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

CRIMINAL APPEAL NO. AAU 073 of 2021
[In the High Court at Lautoka Criminal Case No. HAC 231 of 2017]

BETWEEN	:	**SHILWAN RANDEEP LAL**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. L. Latu for the Respondent**
Date of Hearing	:	**04 October 2023**
Date of Ruling	:	**05 October 2023**

RULING

[1] The appellant had been charged and convicted in the High Court at Lautoka for having committed the murder of Rohan Amreet Lal on 29 November at Sigatoka in the Western Division contrary to section 237 of the Crimes Act 2009. The information read as follows.

> '***Statement of Offence***
>
> ***MURDER****: contrary to section 237 of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***SHILWAN RANDEEP LAL****, on the 29th of November, 2017 at Sigatoka in the Western Division, murdered Rohan Amreet Lal.*

[2] After the prosecution case was closed, the appellant had opted to give evidence and while being cross-examined by the State, the appellant having well understood the contents of the information and the consequences of the plea, had pleaded guilty to the count of

murder. Summary of facts had not been called for as the evidence for the prosecution was already lead. According to the trial judge, the appellant having understood, agreed and accepted the evidence led by the prosecution to be true and correct, had taken full responsibility for his course of action with the assistance of his lawyers.

[3] The learned High Court judge had convicted the appellant on his guilty plea and sentenced him on 01 December 2020 to mandatory life imprisonment and set a minimum serving period of 14 years. An untimely appeal against conviction had been lodged in person by the appellant.

[4] 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).

[5] The delay is over 10 months which is substantial. The appellant has stated that due to COVID 19 restrictions he could not contact anyone outside the correction facility and as a result was unable to collect the relevant documents to draft his appeal in time. It was only somewhere in September 2021 after those restrictions were lifted that he managed to get them from his trial counsel and filed his appeal within a reasonable time in November 2021. There is no way that these assertions could be verified by this court. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction 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.

[6] The ground of appeal raised by the appellant are as follows:

Conviction:

Ground 1

THAT the learned trial Judge may have fallen into an error of law when His Lordship failed to conduct a voir dire hearing in order to determine the admissibility of the caution interview in evidence.

Ground 2

THAT the learned trial Judge may have fallen into an error of law when His Lordship accepted a guilty pleas on the basis of the leading evidence presented by the State which clearly disclosed that the appellant was provoked.

Ground 3

THAT the learned trial Judge may have fallen into an error of law when His Lordship accepted the guilty plea in the absence of an effective assistance of defence counsel.

Ground 4

THAT the learned trial Judge may have fallen into an error of law when His Lordship failed to consider the evidence of provocation partially disclosed during trial.

Ground 5

THAT the guilty was equivocal in that: (i) Failure to enquire whether the appellant was pleading guilty due to any force, pressure or threat or on his own free will since the offence charge were serious; (ii) Failure to consider the circumstances surrounding the entering of guilty plea which includes ignorance fear, duress and mistake; (iii) Failure to make certain that the appellant understood the truth of the charge and summary of facts in the language the appellant understood.

[7] According to the sentencing order the brief facts are as follows

'The accused, Shilwan Randeep Lal, was a farmer during the time material to the incident. He was running a farm together with the deceased, a cousin of his. He has two children and was leading a happy married life. He caught his wife having an affair with the deceased. His wife left him and went with the children to her parents. He went to her home and reconciled with his family. Later his wife informed him that she will not stop her illicit extra marital affair with the deceased. By that he was provoked and decided to kill the deceased.

Accordingly, on the 29th of November, 2017 in the farm he murdered the deceased Rohan Amreet Lal by hitting him with a cane knife.

01st ground of appeal

[8] The state counsel who was the prosecutor at the trial has submitted that on the first trial date the counsel for the appellant representing Mr. Iqbal Khan and Associates

withdrew the *voir dire* grounds indicating that he appellant was not challenging the cautioned interview. Therefore, it is clear that the defence counsel had advised court that they were not challenging the cautioned interview but also they had not required a *voir dire* and thus, there was no error of law in not holding a *voir dire* inquiry [vide **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) & **Khan v State** [2020] FJCA 241; AAU118.2019 (7 December 2020)]. Therefore, in the circumstances there was no need for a *voir dire* to be held by the trial judge on his own. However, the prosecution had led the evidence of relevant police officers who were involved in recording the cautioned statement and the appellant's trial counsel still had every opportunity of challenging them at the trial proper, if they so wished.

02nd and 04th grounds of appeal

[9] The appellant submits that the trial judge should not have accepted the appellant's plea of guilty for murder in the face of evidence of possible provocation. The Court of Appeal analyzed the partial defense of provision in great detail in **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017). From the brief facts, I cannot gather the time lapse between the appellant's meeting with the wife and the attack on the deceased who was her lover. The state counsel has submitted that there was no evidence of provocation that would satisfy the elements under section 242 of the Crimes Act which could possibly bring the appellant's culpability down to manslaughter.

[10] The Supreme Court has reiterated the law relating to provocation as a partial defense as follows in **Masicola v State** [2023] FJSC 27; CAV0011.2021 (30 August 2023)

> *[9] Under s 242(1) of the Crimes Act 2009, murder is reduced to manslaughter where the killer "does the act which causes death in the heat of passion caused by sudden provocation ... before there is time for the passion to cool". Relevantly, "provocation" is defined in s 242(2) as:*
>
> *"The term "provocation" means ... any wrongful act or insult of such as nature as to be likely when—*
> *(a) done to an ordinary person;*
> *...*
> *to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged*

committed upon the person by whom the act or insult is done or offered."

*[10] In **Codrokadroka v The State,**[1] the Supreme Court approved the following principles from the judgment of the Court of Appeal[2] as accurately reflecting the approach that a trial judge should take to the issue of provocation:*

> *"1 The judge should ask himself/herself whether provocation should be left to the assessors **on the most favourable view** of the defence case.*
>
> *2 There should be "a credible narrative" on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.*
>
> *3 There should be "a credible narrative" of a resulting loss of self-control by the accused.*
>
> *4 There should be "a credible narrative" of an attack on the deceased by the accused which is **proportionate** to the provocative words or deeds.*
>
> *5 The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a **sudden** loss of self-control depends on the facts of each case. However cumulative provocation is in principle relevant and admissible.*
>
> *6 There must be an evidential link between the provocation offered and the assault inflicted."*

[11] The authorities establish that a trial judge has the responsibility to raise provocation where there is the necessary "credible narrative" on the facts even if an accused is represented by counsel and does not wish to raise the defence. The authorities recognise that this can, in some circumstances, place the judge in a difficult position.[3]

[11] However, due to lack of trial proceedings at this stage, I am unable to probe this issue any further as to whether the judge should have raised provocation and whether there was the necessary "credible narrative" on the evidence led even when the appellant's

---

[1] *Codrokadroka v The State* [2015] FJSC 15; CAV07.2013 (20 November 2013) at para [17].

[2] *Codrokadroka v The State* [2008] FJCA 122, AAU0034.2006 (25 March 2008) at paragraph [38].

[3] See, for example, the discussion in *Ram v The State* [2012] FJSC 12; CA V0001.2011 (9 May 2012).

trial counsel did not raise the defence. Therefore, I think the best course in the interest of justice would be to leave these two grounds of appeal to be considered by the Full Court with the help of complete appeal records.

05th ground of appeal

[12] The appellant submits that the trial judge failed to ascertain whether the plea of guilty was unequivocal.

[13] **Nalave v State** [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008) the Court of Appeal held:

> *'[23] 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 (**Rex v Golathan** (1915) 84 L.J.K.B 758, **R v Griffiths** (1932) 23 Cr. App. R. 153, **R v. Vent** (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (**R v Murphy** [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (**Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132).'*

[14] 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."*

[15] In **Tuisavusavu v State** [2009] FJCA 50; AAU0064.2004S (3 April 2009) the Court of Appeal stated:

> *'[9] 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). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (**Liberti** (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*

[16] The State has submitted that the appellant was represented all the time by two lawyers from Iqbal Khan & Associates until the appellant expressed his desire to change the plea whilst under cross-examination by the State and later pleaded guilty to the information. The appellant and his counsel had been given time to consider the same and in the afternoon session on the same day the appellant had proceeded to plead guilty. The same counsel had represented the appellant at the sentencing hearing as well. The appellant has not discharged the burden of establishing facts showing that plea was equivocal on the record.

[17] Therefore, I do not think that there would have been any hint of equivocality or an iota of doubt in the mind of the trial judge that the plea of guilty was not unequivocal. From the sentencing order, I cannot see any basis at all to buttress the appellant's complaint that the plea was not unequivocal.

Orders

1. Enlargement of time to appeal against conviction is allowed only on the 01st and 04th grounds of appeal.

COURT OF APPEAL FIJI

.....

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