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

CRIMINAL APPEAL NO.AAU 048 of 2021
[In the High Court at Suva Case No. HAC 140 of 2020S]

BETWEEN	**:**	**JOSEVATA WERELALI KOROI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**20 January 2023**
Date of Ruling	**:**	**23 January 2023**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of murder of ADI ELENANI WAIDRAU contrary to section 237 of the Crimes Act, 2009 on 01 May 2020 at Waima Village, Vunidawa in the Eastern Division.

[2] The appellant had been represented by counsel at the trial. After trial, the learned High Court judge convicted the appellant for murder. He was sentenced on 07 April 2021 for mandatory life imprisonment with a minimum serving period of 18 years.

[3] The sentencing order contains a brief summary of facts as follows:

> *2. The facts of your case demonstrated once again the all too familiar problem of a spouse's inability to deal peacefully with the infidelity of the other spouse. With the rise of liberalism in today's world, free choices are often encouraged in*

individuals, even among married people. Consequently, infidelity among spouses sometimes creep in, if there was turmoil in the family.
3. The above appeared to happen in your case. On 1 May, 2020, you were 32 years old. The deceased, your wife, was 27 years old. You two had been together for 10 years. You reached Form 6 level education at Nasinu Secondary School. You two obviously loved each other because you two had two children together. Your children are now aged 11 and 9 years old. However, you knew since 2017 that your wife was having an affair with another man. You tried to resolve the same by asking her to stop the same, but it appeared she persisted. On 1 May 2020, you decided to end her life, by stabbing her in the right chest and in her left back. You did not seek a resolution to your marital problem in the Family Court. To you, unfortunately, the answer was murder.'

[4] The appellant's appeal against conviction and sentence is timely. 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 (unless it is on a question of law alone). For a timely appeal, the test for leave to appeal against conviction is ***'reasonable prospect of success'*** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) ***that will 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)].

[5] 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 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[6] The appellant urges the following grounds of appeal.

Grounds of appeal against conviction

Ground 1

THAT the Learned Trial Judge felt into erroneous conclusion evidenced in his finding which cannot be substantiated nor allowed to stand in view of the failure to identify and delineate clearly the all-important crucial difference between the events of 2017 versus that three years later on 01 May 2020.

Ground 2

THAT the Learned counsel for the appellant was grossly incompetent in discharging his duty in the best interest of his client in that he failed to: (1) properly advise his client vis-à-vis the nature of evidence intended to be adduced against him during the trial and the need to challenge the intended evidence and his failure to call defence witness as instructed; (ii) follow the appellants instructions and challenge the alleged caution interview and failure to recall defence witness who was compellable witnesses; (iii) file the respective grounds challenging the admissibility of the appellants alleged caution interview.

Ground 3

THAT the Learned Trial Judge erred in law when he did not direct his mind and give due consideration to the evidence of "self defence" raised by the appellant's defence causing a miscarriage.

Ground 4

THAT the Learned Trial Judge erred causing miscarriage of justice when he opted not to closely scrutinize the exhibited audio conversation recording of the marital affairs in order to properly assess and to properly give weight to the question of provocation.

Ground 5

THAT the Learned Trial Judge erred in law that the failure of did not address the appellant or counsel of the appellant the right of the appellant to challenge the confession to determine the admissibility of the caution interview of the appellant in evidence without conducting a trial within a trial.

Ground 6

THAT the Learned Trial Judge erred in law of did not determine very well the heat of passion caused of cumulative provocation by the deceased.

Ground 7

THAT whether there were sufficiency's of admissible evidence led during trial, in the form of the appellant's married wife adulterous affair and the appellant's

endeavor to protect their marriage for their two children's sake had requested his wife to discontinue the affair and later on the appellant's sudden discovery of mobile phone conversation recording between his wife and another man, render a reasonable man in the same circumstances as the appellant to lose self-control and does the failure of the Learned Trial Judge to consider cumulative provocation as a proper basis of defense caused the findings of the Learned Trial Judge to miscarry.

Grounds of appeal against sentence

Ground 8

THAT the Learned Judge erred in law in not considering the best interests of the child in sentencing your Appellant as required by Article 41(2) of the 2013 Fiji Constitution.

Ground 9

THAT the Learned Judge erred in law in not considering the minimum term of 18 years judiciously.

Ground 10

THAT the Appellant reserves the right to appeal such further and other Grounds as the Appellant may be advised upon the receipt of the Court Record.

01st ground of appeal

[7] One important piece of evidence led by the prosecution was the appellant's confession in the form of his cautioned interview. In addition, PW2 had seen the appellant punching the deceased in the mouth and dragging her into their room. Later, she had seen him holding a knife in his right hand and stabbing the deceased's right breast with the same. The appellant had stabbed the deceased once in the right breast and four times in her left back and according to Dr. Mate (PW5), the pathologist the cause of the deceased's death was excessive loss of blood from the heart due to the stab wound to the same, and the multiple stab wounds to the back that caused injuries to the lungs. PW5 had said, *"...The injury to the chest is severe, given the internal injury caused. The force used to the chest injury must be moderate to severe. The stab to the chest went as far as the right side of the heart. This injury is enough to cause the person's death. Three of stab wounds to the back punctured the lungs. With the stab wounds to the chest and the 4 stab wounds to the back, the chance of survival was 2 %..."*

[8] In his sworn evidence the appellant had said that he knew that the deceased, his wife, was having an affair with another man, for 3 years prior to the stabbing. He had said that he gave them a chance to stop it. He had two children with the deceased. On the day in question, that is, 01 May 2020, he had found out a recording of a conversation between a man and his wife in his wife's phone's memory card. He had come home to confront his wife. He had got a knife from his house. Then, he had confronted his wife with what he discovered. Then he had stabbed his wife first in the right breast and 4 times in the back. He had admitted, he intended to kill his wife.

[9] The trial judge had stated in the judgment as follows.

> *25. On his admission alone, in my view, the prosecution had proven beyond reasonable doubt that, when he stabbed the deceased at the material time, he intended to cause her death. In my view, he was also reckless in causing her death. He knew very well that there was a substantial risk that the deceased would die if he stabbed her on the chest and 4 times on the back. It was unjustifiable to take the risk of stabbing her, as mentioned above. He nevertheless took the risk. The deceased died as a result. He was obviously reckless in causing her death.*
>
> *26. Given the above, the prosecution had proven beyond reasonable doubt that the accused murdered the deceased, at the material time. In his evidence and in their closing submission, the defence appear not to deny the above. They appear to argue that the accused was provoked into killing the deceased at the material time, thus he was not guilty of murder, but guilty of the lesser offence of manslaughter. If the defence was correct on this issue, then that was what the law required. We will therefore look at the defence of provocation.*

[10] Thus, there was ample evidence against the appellant for the trial judge to have convicted him of murder.

02nd ground of appeal

[11] The appellant's ground of appeal is based on criticism of his trial counsel, particularly as to his failure to challenge the cautioned interview and call defence witnesses despite his alleged instructions to do so.

[12] This court has not heard from his trial counsel. No ground of appeal based on criticism of trial counsel would be entertained leave aside being upheld unless the appellant has followed the procedure laid down by the Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) in pursuing such a ground of appeal as affirmed by the Supreme Court in **Chand v State** [2022] FJSC 28; CAV0001.2020 (27 October 2022). The appellant has failed to do so and therefore this grounds of appeal cannot be entertained unless and until the prescribed procedure is followed.

[13] Looking at it another way, it is clear that the gits of all criticisms/allegations is the incompetence of the trial counsel and therefore to succeed in appeal the appellant must convince the appellate court that either the alleged incompetence of trial counsel (such as not presenting his defence to court) caused a miscarriage of justice in that it affected the outcome of the trial in such a way as to cause the appellant squander a reasonable prospect of acquittal in the light of the totality of evidence [see for example paragraph [12] and [24] of **Nudd v The Queen** (2006) HAC 9 and **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) or the alleged conduct of trial counsel otherwise deprived him of due process of law or a fair trial [see paragraphs [87], [99] & [100] of ***Nudd;*** **Anderson v HM Advocate** HCJ 1996/1996 JC 29**].** In the first instance the focus is on the outcome or result consequent to the alleged incompetence (see also **Regina v Clinton** CACD 1993/[1993] 1 WLR 1181) and in the second instance irrespective of the impact of the trial counsel's failings or faulty conduct on the outcome/result, the question posed is whether accused's right to have a fair trial had been denied as a result of material errors or irregularities occasioned by the counsel's incompetence.

[14] In general a tactical election which turns out badly for the accused cannot, in itself, occasion a miscarriage of justice. It may only have contributed to the conviction of the guilty [vide **Silatolu v State** [2008] FJSC 48; CAV0002.2006 (29 February 2008) and per Sir Thomas Eichelbaum NPJ in Court of Final Appeal (Hong Kong) in **Chong Ching Yuen v Hksar** (2004) 7 HKCFAR 126; [2004] 2 HKLRD 681]. A conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise [**Ensor** [1989] 1 WLR 497 & **Gautam [**1988] Crim. LR 109 CA (Crim Div)].

[15] As a general rule, a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted. Decisions as to what witnesses to call, what questions to ask or not to ask, what lines of argument to pursue and what points to abandon, are all matters within the discretion of counsel and frequently involve difficult problems of judgment, including judgment as to tactics. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence (vide **R v Birks** (1990) 48 A Crim R 385; (1990) 19 NSWLR 677, 688–9)

[16] If, however, the court has any lurking doubt that an appellant might have suffered some injustice or miscarriage of justice as result of *flagrantly incompetent advocacy* by his advocate it would quash the conviction [vide **Swain** [1988] Crim LR 109, **R v Birks** (1990) 48 A Crim R 385; (1990) 19 NSWLR 677, 688–9]

[17] The appellant submits that he was provoked into killing his wife and he is supposed to have stated as much in his cautioned interview. If, so the decision not to challenge the cautioned interview appears to have been a well-considered strategic decision. I do not see any signs of flagrantly incompetent advocacy in this case.

03rd ground of appeal

[18] Section 42(2) of the Crimes Act, 2009 deals with self–defence. When an accused relies on self-defence, the trial judge should direct the assessors to consider whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds (vide **Naitini v State** [2020] FJCA 20 AAU135 of 2014, AAU 145 of 2014).

[19] The test is not wholly objective. It is the belief of the accused based on the circumstances as he or she perceives them to be, which has to be reasonable. The test is not what a reasonable person in the accused's position would have believed. It follows that where self-defence is an issue, account must be taken of the personal

characteristics of the accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his or her response to the threat (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015).

[20] **Narayan v State** [2020] FJCA 189; AAU0610.2017 (6 October 2020), I had the occasion to remark:

> *'[14]…….* ***However, the test is not wholly objective and it is the subjective belief of the accused based on the circumstances, as perceived by him, that counts but that belief should be objectively reasonable in those circumstances that he was in immediate danger of death or serious injury and that to kill or inflict serious injury provided the only reasonable means of protection.*** *The fact that an appellant has taken up '* ***self-defense*** *' in his evidence does not necessarily make it a credible story and the assessors should always act upon it.*

[21] There is simply no factual basis to sustain self-defence in the appellants' case. The moment he allegedly grabbed the knife away from the deceased, there was no longer any ground for him to believe of any death or serious harm.

04th, 06th and 07th grounds of appeal

[22] These grounds of appeal are based on the issue of provocation**.** Section 242(1) of the Crime Act, 2009 states that when a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in sub-section (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only. The term 'provocation' means *inter alia* any wrongful act or insult of such a nature as to be likely when 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 with having committed upon the person by whom the act or insult is done or offered [vide section 242(2)].

[23] Effect of provocation on a reasonable man is the determining factor to justify a verdict of manslaughter so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In the context of provocation, the "reasonable man" means "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today. In applying the test it is particularly important to consider whether a sufficient interval has lapsed since the provocation to allow a reasonable man time to cool and take into account the instrument with which the homicide was effected, for to retort in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger [see **Rawat v State** [2022] FJCA 168; AAU0186.2016 (24 November 2022)].

[24] The Court of Appeal in **Masicola v State** [2021] FJCA 176; AAU073.2015 (29 April 2021) and **Naitini v State** [2020] FJCA 20; AAU135.2014, AAU145.2014 (27 February 2020) examined the past decisions and principles relating to provocation in that there should be a "credible narrative" on the evidence of (i) provocative words or deeds of the deceased to the accused (ii) a resulting loss of self-control by the accused (iii) an attack on the deceased by the accused which is proportionate to the provocative words or deeds and (iv) There must be an evidential link between the provocation offered and the assault inflicted . 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 fact of each case. However cumulative provocation is in principle relevant and admissible.

[25] The trial judge had addressed his mind on provocation at paragraphs 26 to 28 and not accepted that the appellant was acting under provocation.

[26] On a consideration of totality of evidence, I do not see how the defense of provocation could be upheld in the light of the above legal principles and the factual scenario in the case. It looks as if that the appellant came home intending to stab the deceased after hearing the conversation between his wife and a man on phone, whose identity he knew and not in the heat of the passion. Since 2017 he appears to have had enough time to

resolve the marital dispute with his wife. Provocation should have led to sudden and actual loss of self-control so as to make him for the moment not master of his mind (see **R v Duffy** [1949] 1 All ER 932). In any event the attack on the deceased was not proportionate to what he heard over the phone. Merely getting angry is not the same as provocation in law (**Rawat v State** (supra).

05th Ground of Appeal

[27] The appellant submits that the learned trial judge erred in law in that he did not address the appellant or counsel of the right to challenge the confession to determine the admissibility of the caution interview of the appellant in evidence without conducting a trial within a trial.

[28] Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to Judges and Magistrates and at a trial before assessors a *voir dire* may be conducted prior to swearing in of the assessors but after the accused has pleaded to the information.

[29] **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) had earlier laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

> *'[24]* ***Whenever the court it advised that there is challenge to the confession****, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.*
>
> *[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.*

[30] Obviously, the counsel for the appellant had not sought a *voir dire* inquiry because he wanted to get the advantage of the aspect of provocation the appellant had come out with therein. The responsibility is cast on the counsel to inform the judge that the appellant would challenge the cautioned interview which had not happened here.

08th and 09th ground of appeal

[31] The sentence of life imprisonment is mandatory for murder. The High Court judge had in his sentencing order given reasons for imposing a minimum period of 18 years. I do not see that the sentencing discretion had miscarried in this instance.

[32] None of the grounds of appeal has a reasonable prospect of success.

Order

1. Leave to appeal against conviction and sentence is refused.

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