

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

CRIMINAL APPEAL NO. AAU 67 of 2021
[In the High Court at Suva Criminal Case No. HAC 139 of 2012S]

BETWEEN : **YANG XIU QI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. E. Rice for the Respondent**

Date of Hearing : **24 August 2023**

Date of Ruling : **28 August 2023**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva for having committed the murder of Robert Fong alias Jan Qiu Kuang on 08 April 2012 at Suva in the Central Division contrary to section 237 of the Crimes Act 2009. The charge read as follows.

COUNT 1

'Statement of Offence

MURDER: *Contrary to Section 237 (a) – (c) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

YANG XIU and HU JIAN ZHAN alias KIM, on the 8th day of April, 2012, in Suva, in the Central Division, murdered ROBERT FONG alias JAN QIU KUANG.

- [2] Upon the appellant's plea of guilty to murder, the learned High Court judge had convicted and sentenced him on 10 May 2013 to mandatory life imprisonment and set a minimum serving period of 17 years.
- [3] An appeal against conviction had been lodged in person by the appellant on 14 October 2021; 08 years and 07 months out of time. The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide Rasaku v State CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and Kumar v State; Sinu v State CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).
- [4] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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].
- [5] The delay as stated earlier is 08 years and 07 months which is extraordinary by any stretch of imagination. Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide Lim Hong Kheng v Public Prosecutor [2006] SGHC 100)].
- [6] The explanation offered by the appellant for the delay is that he was waiting for Mr. Liang Xiang who, he says, was to be his employer in Fiji to advise him (presumably on the appeal) while farming and learning English and law. In the past, there have been several appellants including convicted foreign nationals, who have appealed in a timely fashion or within an acceptable lapse of time either through the Legal Aid

Commission or with the help of fellow inmates. The appellant has not adduced the language barrier as a reason for the belated appeal. Nor has he explained as to why he did not seek the assistance of Legal Aid Commission or the help of fellow inmates during the period of more than 08 ½ years to lodge an appeal. Thus, there is no acceptable explanation before me for the delay and therefore, given the inordinate delay a stricter standard would be applied in considering the question of enlargement of time to appeal. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time. However, an appeal after more than 08 ½ years is likely to cause prejudice to the prosecution in so many ways.

[7] The trial judge had set out the summary of facts admitted by the appellant as follows in the sentencing order.

- ‘3. *Briefly, they were as follows. You both came to Fiji from China on or about March 2012. You came to work as security guards at the Chinese Amusement Centre. You were then approached to kill the late Robert Fong in exchange for the payment of some money. Both of you accepted the job. On a Saturday night on 7th April, 2012, both of you went to Suva city in a van driven by another Chinese. You both waited for the late Robert Fong to exit the Angel Night Club, at Victoria Parade, Suva. You both had knives in your possession at the time. Between 1.30 am and 2 am, on Sunday morning on 8th April, 2012, the late Robert Fong exited the Angle Night Club. You both rushed towards him, and jointly stabbed him repeatedly, thereby causing him multiple injuries.*
4. *You both fled from the scene in a van driven by the other Chinese. The late Robert Fong was conveyed to Suva Private Hospital, where he died shortly thereafter. His post mortem report revealed that he died from the serious injuries he suffered as a result of you two's stabbing of him on 8th April, 2012. The matter was reported to police. You were later arrested and caution interviewed by them. You both admitted to police that you stabbed the deceased, at the material time. You were then charged for the murder of the late Robert Fong.*

[8] The grounds of appeal raised by the appellant are as follows.

‘Conviction:

Ground 1

Guilty pleas was equivocal in respect of murder but was a guilty plea to manslaughter.

Ground 2

The case summary contained factual inaccuracies.

Ground 3

Self-defence.

Ground 4

Sentence is harsh and excessive

01st ground of appeal

- [9] The appellant submits that he wanted to plead guilty to manslaughter but not to murder and therefore his plea of guilty was equivocal on murder but not on manslaughter. He also alleges that certain facts included in the summary of facts contained matters he had not admitted in his cautioned interview. For example, he says that he and the co-accused were not paid killers in that they were not hired to kill the deceased but asked by his boss Mr. Liang to teach Robert Fong a lesson by attacking with fists because Fong had allegedly slept with Liang's wife. They took weapons with them to defend themselves if the deceased retaliated. Mr. Robert Fong did fight back and the appellant used the knife to fend him off. He got to know that Mr. Fong had died after the police informed him.
- [10] The appellant also alleges that he was assaulted and beaten daily and not taken to court within 48 hours but only after 09 days. Thus, the appellant asserts that his confession was not voluntary.
- [11] The trial judge had stated in the sentencing order as follows.
- ‘2. *Both of you, through your counsels and with the aid of the official Chinese Court interpreter, said you understood the information. You then both pleaded guilty to the charge of murder. The prosecution then read the summary of facts in court.*
- ‘5. *The court then checked with your counsels, with the aid of the Official Chinese interpreter that, all the elements of the offence of murder, were admitted by the two of you. Both of you admitted, through your counsels that, at the material time, both of your jointly stabbed the deceased with the knives you*

had in your possession, and thereby caused serious injuries to the deceased, from which he later died on 8th April, 2012. Both of you, through your counsels, admitted that, at the time, you both had the intention to cause the late Robert Fong's death. As a result of you two's above admissions, conveyed through your counsel, with the aid of the official Chinese interpreter, I found both of you two guilty of murdering the late Robert Fong on 8th April, 2012, and I convicted you two accordingly.'

- [12] Thus, a Chinese translator/interpreter had been present to assist the appellant and court on the day he admitted all elements of murder and pleaded guilty. His counsel too had been there representing the appellant who had concurred with the admission of elements and the plea of guilty.
- [13] It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record. A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty; A valid plea of guilty is one that is entered in the exercise of a free choice [vide paragraph [23] of **Nalave v State** [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008) & paragraph [19] of **Tuimatavesi v State** [2021] FJCA 111; AAU032.2016 (3 June 2021)]
- [14] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see **Bogiwalu v State** [1998] FJCA 16 and cases cited therein). Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered (**Tuisavusavu v State** [2009] FJCA 50; AAU0064.2004S (3 April 2009) at [9] & [10].
- [15] It was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132);

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the

basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

- [16] Having examined the sentencing order, I do not find any evidence of equivocation. The appellant has not discharged the onus that fell upon him to establish facts upon which the validity of a guilty plea is challenged. There is no way that he understood his plea for murder as a plea for manslaughter as manslaughter was not in contemplation at all in the charge or summary of facts. I have no material to believe that his counsel and the interpreter did not make it clear that the charge and plea was for murder. This position appears to be an afterthought.

Ground 2

- [17] The appellant's contention is that the summary of facts contained factual inaccuracies in that the summary of facts read after the plea of guilty was tendered included facts not recorded in his cautioned interview.

- [18] Had the appellant found some objectionable matters in the summary of facts he could have refused to admit it until the same was removed. There was nothing to prevent the appellant from informing court through his interpreter and counsel that he was not agreeable to those portions of the summary of facts.

- [19] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019)

[26] *Where, as here, the defence counsel indicates to prosecuting counsel that his client will plead guilty, the defence will wish to see the summary of facts. If the facts are accepted by defence counsel's client, the Accused, the plea can proceed. If not, the case must proceed on a not guilty plea and a trial must take place. If there is acceptance by the prosecution of any material requested by the defence to be deleted from the summary of facts, the plea of guilty can still proceed. Another option is for there to be a Newton hearing held limited to the disputed part of the facts.'*

- [20] There was no such application by the defence to delete any part of the summary of facts or nor for a Newton hearing. Neither was there an application to withdraw or change the plea of guilty. The court retains a residual discretion to allow the withdrawal of a guilty plea where not to do so might work an injustice; examples

might be where an accused has been misinformed about the nature of the charge or the availability of a defence or where he has been put under pressure to plead guilty in circumstances where he is not truly admitting guilt (vide **R v Sheikh and Others** [2004] EWCA Crim. 492 & *Samy* at [40]).

- [21] Too much reliance need not be placed on disclosure statements which are not part of the summary of facts to which the appellant had pleaded guilty. The trial court is not expected to go on a voyage of discovery into statements of witnesses in the disclosure bundle which were neither given on oath nor the veracity of them were tested by cross-examination at a trial (see *Samy*). Thus, in the absence of any indication by the appellant or his counsel in the High Court that there were factual inaccuracies in the summary of facts, the appellant's contention cannot be accepted. In any event, the motive for the murder is part of elements of the offence of murder.

Ground 3

- [22] No self-defence had arisen in the summary of facts for the trial judge not to accept the guilty plea for murder. According to the summary of facts, the appellant had gone in search of the deceased to attack him. The appellant and his co-accused had waylaid with arms as the deceased emerged from the night club. No possibility of self-defence had emerged in the summary of facts.
- [23] The appellant has referred to the Court of Appeal decision in **Yang Xieng Jiong v State** [2019] FJCA 17; AAU0077.2015 (7 March 2019). Yang Xieng Jiong was a co-accused in the murder of Mr. Robert Fong along with the appellant and Hu Jian Zhan. However, Yang Xieng Jiong went to trial unlike the other two who pleaded guilty and was convicted for murder and sentenced to life imprisonment with a minimum term of 18 years. His appeal was allowed by the Court of Appeal on the basis of some misdirections to the assessors and the manner in which the charge had been framed where Yang Xieng Jiong had been charged alone for the murder of Mr. Robert Fong. However, the Court of Appeal did not acquit Yang Xieng Jiong but ordered a new trial against him. Therefore, the appeal decision regarding Yang Xieng Jiong has no material impact on the appellant's guilty plea. It is very clear that all three were involved in the attack on Mr. Robert Fong resulting in his death.

Ground 4 (sentence)

- [24] The main plank of the appellant's grievance appears to be on the minimum serving period of 17 years. **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016) has very pertinent observations with regard to setting the minimum period. The trial judge had given reasons for the 17 year period particularly at paragraphs 08 of the sentencing order.

What matters should be considered whether to set a minimum period and if so, in deciding the length of that period? Some helpful guidance from UK.

- [25] In UK, depending on the facts of the offence the starting point for the minimum time to be served in prison for an adult ranges from 15 to 30 years. For the purposes of setting the starting point for the minimum term, schedule 21 to Sentencing Act 2020 in UK sets out four categories.

01st category

- *In cases such as a carefully planned murder of two or more people, or a murder committed by an offender who had already been convicted of murder the starting point for an offender aged 21 or over is a whole life tariff. For an offender aged 18-20 the starting point would be 30 years and for an offender aged under 18 it is 12 years.*

02nd category

- *In cases such as those involving the use of a firearm or explosive the starting point is 30 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

03rd category

- *In cases where the offender brings a knife to the scene and uses it to commit murder the starting point is 25 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

04th category

- *In cases that do not fall into the above categories the starting point is 15 years for an offender aged 18 or over and 12 years for an offender aged under 18.*

[26] Schedule 21 to Sentencing Act 2020 in UK has given some aggravating and mitigating factors to be considered for the determination of minimum term in relation to mandatory life sentence for murder as follows.

‘9. *Aggravating factors (additional to those mentioned in paragraphs 2(2), 3(2) and 4(2) that may be relevant to the offence of murder include—*

- (a) a significant degree of planning or premeditation,*
- (b) the fact that the victim was particularly vulnerable because of age or disability,*
- (c) mental or physical suffering inflicted on the victim before death,*
- (d) the abuse of a position of trust,*
- (e) the use of duress or threats against another person to facilitate the commission of the offence,*
- (f) the fact that victim was providing a public service or performing a public duty, and*
- (g) concealment, destruction or dismemberment of the body.*

10. *Mitigating factors that may be relevant to the offence of murder include—*

- (a) an intention to cause serious bodily harm rather than to kill,*
- (b) lack of premeditation,*
- (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered the offender’s degree of culpability,*
- (d) the fact that the offender was provoked (for example, by prolonged stress) but, in the case of a murder committed before 4 October 2010, in a way not amounting to a defence of provocation,*
- (e) the fact that the offender acted to any extent in self-defence or, in the case of a murder committed on or after 4 October 2010, in fear of violence,*
- (f) a belief by the offender that the murder was an act of mercy, and*
- (g) the age of the offender.’*

[27] Factors mentioned in paragraphs 2(2), 3(2) and 4(2) are as follows:

2(2) Cases that would normally fall within sub-paragraph (1)(a) include—

- (a) the murder of two or more persons, where each murder involves any of the following—*
 - (i) a substantial degree of premeditation or planning,*

- (ii) *the abduction of the victim, or*
- (iii) *sexual or sadistic conduct,*
- (b) *the murder of a child if involving the abduction of the child or sexual or sadistic motivation,*
- (c) *the murder of a police officer or prison officer in the course of his or her duty, where the offence was committed on or after 13 April 2015,*
- (d) *a murder done for the purpose of advancing a political, religious, racial or ideological cause, or*
- (e) *a murder by an offender previously convicted of murder.*

3(2) Cases that (if not falling within paragraph 2(1)) would normally fall within sub-paragraph (1)(a) include—

- (a) *in the case of a offence committed before 13 April 2015, the murder of a police officer or prison officer in the course of his or her duty,*
- (b) *a murder involving the use of a firearm or explosive,*
- (c) *a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),*
- (d) *a murder intended to obstruct or interfere with the course of justice,*
- (e) *a murder involving sexual or sadistic conduct,*
- (f) *the murder of two or more persons,*
- (g) *a murder that is aggravated by racial or religious hostility or by hostility related to sexual orientation,*
- (h) *a murder that is aggravated by hostility related to disability or transgender identity, where the offence was committed on or after 3 December 2012 (or over a period, or at some time during a period, ending on or after that date),*
- (i) *a murder falling within paragraph 2(2) committed by an offender who was aged under 21 when the offence was committed.*

4(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—

- (a) *commit any offence, or*
- (b) *have it available to use as a weapon,*
and used that knife or other weapon in committing the murder.

[28] Section 2(1) states that if—

- (a) *the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and*

(b) *the offender was aged 21 or over when the offence was committed, the appropriate starting point is a whole life order.*


[29] It is important to note that what is stated under the four categories are starting points only. Having set the minimum term, the judge will then take into account any aggravating or mitigating factors that may amend the minimum term either up or down. The judge may also reduce the minimum term to take account of a guilty plea. The final minimum term will take into account all the factors of the case and can be of any length.

[30] Given the facts of the case, it appears to me that the starting point for the appellant may be taken as 25 years as his case falls into the third category and then after adjusting for aggravating and mitigating factors the final minimum period could be arrived at. The trial judge had taken 16 years as the starting point and after adjusting for aggravating and mitigating factors the final minimum period had been determined as 17 years. I see no sentencing error or a real prospect of success in the appellant's sentence appeal on the ground that the minimum period is excessive or harsh.

Orders

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is refused.




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