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IN THE FIJI COURT OF APPEAL

CRIMINAL APPEAL NO.5 OF 1988

Between:

MUNIAPPA CHETTY
KESHHO KUMAR

Appellants

- and -

S T A T E

Respondent

Mr. A. Singh for the Appellant
Mr. I. Mataitoga for the Respondent

Date of Hearing: 15th November, 1988
Delivery of Judgment: 2nd December, 1988.

JUDGMENT OF THE COURT

This is an appeal against the sentence of 6 years imprisonment imposed on the appellants by the Supreme Court at Lautoka on the 6th day of June, 1987.

The sole stated ground of appeal is that the sentence "is harsh and excessive in all the circumstances".

The two appellants were originally charged with murder. An amended information was filed by the Director of Public Prosecutions and both appellants pleaded guilty to a charge of manslaughter.

The facts as recorded by the learned trial judge were admitted by counsel for the appellants and are as follows:-

" The deceased (45) of Raviravi, Ba was a barman at Lautoka Club.

Muniappa Chetty and Kesho Kumar on 20th June 1987 went to Lautoka Club. They were not members of the club. This was at about midday. They mingled with the others and played snooker. Being non members they were being complained by members of not allowing members to play.

Sometime after 6 pm, a club member saw the first accused urinating on the toilet floor. An argument started between the first accused and a club member.

One Shankar and the deceased, both barman of the same club had their day off and were also drinking in the club. Seeing the first accused arguing with one member, Shankar held the first accused and pushed him out of the club. He was told to leave the club. Both the accused left the club. The deceased had not said anything to anyone.

After a few minutes the deceased and Shankar left the club to go home. Earlier both accused stopped at the Lautoka club gate waiting for Shankar. As both the deceased and Shankar approached the accused, they were assaulted by the accuseds. The first accused punched Shankar. Shankar ran away, the second accused punched the deceased who fell and was kicked by the first accused. The deceased was kicked on his body and head. The first accused took the deceased's shirt out and the second accused took \$2.00 out from the shirt pocket. They took the shirt and ran away leaving the deceased lying on the ground. Both accused had run to hire a carrier to go home when they were stopped by second accused's brother who took them home.

On the other side, Shankar came back to the scene of assault with other members of the club. They saw the deceased lying on the driveway facing upwards. He was taken to Lautoka Hospital. He was in a coma at Recovery Ward from 20.6.87 to 26.6.87 when he died. Upon a post mortem examination the following injuries were present.

EXTERNAL EXAMINATION:

Following injuries are present:

- (1) Contusion of both the eyelids with subconjunctival haemorrhage in left eye.
- (2) A sutured cut over the inner aspect of left eyebrow 1 cm in length.
- (3) Extensive contusion of the lower lip with a cut against right inner and left inner incisors and left inner incisors and left outer incisor teeth. All these teeth are loose in the socket.

INNER EXAMINATION:

On reflecting the soft tissues and chest wall there is extensive subcutaneous haemorrhages.

Scalp: Extensive haemorrhage into the scalp tissues.

Brain: Extensive subdural haemorrhages over the parietal areas and mild subarachnoid haemorrhages over the parietal and cerebellar areas. On serial slicing of the brain, there is haemorrhage into the pons. There are tonsillar and uncal coming.

The cause of death was:- Extensive subdura, subarachnoid and position haemorrhages. (Brain haemorrhages). "

In passing sentence the learned trial judge stated:

" Sentence:

The two accuseds have pleaded guilty. I have taken into account the circumstances surrounding this offence and what has been said in mitigation. Accused 1, Muniappa Chetta has one previous conviction of drunk and disorderly and the other accused is a first offender.

The two accused were asked to leave the club as they were not the members. This was after a commotion with one Shankar. When the two came out of the club they waited for Shankar. When Shankar came out with the deceased the two accuseds started assaulting the two. Shankar ran away. During the assault the deceased fell down and received injuries. Because of the injuries he died a few days afterwards.

The Court has been strongly urged not to impose immediate custodial sentences on both men. When the deceased fell to the ground the two accused persons did not leave him alone but they kept kicking and even took away his shirt and money. In my view these actions on the part of the accused persons do not justify in imposing a suspended sentence. They may have had some drinks but drunkenness is not mitigation. "

At the hearing of the appeal Mr Singh contended that the Record was not complete and reference to the fact that the deceased had fallen and hit his head on a concrete curb had been omitted.

Mr Singh did not furnish the court with any written submissions. He stated that the appeal was merely on the issue of the severity of the sentence implying submissions were not necessary. He sought an adjournment in order to enable him to have the Record checked and corrected. This application was refused.

It was pointed out to Mr Singh that, if there had been any omission from the Record, he should have drawn the attention of the High Court or the Director of Public Prosecutions to the omission. This Court should also have been given prior notice by informing the Registrar.

This Court was presented with a Record which makes no reference to the alleged fact that the deceased fell and hit his head on a concrete curb. The Prosecuting Officer is not recorded as having admitted this fact and the learned judge also makes no mention of it.

In the Record Mr Singh admits the facts related by the Prosecution. Mr Singh's plea in mitigation makes no mention of the deceased falling and hitting his head on a concrete curb. If this alleged fact, which was highly relevant, was true, we would have expected Mr Singh to have made this alleged fact his main argument for a lenient suspended sentence. He did not do so.

We would also have expected that the learned trial judge would have mentioned the matter. On the contrary he was deeply concerned with the fact that the deceased after he fell to the ground was kicked by the accused.

Mr Singh relies on two sentences in the remarks made by the learned judge to indicate that the fall was the direct cause of the death of the deceased and not the assault. The learned judge said:

"During the assault the deceased fell down and received injuries. Because of the injuries he died a few days later."

Those statements are ambiguous. The construction put on them by Mr Singh, that the fall caused the death, is not supported by the recorded facts or indeed by the medical report.

The deceased did receive injuries after he was on the ground but the reasonable inference is that those injuries were caused by his being kicked by the accused.

It needs no medical man to satisfy us that a fall could not possibly have caused all the very extensive brain haemorrhages and the extensive chest haemorrhage the deceased suffered. The loosening of the deceased's teeth is more consistent with injury from a kick or a punch than a fall. The injuries indicate that there were more than one or two kicks or punches to the head and body.

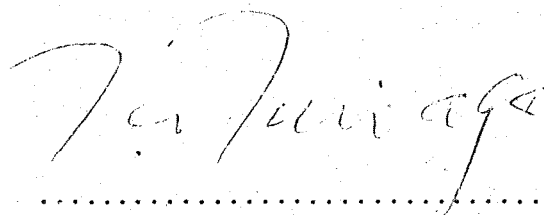
When considering sentence we must accept that the deceased was kicked in the head after he fell down and that contributed to his death if it was not the sole cause.

We have considered all that Mr Singh has said in support of the appeal against sentence.

On the stated facts the two appellants planned to attack Mr Shankar and lay in wait for him. They had no reason to assault the deceased who had the misfortune to be with Mr Shankar. The assault when it involved kicking of the deceased in the head and body when he was on the ground helpless, was an aggravated and brutal assault and serious injury to the deceased could have been anticipated.

The sentences in our view were not wrong in principle or manifestly excessive in the circumstances.

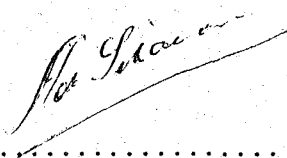
The appeal is accordingly dismissed.



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President, Fiji Court of Appeal



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Justice of Appeal



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Justice of Appeal