IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0016 of 2019
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0142/14; HAC 052 of 2013]

BETWEEN: **SAILASA MOCIU**

Petitioner

AND: **THE STATE**

Respondent

Coram: The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court
The Hon. Mr. Justice Priyasath Dep, Judge of the Supreme Court

Counsel: Petitioner in Person
Dr. A Jack for the Respondent

Date of Hearing: 4th August, 2022

Date of Judgment: 25th August 2022

JUDGMENT

Gates J

[1] On 4th November 2014 the Petitioner was found guilty of the murder of his wife. He was sentenced the next day to life imprisonment with a non-parole period of 20 years. The

assessors had tendered unanimous opinions of guilt and the learned trial judge had concurred.

[2] To this Court he brings four grounds of appeal against conviction and one against sentence.

[3] One of the grounds repeats a ground dealing with the judge's directions on provocation. On the 27th of March 2017, this ground had been rejected by the single judge in the Court of Appeal and leave had been refused. It did not form a ground of appeal before the Full Court either.

[4] The Petitioner was represented in the High Court trial and also before the Court of Appeal.

Facts

[5] The Petitioner was charged with a single count of murder contrary to section 237 of the Crimes Act. The offence had happened on the 9th of January 2013. He and his wife Kasaya were staying at her village Naisamua in Tailevu. They usually stayed at Loqi settlement near Nadi where he was a farmer. They had 4 children. A few months earlier he had been released from prison. He noticed that their relationship had changed. It appeared his wife was no longer interested in him. He suspected her of having affairs. He did not like her leaving home, drinking excessively, and neglecting the children.

[6] In his caution interview statement the Petitioner related that they had been drinking yaqona at Naisamua village until 1.00a.m. Afterwards he and his wife retired to sleep in the sitting room. It seems matters were tense between them. He said *"he was very wild on her*". They argued and thereby disturbed another relative in the house. He felt ashamed at the situation.

[7] He decided to leave and to go back to Nadi. He told his wife to accompany him to the main road. She called one Aliti and another girl to come with her. They left the house at

around 5am. He carried his bag. He said it contained his clothes and toiletries. He admitted he had a kitchen knife in the bag as well. At one time, the knife fell out of the bag, as they proceeded along the pathway. He retrieved it.

[8] The Petitioner walked in front. His wife and the two girls followed. In interview he said his intention was to stab Kasaya. Once they reached the bridge which went over a creek he asked his wife to take him right to the bus stop on the main Kings Road. She refused and told him to go on alone. She turned to walk back. At that point he ran towards her, took out the knife, and stabbed her.

[9] Apparently he took hold of her from the back and holding her tightly pressed the knife forcefully down onto her right shoulder. There were 3 injuries visible, though he admitted to two stabbings. The shoulder wound caused a severance of the brachial artery. The pathologist in his report considered the victim died from shock, excessive blood loss, and the severance of the brachial artery and the right pectoral muscle.

[10] The Petitioner said she then fell "*by herself*" into the creek, though the witness Aliti said she saw the Petitioner pushing Kasaya into the creek. The attack took place on the road at the edge of the bridge. He then ran away to the main road. He went to his brother's place in Vatuwaqa in Suva, and hid the knife in the graveyard at the Vatuwaqa Cemetery. Later he showed the police where he had placed the knife.

[11] When his brother informed him that Kasaya had died, he took a bus to Nadi. From that point on, he was on the run, for thirteen days in all. There was a large scale search for him in the jungles around Nadi. Through his then lawyer he eventually surrendered himself. Finally in the interview when asked if he wished to say anything else, he said he would ask for forgiveness in Court.

[12] The facts were largely undisputed. He claimed that he did not intend to kill his wife. In evidence he said he was 44 years old and had been married to Kasaya for 17 years. In the

early hours he had wanted to have a family talk about the children. Kasaya would not allow it. He admitted that he had brought the knife with him from Nadi. It was his knife.

[13] In his evidence he said:

> *"I was really angry at the time. I knew she was doing something. She was swearing at me that morning. I wanted to teach her something or frighten her. I took out the knife, and I stabbed Kasaya on the shoulders. I stabbed her twice on the arm and the shoulder. I wanted to teach her for neglecting the children and drinking excessively. I did not intend to kill her. If I wanted to kill her, I would stab her on the neck, stomach or from the back. I pulled her towards me from the front and I stabbed the side of her arm and I tried to stab her again and she hit my hand and I stabbed her on the shoulder."*

[14] In the course of his cross-examination he was shown the knife. He said:

> *"I recognize the knife. That's the knife I used to stab Kasaya. Both edges of the knife were sharpened. It was sharpened 1 week before the stabbing. My son (PW10) saw me sharpening it. I brought the knife from Nadi to Naisamua Village. I did not plan to stab Kasaya. I stabbed Kasaya near the bridge. I only stabbed her twice."*

Grounds 1 and 2

[15] These two grounds repeat the complaint to the Court of Appeal which had constituted a single ground of appeal to that Court. In essence it complained that the trial judge was in error in two ways. First, he had directed the assessors *"very strongly on the prosecution version of the evidence stating that the State had proved the elements beyond reasonable doubt."* Secondly, the judge had referred to examples of offending similar to the alleged offending in the Petitioner's case. These two errors it was claimed denied the Petitioner a fair trial and resulted in a substantial miscarriage of justice.

[16] In the opening paragraph of the judge's summing up to the assessors his Lordship had this to say:

> *"On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely*

a matter for you whether you accept what I say or form your own opinions. You are the judges of fact."

[17] On the role of State and Defence counsel he said:

"However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case and which version of the evidence is reliable."

[18] The judge summarized the defence case:

"On 28 October 2014, the first day of the trial proper, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the murder allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was put to his defence, he chose to give sworn evidence and called no witness. That was his right.

In his evidence, the accused admitted he was at the crime scene, at the material time. He also admitted that, he took out a kitchen knife and stabbed his wife on the right shoulder. He admitted that, he did the above because he wanted to teach his wife a lesson "for neglecting the children and drinking excessively." He said, he did not intend to kill his wife. If he did so, he said, he would have stabbed her on the neck, stomach or from the back. When cross-examined, the accused admitted that he stabbed his wife on the right shoulder with a knife, and this caused a massive wound and injury. He also said, he gave his caution interview statements to the police voluntarily.

He said, because he did not intend to kill his wife, when stabbing her, he is not guilty as charged. He asks you, as assessors and judges of fact, to find him not guilty as charged, and acquit him accordingly. That was the case for the accused."

[19] In analyzing the evidence the judge gave careful and balanced directions on the caution interview, its circumstances, and on whether it had been voluntary. He concluded *"whether or not to accept his alleged confessions in his caution interview statement, is entirely a matter for you."*

[20] The judge went on to deal with each of the elements of the offence required to be proved. He quoted that part of the interview where the Petitioner had said what his intention was in using the knife. This evidence was confirmed by the Petitioner in his sworn evidence

in the trial. The conduct required by section 237(b), the first limb of the offence, *"the person engages in conduct"*, was therefore proven, and had been confirmed in evidence by the Petitioner himself.

[21] Had the conduct caused the death of another person, here Kasaya the wife of the Petitioner? The answer, the judge said, was fundamentally a medical matter. He referred to the post mortem report, about which the judge instructed the assessors *"you must carefully read and understand the report"*. He went on:

> *"It would appear that Doctor Goundar's conclusion as to the cause of the deceased's death, supports the prosecution's theory that, the accused by stabbing the deceased's right shoulder, with a knife, severed her artery leading to excessive loss of blood and her consequent death. It would appear that the prosecution had proven the second element of murder beyond a reasonable doubt. In any event, it is a matter entirely for you."*

[22] The judge came to the third element – the intention to cause the death. He directed:

> "*As we have said before, we cannot cut open the accused's head and examine his brain, to find out his intention, at the time he stabbed his wife in the shoulder. We must look to his physical actions at the time, what he said and the surrounding circumstances, to draw inferences of fact, as to his intention. In other words, we must put ourselves in his shoes, and from his physical actions, spoken words and the surrounding circumstance, we should be able to find out his intention."*

[23] The judge related the existing family circumstances. For when the Petitioner returned from prison, his wife's attitude towards him had changed adversely. But the Petitioner had wanted to hold his family together. The children were with him at Nadi for the Christmas whilst, his wife was away at her village. He was already seen to be sharpening the knife which he used in the alleged murder later. His own son had testified as having seeing him sharpening the knife one week before the murder. None of this evidence referred to had been disputed.

[24] The judge related fairly all of the details of the night leading up to the use of the knife. The Petitioner had planned to stab his wife. He was angry with her and she had been disrespectful of him. He said he wanted to teach her a lesson for neglecting the children

and for drinking excessively. The stabbing had been admitted but he said he did not intend to kill her.

[25] In commenting on the admitted evidence the judge said:

> *"What do the above facts and surrounding circumstances tell you? Did the accused have the intention to stab his wife to death, at the material time? He did not rush her to hospital? He ran away. It would appear, given the above that, the accused had the intention to stab his wife to death, at the material time. However, it is a matter entirely for you."*

[26] Taking the summing up as a whole, it is clear the issues for the assessors together with the relevant evidence were set out in a balanced and a fair manner.

[27] Criticisms was made of the judge's examples of ways in which the physical elements of the offence of murder could be committed. The judge had said:

> *"For example, A wants to shoot B with a gun. A picks up a gun, and shoots B in the heart. A did a "wilful act". Likewise, if A wants to stab B with a kitchen knife. When A stabs B's shoulder with a kitchen knife, A did a "wilful act.""*

and on causation of death:

> *"Continuing from the above examples when A shot B in the heart, with a gun, B later died as a result of the injuries to his heart. A's shooting B in the heart (wilful act) was a substantial cause of B's death. Likewise, when A stabs B's shoulder with a kitchen knife. B later died as a result of severe loss of blood due to a severed artery. A's stabbing B with a kitchen knife (wilful act) was a substantial cause of B's death."*

[28] As the single judge in the Court of Appeal, in refusing leave, had remarked the complaint on this ground is misconceived. The examples given by the trial judge were given on elements of proof that were not in contention. These elements were not challenged. The petitioner's case concerned his intent in wounding his wife by the stabbings. These examples could not have caused any prejudice to the Petitioner's case, nor bolstered the prosecution case: **Anesh Ram v The State** [2015] (unreported) AAU0087.2010; 2nd October 2015 [paras.16 – 17]. This part of the case against him was admitted in the

caution interview on the Petitioner's own sworn testimony, and in the way defence Counsel had conducted the case at trial. These two grounds therefore fail.

Grounds 3 and 4

[29] These two grounds can be taken together. Ground 3 questioned the proof of "*premeditation*" and the intention to kill. Ground 4 raised the issue of provocation in the form that the Petitioner had acted as a *"result of my unbearable and combination mistreatment done by my wife."*

[30] The judge in the trial had found that there was pre-planning and his Lordship had rejected provocation as a defence. Whilst the judge set out in the summing up the pressures facing the Petitioner in the deteriorating family circumstances, it was clear, though frustrated and angry at the time the Petitioner had not committed the stabbings in the heat of passion with a sudden loss of control.

[31] The trial judge had directed the assessors as follows in two paragraphs:

> "*14. Provocation is a partial defence. If it is made out, it reduces an offence of murder to manslaughter. If an accused person does an act which causes death, in the heat of passion, caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter. Provocation is any wrongful act or insult of such nature, when done to an ordinary person, deprives him of the power of self-control, and induces him to assault the deceased. If you find that the above defence is available to the accused, then you must find him not guilty of murder, but guilty of manslaughter. However, if you find that the defence is not available to the accused, and all the three elements of murder had been proven by the prosecution beyond a reasonable doubt, then you must find the accused guilty as charged.*
>
> *36. You will have to consider the above defence, if you have reached the conclusion at this stage that, the accused is guilty of murdering his wife, at the material time. Please, examine this defence of provocation in the light of the direction I gave you at paragraph 14 hereof. Was the accused provoked by the wife to the extent that he subsequently stabbed her? Was the provocation by the wife of such a nature as to cause him to lose his power of self-control? Was the stabbing done in the heat of passion, caused by sudden provocation, and before there was time for his passion to cool? Was the retaliation proportionate to the provocation? In my view, the surrounding*

circumstances and the previous verbal arguments between the accused and his wife from 1am to 5am on 9 January 2013, was not sudden provocation. There was enough time for his anger etc to cool down as they walked to the bridge. In his own evidence, he wanted to teach her a lesson. In my view, the defence of provocation is not available to the accused. In any event, it is entirely a matter for you.

[32] The single judge of appeal found this ground to be unarguable and refused leave. Counsel had accepted that the directions on provocation were correct but submitted that the trial judge should have emphasised the facts showing that the provocation had been prolonged. But the judge had fairly set out the circumstances to the assessors which had caused anger and frustration to the Petitioner. He concluded they did not amount to provocation. The finding that provocation did not apply and that the prosecution had proved its case was open to the trial judge. These two grounds must also fail.

[33] In this petition hearing as often happens when the Petitioner appears without Counsel, a submission is filed from within the prison where the Petitioner is serving his or her term. Much worthy effort and industry has gone into the research and production of these written submissions. However it is essential that the submissions deal only with the grounds of the petition. Some of the submissions deal with extraneous matters or are irrelevant to the grounds filed. In this case identification arguments were raised when identification of the perpetrator of the knifing had never been in issue, either at the trial or in any of the appeals.

Ground 5 – Sentence

[34] This ground complains of the 20 year non-parole term. The head sentence of life imprisonment for murder is fixed by law in the Penalty Section of the Crimes Act. [Section 237]. The sentencing judge has no discretion in the matter. But there is discretion when it comes to the fixing of the non-parole period before pardon can be considered.

[35] The Petitioner complains the non-parole period is excessive, "*in comparison with other cruel and brutal murder sentences in our country."*

[36] The learned Judge had considered other non-parole periods for murder. In his sentencing remarks he said:

> *"As I have said in **State v Seremaia Naidole Momo**, HAC 086 of 2011S and **State v Roneel Chand**, HAC 064 of 2011S, both are High Court, Suva cases, "… "Murder" is a serious offence, and it is often said, to be at the top of the criminal calendar. It carries a mandatory penalty of life imprisonment. (Section 237, Crime Decree 2009). The court has the power to fix a non-parole period to be served, before a prisoner is eligible for parole. Case precedents show that the non-parole, period of murder varies widely, depending on the peculiar facts of the case. In **Waisale Waqaivalu v The State**, Criminal Appeal No. CAV 0005 of 2007, Supreme Court, Fiji, on 5 counts of murder and 1 of attempted murder, the accused was given 19 years non-parole period on each murder count, and 10 years consecutive on a pending prison sentence, total non-parole period was 26 years. In **State v Niume & Others**, Criminal Case No. HAC 010 of 2010, High Court, Suva, on 2 counts of murder, Accused No.1 was given 25 years non-parole period for the murder counts. In **State v Ashwin Chand**, Criminal Case No. HAC 032 of 2005, High Court, Lautoka, on a count of murder, the accused was given a non-parole period of 22 years. In **State v Navau Lebobo,** Criminal Case No. HAC 016 of 2002, High Court, Suva, the non-parole period was 20 years. Twenty years non-parole period were also imposed in the following three cases: **State v Anesh Ram**, Criminal Case No. HAC 124 of 2008S, High Court, Suva: **State v Bharat Lal & Others**, Criminal Case No. HAC 061 of 2009S, High Court, Suva, and **The State v Salesi Balekivuya**, Criminal Case No. 095 of 2010S, High Court, Suva. In **State v Tukuna**, Criminal Case No. HAC 021 of 2009, High Court, Lautoka, the non-parole period was 11 years. The non-parole period imposed will depend on the mitigating and aggravating factors…"*

[37] Each case will depend upon its own peculiar facts. This was indeed a shocking and brutal attack with a knife. The 20 years non-parole period correctly reflected the criminality involved. The offence is to be regarded as one at the top of the range for domestic violence cases. Women are especially vulnerable. Such crimes deserve severe denunciation from the court. This ground fails.

[38] The petition does not meet the criteria for the grant of special leave and is to be dismissed.

Ekanayake J

[39] I have read in draft the judgment of Gates J and I agree with its reasons, conclusions and orders proposed.

Dep J

[40] I have read in draft the judgment of Gates J and I agree with his reasoning and conclusions.

Orders:

In the result the orders are:

1) *Special leave refused.*
2) *The petition is dismissed.*
3) *Conviction and sentence affirmed.*

Hon. Mr Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

Hon. Mr Justice Priyasath Dep
Judge of the Supreme Court