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

CRIMINAL APPEAL NO.AAU 088 of 2020
[In the High Court at Lautoka Case No. HAC 100 of 2016]

BETWEEN	**:**	**NAZEEM SHEERAZ ALI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	**:**	**05 January 2023**
Date of Ruling	**:**	**06 January 2023**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of murder of Susana Vakaloloma contrary to section 237 of the Crimes Act, 2009 committed on 07 May 2016 at Yalalevu Ba in the Western Division.

[2] The appellant had been represented by the same counsel in the Magistrates court and the High Court up to the point of filing mitigation submissions. The trial had been fixed from 16–20 September 2019. However, on the date of the trial (*i.e.* 16 September 2019) prior to the commencement of the trial, the appellant had pleaded guilty to the charge of murder and summary of facts had been read over on 17 September 2019 which he had admitted. The sentencing had been adjourned to 15 October 2019 and in the meantime both parties had tendered mitigation submissions. However, the appellant's counsel had not been present on 15 October 2019 and the appellant had submitted a note to the High Court judge seeking to vacate his guilty plea. This fact had been recorded by the

prosecuting state counsel in his file. Sentencing had been adjourned to the following day. On 16 October 2019 the trial judge had proceeded to sentence the appellant on his guilty plea to mandatory life imprisonment with a minimum serving period of 19 years.

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

> *3. On 17 September 2019 the summary of facts was read out and explained to you. According to the summary of facts you were in a de facto relationship with the deceased. On 07 May 2016 you were drinking wine with the deceased. After drinking about 7 bottles of wine, an argument arose with the deceased as she asked for more liquor. In the process you took a cane knife and struck the deceased on her neck. The deceased collapsed on a mattress and you kept on striking the deceased several times on her neck, arms and legs. Thereafter you took the body of the deceased to the kitchen and severed the arms and the legs from the body with the cane knife. You packed the arms and the legs of the deceased in a garbage bag and packed the remaining body parts of the deceased in a drawer. On 8 May 2016 you rang one Ratu Samu Raganitoga and confessed to him that you killed the deceased. You requested him to assist you in burying the body. You took him home and showed him the body parts. You told him that you wiped off the blood that was in the sitting room. You asked him to assist you to load the body in the car. He refused to assist and asked you to drop him off at Ba Town. On 10 May 2016 he reported the matter to the Police. Later you were arrested, and you admitted under caution that you killed the deceased. As per the Postmortem report the death is caused by Exsanguination and multiple traumatic slashed injuries.*

[4] The appellant's appeal against conviction (16 July 2020) is out of time by 08 months. The Rules of Court have to be observed and must not be disregarded or ignored [vide **Halsbury's Laws** (4th Ed) Vol 37 para 25; **Revici v Prentice Hall Inc** [1969] 1 All ER 772 (CA); **Samuels v Linzi Dresses Ltd** [1980] 1 All ER 803, 812 (CA)] and in order to justify a court extending time there must be some material before court (vide **Ratnam v Cumarasamy** [1964] 3 All ER 933 at 935) and if no excuse is offered, no indulgence should be granted [vide **Revici v Prentice Hall Incorporated and Others** (supra)].

[5] The discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties which means that such discretion can only be exercised upon proof on the material before court that strict compliance with the rules will work injustice to the applicant [see **Gallo v Dawson** [1990] HCA30; (1990) 93 ALR 479] . In addition, the practical utility of the remedy sought on appeal, the extent of the

impact on others similarly affected, any impact on the administration of justice and any floodgates considerations have to be considered relevantly in exercising the court's discretion (see **R v Knight** [1998] I NZLR 583 at 589).

[6] 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).

[7] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[8] The delay in this conviction appeal is substantial. The appellant's explanation is that he in fact tendered his appeal within time to the Correction Centre, which however, had not reached the CA Registry. The appellant had attached a copy of the initial appeal signed on 25 October 2019 to his affidavit. Therefore, I accept that the appellant had indeed tendered his appeal in time. I would now 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.

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

Conviction

Ground 1

THAT the plea of guilty is equivocal on the grounds of flagrantly incompetent advocacy and the gross misrepresentation by the defence counsel.

Ground 2

THAT the Learned Trial Judge may have fallen into an error of law and fact by failed to consider that at the material time of the alleged incident the appellant was intoxicated with liquor and such with his state of intoxication whether he could form intention specific or otherwise and in the absence of which he would not be guilty of the offence.

Ground 3

THAT the guilty plea is equivocal on the following reasons:

(i) Not a true admission of guilt.

(ii) Made in circumstances include, ignorance, fear, duress, mistake or even the desire to gain technical advantage.

(iii) Accompanied by a qualification indicating that the appellant is unaware of its significant.

(iv) Not entered in the exercise of free choice.

Ground 4

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship failed to consider the submission of the appellant for a change of plea from guilty to not guilty prior to sentencing on this matter.

Ground 5

THAT the Learned Trial Judge may have fallen into an error of law when he failed to decide whether on the evidence of summary of facts he should direct himself on the availability of any alternative defence or verdict that is not raised by the defence.

01st and 03rd ground of appeal

[10] The appellant alleges that his trial counsel informed him on the day of the trial that he was not ready for trial and the appellant had to plead guilty or defend himself. Accordingly, the appellant says that he reluctantly sign a letter given to him by the trial counsel as he had no other option under such pressure. The trial counsel is alleged to have warned him that if the appellant did not sign the letter, he would not make any submission to court and the appellant would get a life sentence but if he pleaded guilty the counsel would get him out of murder charge. Thus, when the matter was called, the counsel informed court that the appellant on his advice had decided to take a progressive approach. The appellant accordingly pleaded guilty and admitted the summary of facts. He has submitted an affidavit from a person named Ravinesh Singh known to him who was said to be present and overheard the conversation between the appellant and his counsel to substantiate the appellant's stance that it was not a voluntary admission of guilt. The trial counsel has not been made aware of these serious allegations and this court has no explanation coming from him.

[11] 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.

02nd ground of appeal

[12] The appellant submits that intoxication revealed in the summary of facts may have negated the required fault element for murder.

[13] It is clear that this is a case of voluntary intoxication. The evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drinks so

that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts [vide **Director of Public Prosecutions v Beard** (1920) AC 479 (HL) as quoted in **Ratabua v The State** AAU 129 of 2016 (29 September 2022)].

[14] In **Tapoge v State** [2017] FJCA 140; AAU121.2013 (30 November 2017) the Court of Appeal dealing with intoxication held

> *'[22] Like provocation, voluntary intoxication is not an excuse for an unlawful killing. But voluntary intoxication is relevant in determining whether the accused had the pre-requisite fault element to be guilty of murder.'*

[15] The narrative in the summary of facts regarding the appellant and the deceased sharing 07 bottles of wine falls far short of this high degree of voluntary intoxication to the level of insanity needed to negate the fault element completely or even to negate the specific fault element for murder to bring it down to manslaughter.

04th ground of appeal

[16] The appellant insists that he wanted to withdraw his guilty plea on 15 October 2010 and submitted a note to the trial judge to that effect. This is confirmed by the note made by the prosecuting counsel on his file as Mr. Babitu informed this court at the hearing. This episode had happened in the absence of the appellant's trial counsel who had not turned up in court on that day or even on the following day.

[17] The trial counsel's absence may have been due to the fact that the appellant was apparently reluctant to follow his advice though the appellant pleaded guilty on 16 September 2019 grudgingly and allegedly under duress (according to the appellant) but now wanted to withdraw the guilty plea. However, if that be the case, the trial counsel, instead of abdicating his duty towards court should have appeared and sought permission to withdraw from the case if he felt that he could not continue to represent the appellant due to disagreement on what was best for the appellant; a plea of guilty or trial. According to the appellant, his application to withdraw the plea of guilty was rejected by the trial judge as there was still a counsel on record and the judge proceeded to sentence him on the following day.

[18] In **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter that

> *'[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).*

[19] A change of plea from guilty to not guilty may be entertained at any time before sentence is passed [vide **Ali v State** [2020] FJCA 11; AAU31.2015 (27 February 2020) & **R. v. McNally** [1954] 1 W.L.R 933; 38 Cr. App. R.90)].

[20] In **Tuisavusavu v State** [2009] FJCA 50; AAU 0064.2004S (3 April 2009) the Court of Appeal held:

> *"[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 **Bogiwaluv 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.*
>
> *[10] Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence.'*

[21] In **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] VicRp 19; [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).*

[22] 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** [vide **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132)]

[23] The reason/s why the trial judge rejected the appellant's application to withdraw the plea of guilty is not given in the sentencing order. I stated in **Fiji Independent Commission Against Corruption (FICAC) v Kamlesh Arya** AAU 68 of 2019 (30 December 2022)

> *'[8] However, if this court, due to the non-availability of complete trial transcripts, cannot determine whether a particular ground of appeal has a reasonable prospect of success or not on the material available such as the voir dire ruling, summing-up, judgment & sentencing order or any other incidental orders, it may still grant leave to appeal or enlargement of time to appeal, as the case may be, if it appears to court that such a ground of appeal may have merits or otherwise deserve to be examined by the full court in the interest of justice or if the court is of the view that it should be considered by the full court to establish a guiding principle for the lower courts or develop jurisprudence at large.*

However, the court will not have recourse to this course of action as a matter of routine but only in special and really deserving instances.'

[24] I think given the circumstances discussed above, this is a fit case to grant enlargement of time in the interest of justice to enable the full court to examine the full record to see the merits of the ground of appeal in the light of above principles of law.

05th ground of appeal

[25] The appellant argues that the trial judge should have considered the defence of provocation caused by the deceased demanding more drinks as appearing from the summary of facts.

[26] A similar argument on provocation was discussed by the Court of Appeal in **Rawat v State** [2022] FJCA 168; AAU0186.2016 (24 November 2022) and stated

*'[47]……. 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 TT was not proportionate to the provocative words or deeds. Merely getting angry is not the same as provocation in law.'*

[27] I see no basis for a defence of provocation to succeed in the appellant's case. There is simply no evidential basis for such a plea.

Order

1. Enlargement of time to appeal against conviction is allowed only on the 04th ground of appeal.

COURT OF APPEAL FIJI

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