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

CRIMINAL APPEAL NO. AAU 56 of 2022
[In the High Court at Lautoka Criminal Case No. HAC 01 of 2018]

BETWEEN	**:**	**SHALENDRA BHAN SINGH**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. S. Swastika the Respondent**
Date of Hearing	**:**	**08 April 2024**
Date of Ruling	**:**	**09 April 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Lautoka for having committed murder contrary to section 237 of the Crimes Act 2009. The particulars of the offence are:

> *'**Statement of Offence***
>
> ***MURDER**: Contrary to section 237 of the Crimes Act 2009.*
>
> ***Particulars of offence***
>
> ***SHALENDRA BHAN SINGH** on the 25th day of December, 2017 at Lautoka in the Western Division murdered KUNAL KAMLESH SAMI.'*

[2] The trial judge convicted the appellant as charged and sentenced him on 14 April 2022 to mandatory life imprisonment and set a minimum serving period of 18 years.

[3] The appellant's appeal against conviction is timely.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. 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] The grounds 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 correctly applied the law on provocation to the facts of the case.*
>
> ***Ground 2:***
>
> *THAT the Learned Trial Judge may have fallen into error of law when His Lordship failed to seriously consider the evidence of the PW Ranshika Rashika Kumar which support the contention of the Appellant regarding provocation.*
>
> ***Ground 3:***
>
> *THAT the Learned Trial Judge may have fallen into error of law when His Lordship failed to make an independent assessment of evidence.*
>
> ***Ground 4:***
>
> *THAT the Learned Trial Judge may have fallen into error of law when His Lordship failed to consider the irregularities discrepancies of the evidence of the State in respect to the issues of provocation*

Ground 5:

THAT the verdict is unreasonable and cannot be supported having regards to evidence.

Ground 6:

THAT the Learned Trial Judge may have fallen into error of law when he failed to direct his mind and consider the contents of the Appellants caution interview which clearly encapsulate the issues of causation and provocation.

Ground 7:

THAT the Learned Trial Judge may have fallen into error of law when His Lordship failed to direct his mind and consider the inconsistent irregularities discrepancies of the evidence of the State.

Ground 8:

THAT the conviction cannot stand having regards to evidence.

Ground 9:

THAT the Learned Trial Judge erred in law and in fact when His Lordship failed to direct himself on the essential element of the charge of murder especially the meaning of "Malice aforethought" in the failure of doing so caused a grave substantial miscarriage of justice.

Ground 10:

THAT the Learned Trial Judge erred in law and in fact when His Lordship incorrectly relied on the last part of the video footage evidence when it did not satisfy the main element of murder. In correcting doing so caused a grave substantial miscarriage of justice.

Ground 11:

THAT the Learned Trial Judge erred in law and in fact when His Lordship failed to weigh the "psychological torment" leading to provocation of the appellant resulting in the assault of the deceased.

Ground 12:

THAT the Learned Trial Judge erred in law and in fact when His Lordship failed to direct himself on the issues of provocation and self-defense.

Ground 13:

THAT the Learned Trial Judge erred in law and in fact when His Lordship failed to assess the evidence of self-defense, on the face of the record of PW1's statement before convicting the Appellant on the charge murder.

Ground 14:

THAT the Learned Trial Judge erred in law and in fact when His Lordship failed to analyse the Appellant's medical report on the issue of self-defense which is substantial miscarriage of justice.

[6] According to the sentencing order the brief summary of facts are as follows:

2. 'The brief facts were as follows:

a. On 25th December, 2017 the deceased who was the defacto partner of the accused step daughter Ranshika Kumar upon invitation went to the accused house to celebrate Christmas. The deceased and the accused were drinking alcohol when the deceased made some comments and swore at the accused.

b. The accused also swore at the deceased and an argument broke out between the two. Thereafter, the accused and the deceased had a fist fight inside the house of the accused which later ended up in the compound. After the two were separated by neighbours the deceased left and was standing on the road away from the house of the accused. The accused did not want the deceased to come back.

c. After a while the accused saw the deceased on the road and he walked towards the deceased with a 2 x 1 timber in his hand and struck the deceased several times, and also kicked and stomped him which resulted in the death of the deceased almost instantly. The victim was taken to the hospital but was pronounced dead on arrival.

d. Furthermore, the accused had also said on three occasions that day that he will kill the deceased. An eye witness was able to record the actual incident in a mobile phone which was played in court. The post mortem examination report noted the cause of death as:

(a) Cardiac Tamponade;
(b) Haemopericardium;
(c) Ruptured heart due to blunt force trauma;
(d) Severe chest trauma;
(e) Cerebral oedema; and
(f) Blunt force trauma.

Grounds 01, 02 & 11

[7] The gist of these grounds of appeal is whether the partial defense of provocation was available to the appellant. In **Masicola v State** [2023] FJSC 27; CAV0011.2021 (30

August 2023) the Supreme Court summarised the salient features of 'provocation' as follows:

> *[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."*

[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].

[8] It is very clear from the totality of evidence that the after the initial fight between the appellant and deceased at home and they were separated by the neighbors, the deceased left and was standing on the road away from the house of the appellant. According to what the appellant stated at the hearing the distance from home to where he attacked the deceased was about 20 meters. After a while the appellant had seen the deceased on the road and he walked towards the deceased with a 2 x 1 timber in his hand and attacked him. The deceased was unarmed at that time. Even after the deceased fell on the ground as a result of the assault the appellant had also kicked and stomped him twice which had resulted in the death of the deceased almost instantly.

[9] Therefore, there had been clearly sufficient time for the passion to cool and the appellant's attack on the deceased with the 2 x 1 timber cannot be considered to have happened in the heat of passion caused by provocation earlier in the house. It was a premeditated and well calculated attack on the unarmed deceased. There was no evidence of provocative words or deeds coming from the deceased directed at the appellant that triggered the appellant's attack on the deceased near the road. There is nothing to suggest that the appellant had suddenly lost his self-control at the time of the assault on the deceased with the 2 x 1 timber. Needless to say that in these circumstances no question arises on the proportionality of the attack because there were no provocative words or deeds on the part of the deceased. Thus, it is very clear that the partial defense of provocation had not been made out.

Ground 3

[10] The appellant has not demonstrated in what way the trial judge had failed to make an independent assessment of evidence. At paragraph 117-141 of the judgment the trial judge had thoroughly ventilated the proposition of provocation which was the central plank of the defense case, for the attack itself was not in dispute.

Ground 4 and 7

[11] The appellant's complaint is directed at the evidence of PW1 and PW3 as summarized by the trial judge at paragraphs 35, 36, 56 and 59 of the judgment. PW1 is the

appellant's step daughter and the deceased's *de facto* partner and PW3 is a neighbor. PW1 had witnessed the incident at home from the beginning and PW3 could only speak to what he saw since his arrival at the appellant's house. Thus, there is no material discrepancy/inconsistency in the testimony between PW1 and PW3. Each narrative contain their respective observations of the scenario as they saw it unfolding in front of their eyes.

[12] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) it was held:

> *[13] .....the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*
>
> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*

Ground 5 and 8

[13] By no stretch of argument, could I say that the trial judge had not considered the totality of evidence. For any concern whether the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows (which is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> *'[23] ……**the correct approach by the appellate court is to examine the record or the transcript** to see whether by reason of inconsistencies,*

discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence. ***These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors****'*

[14] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court.

[15] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[16] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.

[17] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carry out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, to decide whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[18] Having considered the comprehensive judgment, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence.

Ground 6

[19] The prosecution has not relied on the appellant's cautioned interview as part of its case. Neither has the defense led it in evidence. Thus, the cautioned interview did not form part of the evidence before the trial judge and he had no legal basis to consider it in his judgment.

Ground 9

[20] There is no concept called 'malice afterthought' in the Crimes Act. The mental element is referred to as the fault element. The trial judge had addressed his mind to the fault element for murder at paragraphs 4, 5 & 10-12 of the judgment.

Ground 10

[21] The video footage recorded by a juvenile did not contain the last part of the incident (*i.e.* the second time the appellant stomped on the deceased's chest) but there were eye-witness evidence (PW1 & PW5) to speak to the entire scenario. The trial judge did not rely only on the video footage but the prosecution case was based on other evidence. Even without the video evidence there was ample evidence to understand

the totality of events that happened. The video footage did not form such a vital or indispensable part of the case against the appellant.

Ground 12-14

[22] The appellant's arguments based self-defense are totally misconceived. Self-defence is a total defence whereas provocation is only a partial defence. Conscious responsive act in self-defence is based on the perceived threat by an accused whereas the accused's loss of self-control is the cornerstone of acting under provocation. There was no credible narrative of the appellant having exercised self-defense in this case. See **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) **Naitini v State** [2020] FJCA 20 AAU135 of 2014, AAU 145 of 2014), **Narayan v State** [2020] FJCA 189; AAU0610.2017 (6 October 2020).

***Order* of the Court:**

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent