IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 05 of 2019

STATE

V

SEMESA BOKINI

Counsel	:	Mr. Taitusi Tuenuku with Mr. Laisiasa Baleilevuka for the State Ms. Keli Vulimainadave for the Accused
Dates of Trial	:	17-20 and 23-25 October 2023
Judgment	:	29 April 2024
Sentence	:	13 December 2024

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "NSN".

SENTENCE

[1] Semesa Bokini, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offences:

Count One

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (b) of the Crimes Act 2009.

Particulars of Offence

SEMESA BOKINI, on the 5th day of January 2019, at Korovou, Tavua, in the Western Division, armed with an offensive weapon robbed **MOHAMMED SHAFIQUE** and **NSN** of the following items: 1 x Samsung J2 Prime mobile phone valued at $500.00, 1 x Apple I-Phone valued at

$2,000.00, 1 x Android Mobile Phone valued at $900.00 and 1 x Nokia Mobile Phone valued at $100.00 all to the total value of $3,500.00, the properties of **MOHAMMED SHAFIQUE** and **NSN** and immediately before the robbery force was used on the said **MOHAMMED SHAFIQUE** and **NSN.**

Count Two

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

SEMESA BOKINI, on the 5th day of January 2019, at Korovou, Tavua, in the Western Division, attempted to have carnal knowledge of **NSN,** without her consent.

Count Three

Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Act 2009.

Particulars of Offence

SEMESA BOKINI, on the 5th day of January 2019, at Korovou, Tavua, in the Western Division, murdered **MOHAMMED SHAFIQUE.**

[2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 7 days.

[3] The prosecution in support of their case, called 15 witnesses- the complainant and 4 other civilian witnesses; the Forensic Biologist; the Forensic Pathologist; the Medical Officer who examined the deceased and the complainant at the Tavua Hospital; the Medical Officer who examined the accused at the Tavua Hospital; and 6 Police Officers, who were part of the investigating team. The prosecution also tendered to Court several production items as prosecution exhibits.

[4] You gave evidence on your own behalf. You also called witness Marika Vunisa.

[5] At the conclusion of the evidence and having reviewed the totality of the evidence, this Court found you guilty and convicted you of the three charges of Aggravated Robbery, Attempt to Commit Rape and Murder.

[6] It was proved during the trial that on 5 January 2019, at Korovou, Tavua, armed with an offensive weapon you Robbed Mohammed Shafique and NSN of their property (the items listed in the charge), and immediately before the Robbery used force on the said Mohammed Shafique and NSN, with the intention to commit the Robbery or escape from the scene.

[7] It was also proved during the trial that on 5 January 2019, at Korovou, Tavua, you attempted to have carnal knowledge of the complainant NSN, without the consent of the complainant NSN, and you knew or believed that the complainant NSN was not consenting, or you were reckless as to whether or not she was consenting.

[8] It was further proved during the trial that on 5 January 2019, at Korovou, Tavua, you engaged in a conduct, and the said conduct caused the death of Mohammed Shafique (the deceased), and you intended to cause the death of the deceased or you were reckless as to causing the death of the deceased by your conduct.

[9] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

> *4. — (1) The only purposes for which sentencing may be imposed by a court are —*
>
> *(a) to punish offenders to an extent and in a manner which is just in all the circumstances;*
>
> *(b) to protect the community from offenders;*
>
> *(c) to deter offenders or other persons from committing offences of the same or similar nature;*
>
> *(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;*
>
> *(e) to signify that the court and the community denounce the commission of such offences; or*
>
> *(f) any combination of these purposes.*

[10] Semesa Bokini, I have duly considered the above factors in determining the sentence to be imposed on you, which is primarily to punish and to deter offenders or other persons

from committing such offences and also to signify that the Court and the community denounce the commission of such offences.

[11] Section 4(2) of the Sentencing and Penalties Act provides that a Court must also consider the following factors when sentencing an offender:

> *(2) In sentencing offenders a court must have regard to —*
>
> *(a) the maximum penalty prescribed for the offence;*
>
> *(b) current sentencing practice and the terms of any applicable guideline judgment;*
>
> *(c) the nature and gravity of the particular offence;*
>
> *(d) the offender's culpability and degree of responsibility for the offence;*
>
> *(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*
>
> *(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;*
>
> *(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;*
>
> *(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;*
>
> *(i) the offender's previous character;*
>
> *(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and*
>
> *(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.*

[12] Semesa Bokini, I have duly considered the above factors as well in determining the sentence to be imposed on you.

[13] Let me first deal with the charge of Murder which is the most serious of the three charges.

[14] In terms of the provisions of Section 237 of the Crimes Act No. 44 of 2009 ("Crimes Act") the penalty for the offence of Murder is a mandatory sentence of imprisonment for life,

with a judicial discretion to set a minimum term to be served before pardon may be considered.

[15] In ***State v Masicola*** [2015] FJHC 411; HAC081.2014S (5 June 2015); His Lordship Justice Temo held:

> *"The offence of "murder" (count no. 1) is often said to be at the top of the criminal calendar. To preserve human life is a fundamental objective in preserving and maintaining the wellbeing of our society. Our lawmakers had prescribed a mandatory penalty of life imprisonment for those found guilty of murder. The court is empowered "to set a minimum term to be served before a pardon may be considered" (Section 237 of the Crimes Decree 2009). A pardon may only be granted by His Excellency the President of the Republic of Fiji (Section 119 of the 2013 Fiji Constitution). Minimum terms for murder had been set between 26 to 11 years imprisonment, depending on the mitigating and aggravating factors:* ***Waisale Waqanivalu v The State****, Criminal Appeal No. CAV 005 of 2007, Supreme Court, Fiji;* ***The State v Navau Lebobo****, Criminal Case No. HAC 016 of 2002, High Court, Suva:* ***State v Anesh Ram****, Criminal Case No. HAC 124 of 2008, High Court, Suva and* ***State v Tukana****, Criminal Case No. HAC 021 of 2009, High Court, Lautoka."*

[16] The penalty stipulated in Section 237 of the Crimes Act is a stand-alone penalty provision which is specific to sentencing upon a conviction for Murder. As such, His Lordship Justice Calanchini (Then President, Court of Appeal) has held that the general provisions that apply to sentencing under the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act"), have no application.

[17] In the case of ***Aziz v The State*** [2015] FJCA 91; AAU112.2011 (13 July 2015); His Lordship Justice Calanchini held as follows:

> *"....Under section 237 of the Crimes Decree (Crimes Act) the penalty for murder is expressly stated to be a mandatory sentence of imprisonment for life with a judicial discretion to set a minimum term to be served before a pardon may be considered. This is a particular sentencing enactment that applies specifically to an offender convicted of murder. Pardon is part of the prerogative of mercy exercised by the President on the recommendation of the Mercy Commission under section 119 of the Constitution. The pardon may be free or conditional (section 119 (3) (a)). The effect of a free pardon is to clear the person from all consequences of the offence for which it is*

granted and from all statutory or other disqualifications following upon conviction, but not to remove the conviction (8 (2) Halsburys 827).

Although section 18 of the Sentencing Decree (Sentencing and Penalties Act) is a general enactment which ordinarily would apply to a life sentence imposed for murder, the particular enactment in section 237 of the Crimes Decree must be operative and in such case the maxim of interpretation "generalia specialibus non derogant" (general things do not derogate from special things) should be applied. The provisions of section 18 of the Sentencing Decree will have general application to all sentences, including where life imprisonment is prescribed as a maximum sentence unless a specific sentencing provision excludes its application. In my judgment a sentencing court is not expected to select either a non-parole term or a minimum term when sentencing for murder under section 237 of the Crimes Decrees. As a result any person convicted of murder should be sentenced in compliance with section 237 of the Crimes Decree. For the same reason the discretion given to the High Court under section 19(2) of the Sentencing Decree, being an enactment of general application, does not apply to the specific sentencing provision for murder under section 237 of the Crimes Decree."

[18] Furthermore, some very useful guidance on sentencing in cases of Murder have been provided by His Lordship Justice Calanchini in ***Balekivuya v The State*** [2016] FJCA 16; AAU0081.2011 (26 February 2016).

"[36] Section 237 (of the Crimes Act) provides for a mandatory sentence of life imprisonment for a person convicted of murder. It must be recalled that life imprisonment means imprisonment for life (Lord Parker CJ in R v Foy [1962] 2 All ER 246). ***The trial Judge when sentencing a person convicted of murder is required to exercise a discretion in two ways. The first is whether a minimum term should be set. The second is the length of the minimum term that should be served before a pardon may be considered.*** *The use of the word "pardon" in the penalty provision is not the same as what is sometimes referred to as an "early release" provision. The word "pardon" is not defined in the Crimes Decree nor is it defined in the Sentencing Decree. The only reference to the word "pardon" that is relevant to sentencing is to be found in section 119 of the Constitution. Under section 119(3) the Prerogative of Mercy Commission (the Mercy Commission), on the petition of a convicted person, may recommend that the President exercise a power of mercy by, amongst others, granting a free or conditional pardon to a person convicted of an offence.*

[37] In my judgment the effect of section 237 when read with section 119(3) of the Constitution is that a convicted murderer may not petition the Mercy Commission to recommend a pardon until that person has served the minimum term set by the trial Judge. The reference to minimum term in section 237 has nothing to do with early release. The Mercy Commission may or may not make the necessary recommendation to the President. Furthermore, the matters that the Mercy Commission takes into account in deciding whether to recommend a pardon may or may not be the same as the matters that are taken into account by the trial judge when he sets the minimum term.

[38] It should be noted that under section 119(3) of the Constitution any convicted person may petition at any time the Mercy Commission to recommend (a) a pardon, (b) postponement of punishment or (c) remission of punishment. However it would be reasonable to conclude that the Mercy Commission would take into account the sentencing judgment and the actual sentence imposed during the course of its deliberations.

[39] Finally and importantly, it is abundantly clear from the observations made above that the discretion to set a minimum term under section 237 of the Decree is not the same as the mandatory requirement to set a non-parole term under section 18 of the Sentencing Decree.

[40] The non-parole period is determined after the trial judge has arrived at what is referred to as the head sentence. The head sentence is premised on the existence of a prescribed maximum (<u>not</u> mandatory) penalty from which a tariff is identified, a starting point determined, aggravating and mitigating factors considered, any early plea of guilty credited and finally, under section 24 of the Sentencing Decree, a deduction made for time spent in remand as time already served. ***However the position is different when the head sentence is a mandatory sentence of life imprisonment. There is no basis for undertaking the approach described above when the head sentence is fixed by law.*** *Furthermore there is no basis for proceeding to determine a non-parole period for a person sentenced to the mandatory life sentence for murder since the specific sentence provision of section 237 of the Decree displaces the general sentencing arrangements set out in section 18 of the Sentencing Decree. In my judgment the reference to the court sentencing a person to imprisonment for life in section 18 of the Sentencing Decree is a reference to a life sentence that has been imposed as a maximum penalty, as distinct from a mandatory penalty. Examples of prescribed maximum penalties can be found for the offences of rape and aggravated robbery under the Decree.*

[41] ***For all of the reasons stated above I have concluded that there is no requirement for a trial judge to consider the time spent in remand when***

he has imposed the mandatory head sentence of life imprisonment upon a conviction for murder under section 237 of the Decree. *Further given that the minimum term, if one is set, does no more than entitle the convicted person to petition the Mercy Commission to recommend a pardon in my judgment there is no requirement for the trial judge to consider the time spent in remand when setting the minimum term under section 237 of the Decree. In my view section 24 of the Sentencing Decree has no application to the specific sentencing provisions in section 237 of the Decree.*

[42] ………… ***As I observed earlier, there is no guidance as to what matters should be considered by the judge in deciding whether to set a minimum term. There are also no guidelines as to what matters should be considered when determining the length of the minimum term.***

[43] ***He should however give reasons when exercising the discretion not to impose a minimum term. He should also give reasons when setting the length of the minimum term.*** *Some guidance may be found in the decision of R v Jones [2005] EWCA Crim. 3115, [2006] 2 Cr. App. R (S) 19 for the purpose of deciding whether a minimum term ought to be set. The Court of Appeal observed at paragraph 10:*

"A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life."

In determining what the length of the minimum term should be a trial judge should consider the personal circumstances of the convicted murderer and his previous history."

……….

"[48] …………… It is clear that the sentencing practices that were being applied prior to the coming into effect of the Crimes Decree, the Sentencing Decree and the Constitution no longer apply. Whatever matters a trial judge should consider when determining whether to set a minimum term and the length of that term under section 237, the process is not the same as arriving at a head sentence and a non-parole period. ***In my judgment the decision whether to set a minimum term and its length are at the discretion of the trial judge on the facts of the case.****"[All emphasis is mine].*

[19] Semesa Bokini, considering all the facts and circumstances of this case, I deem that it is appropriate to fix a minimum term to be served by the accused before pardon may be

considered. In determining the length of the minimum term I take the following factors into consideration:

(1) You have been found guilty and convicted of multiple offending. You invaded into the residential premises of the deceased and the complainant late in the night (around 10.30 p.m.), thereby paying complete disregard to their privacy and property rights.

(2) There is a frequent prevalence of these type of property offences in our society today.

(3) You assaulted the deceased with a piece of timber thereby causing severe head injuries to him which resulted in his death.

(4) Furthermore, you entered the complainant's room with the piece of timber in hand and at the same time you hit her with that piece of timber on her forehead [The complainant still has the scar on her forehead]. When you hit her on her forehead, she was about to fall in front. At that time, you had hit her again at the back of her head with the same piece of timber. The complainant had fallen face down on the tiled floor.

(5) Thereafter, you had attempted to rape the complainant. The impact of the crime on the complainant was extremely traumatic.

(6) As per the previous Convictions Report filed in this Court, there is one previous conviction recorded against you. This is for the offence of Damaging Property, where you were imposed a sentence of 2 months imprisonment which was suspended for 36 months, by the Magistrate's Court of Tavua, on 29 September 2022 (Magistrate's Court of Tavua, Case No. CF182 of 2022).

(7) As personal circumstances, you have submitted the following factors to Court:

    (i) That you are 26 years old. Your date of birth is 5 March 1998. At the time of the offending you were 20 years. Thus you were a young offender.

(ii) You are said to be single. You were residing with your mother and two nieces in Korovou Village in Tavua. Your father has passed on. You are said to be the sole bread winner in your family.

(iii) You were said to be employed as a Carpenter with a construction company earning $30.00 per day.

(8) Court is aware that you fully cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.

(9) You have been in remand custody for this case for a long period of time. You were arrested for this case on 6 January 2019 and remanded into custody. You were granted bail by this Court on 8 February 2021. That is a period of 2 years and 1 month in remand (25 months). Thereafter, on 29 April 2024, the day on which the Judgment was pronounced, you were remanded into custody once again. You have remained in custody since that day. That is a further period of about 7½ months. Therefore, you have been in remand custody for this case for a period of 32½ months. In determining the minimum term to be served by you before pardon may be considered, it is important that this Court considers the said period of remand that you have been in custody.

[20] Semesa Bokini, the penalty for the offence of Murder is a mandatory sentence of imprisonment for life. Accordingly, I sentence you to a mandatory sentence of imprisonment for life. Taking into consideration all the facts and circumstances I have referred to above, including your personal circumstances and your previous history, I set a minimum term of 16 years to be served by you before pardon may be considered.

[21] Semesa Bokini, the first count you have been found guilty and convicted of is the offence of Aggravated Robbery. In terms of Section 311 (1) of the Crimes Act the offence of Aggravated Robbery carries a maximum penalty of 20 years imprisonment.

[22] The general tariff for the offence of Aggravated Robbery where it was a home invasion, was held to be between 8 and 16 years imprisonment. This tariff was endorsed by the

Supreme Court in ***Wallace Wise v. State*** [2015] FJSC 7; CAV 04 of 2015 (24 April 2015); where it was held:

> *"……We believe that offences of this nature should fall within the range of 8-16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them."*

[23] The current authority setting out the tariff for Aggravated Robbery is the Supreme Court decision in ***State v. Tawake*** [2022] FJSC 22; CAV 0025.2019 (28 April 2022). As per the tariff set out in the said case, the circumstances of this case would fall under the Category of *Aggravated Robbery (Offender with a Weapon)* with the level of harm being in the *High* Category, which is a sentencing range of 5 to 9 years imprisonment.

[24] Accordingly, considering the objective seriousness of the offence and taking into consideration the nature and the gravity of the offence and your culpability and degree of responsibility for the offence, I impose on you a sentence of 7 years imprisonment for the first count of Aggravated Robbery.

[25] Semesa Bokini, the second count you have been found guilty and convicted of is the offence of Attempt to Commit Rape. In terms of Section 208 of the Crimes Act the offence of Attempt to Commit Rape carries a maximum penalty of 10 years imprisonment.

[26] In the case of ***Aunima v. The State*** [2001] FJHC 105; HAC0033J.2001s (27 June 2001); Her Ladyship Madam Justice Shameem held that the tariff for the offence of Attempted Rape was between 12 months to 5 years imprisonment.

> *"Applying all these principles, I find that the accepted tariff for Attempted Rape in the Fiji Courts ranges from 12 months imprisonment to 5 years imprisonment. A starting point should then be chosen according to the seriousness of the offending."*

[27] In the case of ***Bulimaiwai v The State*** [2005] FJHC 261; HAA0068J.2005S (2 September 2005) Her Ladyship Madam Justice Shameem held:

> *"In Joji Aunima v. State Cr. App. 33/2000, I identified the tariff for attempted rape as being 12 months imprisonment to 5 years*

imprisonment. Sentences at the upper end of the tariff should be imposed where gratuitous violence is inflicted, where a weapon is used, where there is a gross breach of trust or where there is a large age gap between complainant and offender. In Hari Chand v. State (supra) I upheld a 3 year term for the attempted rape of his daughter-in-law by the offender. There was no gratuitous violence but there was a gross breach of trust."

[28] However, what must be borne in mind is at the time the above two cases were decided the offence of Attempt to Commit Rape was an offence under the Penal Code and carried a maximum penalty of 7 years imprisonment. In terms of the Crimes Act the maximum penalty for the offence is now 10 years imprisonment.

[29] Accordingly, considering the objective seriousness of the offence and taking into consideration the nature and the gravity of the offence and your culpability and degree of responsibility for the offence, I impose on you a sentence of 4 years imprisonment for the second count of Attempt to Commit Rape.

[30] In the circumstances, Semesa Bokini, your sentences are as follows:

Count 1 – Aggravated Robbery contrary to Section 311 (1) of the Crimes Act – 7 years imprisonment.

Count 2- Attempt to Commit Rape contrary to Section 208 of the Crimes Act – 4 years imprisonment.

Count 3 – Murder contrary to Section 237 of the Crimes Act – mandatory sentence of imprisonment for life, with a minimum term of 16 years to be served by you before pardon may be considered.

[31] I order that all the above sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be mandatory sentence of imprisonment for life, with a minimum term of 16 years to be served by you before pardon may be considered.

[32] In the result, I sentence you to a mandatory sentence of imprisonment for life. I set a minimum term of 16 years to be served by you before pardon may be considered.

[33] You have 30 days to appeal to the Court of Appeal if you so wish.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA
Dated this 13th Day of December 2024

Solicitors for the State	**:**	**Office of the Director of Public Prosecutions, Lautoka.**
Solicitors for the Accused	**:**	**Office of the Legal Aid Commission, Lautoka.**