed to comprehend that there is contradicting evidence in regards to the actual time of incident.*

***Ground 7***

*THAT the Learned Trial Judge erred in law and in fact when he directed the assessors that 'you heard that the accused was heavily intoxicated at the time of the alleged act', despite no prima facie evidence of intoxication by way of breath analysis report or medical evidence to substantiate his directions to the assessors.*

***Sentence***

***Ground 8***

*THAT the Sentence is harsh and excessive taking all circumstances of the matter.*

[8] The trial judge had summarized the prosecution evidence as follows in the sentencing order.

> *'[2] Shri Chand was a 56-year old male with a pre-existing heart condition. His arteries were clogged and he had previously suffered from a heart attack. On 25 January 2018 at around 3.30am, the offender saw Mr Chand at Regal Lane – a no through road between the Suva Handicraft Centre and the Westpac building in the city. Mr Chand was in a company of a male child inside a taxi when the offender got into an argument with him for bringing a child out at that time of the night and at that particular location. Mr Chand was a taxi driver and separated*

*from his spouse at the time. He was looking after his friend's child when the friend went to work.*

*[3] The offender was 39 years old at the time of the offence. He is now 41 years of age. He was a medical doctor until he was terminated from his employment after he was charged in this case. He was married with three children but is separated from his spouse. His teenage children are living with their mother and schooling in Labasa.*

*[4] On the night the incident occurred the offender was on his way to the bus stand to return home after clubbing with his friends. He drank substantial alcohol that night but in his evidence he said that he was capable of making decisions despite being drunk.*

*[5] The attack on the victim was unprovoked. The offender claimed that the victim became abusive and aggressive when he questioned him regarding the presence of a child with him at that time of the night and at that particular location where the incident occurred. This claim was contrary to the evidence of the witnesses who said that it was the offender who was abusive and aggressive, not the victim. It seems the offender relentlessly pursued the victim because he was not willing to accept the presence of a child with an adult male at that time of the night. He did not want to accept that the victim was the guardian of the child. The confrontation ended into a violent attack on the victim.*

*[6] It is clear that both the victim and the child was traumatized by the actions of the offender. Both were distressed to a point that they could not speak. The victim was chased and punched in the chest and jaw. He tried to deflect the attack by running away but the offender pursued him until some iTaukei youths came to his rescue and chased the offender away. By the time the attack stopped the victim was restless, shaken and weak. He lost consciousness shortly after the attack while driving his vehicle to the police station with a police officer and the child inside the vehicle. He was taken to the hospital in a police vehicle and administered a CPR at the emergency ward. The CPR was called off at around 4.50am by the supervising doctor as there was no sign of life.*

*[7] Post mortem examination revealed multiple traumatic injuries to the victim's jaw, chest, knees and liver. These injuries significantly contributed to the victim's primary cause of death, which was a severe coronary artery disease. The medical evidence was that the multiple traumatic injuries led to the victim's heart not to function properly leading to his death. The offender was convicted for hastening or accelerating the victim's death by using physical violence.'*

[9] The defence position had been set out by the trial judge in the summing-up as follows:

> *'[31] The Accused in his evidence admits being involved in an argument with the deceased on the night in question. He said he was drunk but capable of making decisions. He said that he got into an argument out of concern for the safety of the young child who had accompanied the deceased at that time of the night and at that particular location. He said that the deceased was the aggressor and swore at his mother. He said he punched the deceased on the jaw and may have shoved him and ran after him when he falsely accused him of theft. He said he did not know about the deceased's medical condition.*
>
> *[32] The defence case is that it was not the assault of the Accused that significantly caused the death of Mr Chand. The defence says that the Accused is not guilty of manslaughter. The defence says that if the Accused is guilty of anything he is guilty of the alternative offence of assault occasioning actual bodily harm. You may consider an alternative offence even if the Accused is not charged with the offence in the Information.'*

***01st ground of appeal***

[10] The appellant submits that the learned trial judge failed to direct the assessors and himself on the material contradiction or inconsistencies in the versions of prosecution witnesses.

[11] The appellant points out the differences in the evidence of PW1 to PW5, all of whom had witnessed the incident having arrived there at different times possibly from different directions. Thus, naturally all of them had not observed the entirety of the episode that had unfolded from the beginning to the end but spoken to the phases of the incident of what each one had seen.

[12] What emerges collectively from their evidence is that the appellant had been seen shouting and accusing the deceased who looked frightened and shaken. The appellant had been seen throwing two punches; one on the chest and another on the jaw of the deceased. The appellant had chased the deceased around his taxi and the latter had been seen tired and unstable falling to the ground twice during the chase.

[13] Instead of showing inconsistency, the slightly different versions of the appellant's attack on the deceased in the evidence of those eye-witnesses demonstrate that they were speaking the truth and stated the incident as they saw. They were disinterested witnesses. In any event, the alleged contradictions and inconsistences do not really go to the root of the prosecution case as to discredit the evidence of the eye-witnesses [see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280, **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016)].

[14] There is no reasonable prospect of success in this ground of appeal.

***02nd, 03rd and 04th grounds of appeal***

[15] The appellant's counsel indicated that these are the most important grounds of appeal. All of them rest on medical evidence as to the cause of death and causation.

[16] The appellant challenges the following statement in the judgment.

> *'[2] I am satisfied beyond reasonable doubt that the Accused voluntarily engaged in acts of physical violence on the victim who was suffering from a heart disease and that it was the conduct of the Accused that hastened or accelerated the death of the victim and that the Accused realized the possibility of serious harm to the victim when he assaulted him.*

[17] The appellate counsel's submission on this point of appeal is partly based on the appellant's own 'expertise' as a former medical doctor. However, he had not given evidence on the same lines the trial. Nor had he called any other expert medical evidence on his behalf. Therefore, the only expert evidence the trial judge had before him was the evidence led by the prosecution which is summarised in the summing-up as follows:

> *'[28] The last witness for the prosecution was a forensic pathologist, Dr Mate. After conducting post mortem, Dr Mate compiled a report that is in evidence before you. It is not in dispute that the primary cause of death was a severe coronary artery disease that is, narrowing of blood*

*vessels that pumps blood into the heart. In other words, Mr Chand had blocked arteries. The primary cause of death was significantly contributed by two other pre-existing conditions that is, fat build-up within the walls of the blood vessels and a previous heart attack, and a fresh antecedent cause was multiple traumatic injuries to the jaw and chest, both knees and the liver. Dr Mate said that these injuries could have been caused by use of moderate force. The injuries were not severe in the sense that they did not affect the vital organs except the liver. Dr Mate said that there was a high chance that the multiple traumatic injuries led to Mr Chand's heart not to function properly leading to his death.'*

[18] Undoubtedly, the deceased had a medical history of a heart decease and as explained in the primary cause of death his severe coronary artery disease had directly led to his death. However, the antecedent or immediate cause of death was multiple traumatic injuries to the jaw and chest, both knees and the liver which Dr Mate described as having '*a high chance'* of leading to the deceased's heart not to function properly leading to his death.

[19] Though, there appears to be no direct evidence that the appellant's attack had impacted on the deceased's liver, his knee injuries could have been caused by him falling to the ground twice. Yet, the fact remains that there is clear evidence that it was the appellant and he alone who got involved with, chased and assaulted the deceased during the incident. Thus, the liver injury too could be reasonably attributed to his attack. Obviously, the deceased (who had blocked arteries and a previous heart attack unknown to the appellant) had been made to run around the taxi by the appellant making him tired and unstable during the incident. Given the appellant's historical medical condition these symptoms should come as no surprise. Thus, what needs to be taken into account in not only the couple of visible blows delivered on the deceased by the appellant but what impact the whole episode created by the appellant had on the deceased's death.

[20] In the circumstances it is important to examine the trial judge's directions to the assessors.

*'[32] The defence case is that it was not the assault of the Accused that significantly caused the death of Mr Chand. The defence says that the*

*Accused is not guilty of manslaughter. The defence says that if the Accused is guilty of anything he is guilty of the alternative offence of assault occasioning actual bodily harm. You may consider an alternative offence even if the Accused is not charged with the offence in the Information.*

*[36] Let me summarize the steps for you to determine the charge. Firstly, you must consider the charge of manslaughter. If you feel sure that the Accused voluntarily engaged in use of force or violence against the deceased by physically assaulting him and that it was the conduct of the Accused that significantly contributed to the death or accelerated the death of the deceased suffering from a heart disease and that the Accused realized the possibility of causing serious harm to the deceased and yet went ahead with his assault, then the proper opinion is guilty of manslaughter.*

*[37] But if you are not sure whether it was the conduct of the Accused that significantly contributed or accelerated the death of the deceased suffering from a heart disease, or if you are not sure if he realized the possibility of causing serious harm to the deceased, then you may consider the alternative offence of assault occasioning actual bodily harm. The Accused is guilty of assault occasioning actual bodily harm if he intentionally or recklessly applied force without the consent, causing hurt or injury to the victim. You will only be asked for your opinion on the alternative offence if your opinion is not guilty of manslaughter.'*

[21] What cannot be in dispute is that there is a direct nexus or causation between the appellant's acts (constituting the antecedent or immediate cause of death) and the primary cause of death leading to the deceased's heart not to function properly resulting in the death of the deceased. Thus, the appellant's position that it was not his assault that significantly caused the death of the deceased appears to be untenable. In the circumstances, the trial judge had given correct directions to the assessors to decide for themselves a verdict of manslaughter or an assault occasioning actual bodily harm. The assessors' decision on the former means that they were satisfied and sure that it was the conduct of the appellant that significantly contributed or accelerated the death of the deceased suffering from a heart disease as he was. As the trial judge had succinctly put at paragraph 13 of the summing-up, it was not necessary for the prosecution to prove that the appellant was aware of Mr Chand's pre-existing medical condition when he engaged in the alleged conduct that accelerated Mr Chand's death and it did not matter if Mr Chand would have died in any event due to

his pre-existing heart condition sooner or later. In fact there is no evidence that in any event the deceased would have suffered a natural death in the near future with or without the appellant's intervention.

[22] A trial judge is not expected to repeat everything he had stated in the summing-up in his written decision/judgment when he directs himself accordingly (vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) and 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) and **Fraser v State**]

[23] The trial judge had directed himself according to the summing-up and he cannot be faulted for his conclusion that it was the conduct of the appellant that hastened or accelerated the death of the victim and that the appellant realized the possibility of serious harm to the victim when he assaulted him as opposed to intentionally or recklessly applied force without the consent, causing hurt or injury to the victim.

[24] The learned trial judge had expressed his thinking on the issue of cause of death and causation in the sentencing order as well.

> *'[7] Post mortem examination revealed multiple traumatic injuries to the victim's jaw, chest, knees and liver. These injuries significantly contributed to the victim's primary cause of death, which was a severe coronary artery disease. The medical evidence was that the multiple traumatic injuries led to the victim's heart not to function properly leading to his death. The*

*offender was convicted for hastening or accelerating the victim's death by using physical violence.'*

[25] The appellant's compliant that the pathologist's evidence contravenes her findings during the autopsy cannot be examined at this stage for want of such material and I cannot agree with his criticism of the trial judge that he had failed to investigate the cause of death given the pathologist's evidence that the injuries were not severe or non-fatal in the sense that they did not affect the vital organs except the liver. The doctor had stated that there was a high chance that the multiple traumatic injuries led to the deceased's heart not to function properly leading to his death.

[26] Therefore, on the material available at this stage I am unable to say that these grounds of appeal have a reasonable prospect of success. If, however, the appellant wishes to have this issue further examined with the benefit of the medical report and medical evidence along with other evidence as to whether it was the appellant's conduct that hastened or accelerated the death of the victim and that he had realized the possibility of serious harm to the victim when he assaulted him or on the contrary, whether he only intentionally or recklessly applied force on the deceased without the consent, causing hurt or injury to the victim making him liable only for the offence of committing an assault occasioning actual bodily harm, he will have to take up the appeal before the full court.

***05th, 06th and 07th ground of appeal***

[27] All the above grounds of appeal are founded on pure factual matters and should have been fully canvassed during the trial. In any event, I do not see the possibility of any such complaints, even if true, having the effect of altering the verdict of manslaughter entered against the appellant.

[28] Further, these matters should have been raised by way of redirections as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17;

CAV 0009 of 2018 (30 August 2018) and the deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

***08th ground of appeal***

[29] The appellant complains that the sentence is harsh and excessive in all the circumstances.

[30] The learned trial judge had set out all the circumstances relevant to the sentencing from paragraphs 01-09 of the sentencing order and proceeded to pronounce the sentence as follows:

> *'[10] The maximum penalty prescribed for manslaughter is 25 years' imprisonment. Sentences can range from a suspended sentence to 12 years' imprisonment depending on the nature and degree of violence used* ***(Kim Nam Bae v State*** *Cr App No. AAU0015 of 1998S). When physical violence is used to take away a human life, a prison sentence is inevitable, unless there is a special circumstance present.*
>
> *[11] Based on the facts of this case I assess the offender's moral culpability to fall in the middle range of the tariff. The purpose of sentence is to punish the offender, denounce his conduct and deter others.*
>
> *[12] Remand period is about two months, for which I make a downward adjustment.*
>
> *[13] Marvin Ray Ketenilagi, for the reckless killing of Shri Chand, I sentence you to 6 years' imprisonment with a non-parole period of 4 years.'*

[31] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3

December 2015)]. The appellant's sentence lies in the middle of the sentencing tariff for manslaughter.

[32] I see no reasonable prospect of success in the appellant's appeal against sentence. It cannot be called disproportionate, harsh or excessive. Quantum of the sentence alone can rarely be a ground for the intervention by the appellate court [vide **Raj v State** (supra)].

***Bail pending appeal***

[33] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***),*** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[34] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[35] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[36] I have already held that the appellant's appeal against conviction and sentence has no reasonable prospect of success and therefore, his appeal obviously does not reach the higher threshold of 'very high likelihood of success'. Neither has he demonstrated other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

**Orders**

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.
3. Bail pending appeal is refused.

COURT OF APPEAL FIJI

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