

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0015 OF 1998S
(High Court Criminal Case No. HAC0002 of 1997L)

BETWEEN:

KIM NAM BAE

Appellant

AND:

THE STATE

Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Mari Kapi, Justice of Appeal
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing:

Tuesday, 16th February 1999, Suva

Counsel:

Appellant in Person
Mr. J. Naigulevu for the Respondent

Date of Judgment:

Friday, 26th February 1999

JUDGMENT OF THE COURT

The appellant was initially charged in the High Court with murder. After the prosecution had changed and replaced it with a charge of manslaughter, contrary to section 198 of the *Penal Code* (Cap 17), he pleaded guilty to the offence and was sentenced to serve 6 years imprisonment.

When his appeal to this Court was filed, he was represented by solicitors and the appeal was not only against the sentence but against the acceptance of his plea of guilty. However, he subsequently came before us on 16th February 1998 and amended his petition of appeal so that it now relates only to the sentence imposed on him. He discharged his solicitors and is now unrepresented.

The question we have to determine is whether we “think that a different sentence should be passed” (s 23 (3) of the *Court of Appeal Act* (Cap 12)? It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v The King* (1936) 55 CLR 499).

The appellant complains that his sentence is manifestly excessive in the circumstances and submits that we should reduce the sentence to the period already served in prison. In his three page written submissions, he sets out nine points. It is not necessary to deal with them point by point. Some of the points raised relate to the issue of conviction which is no longer relevant. In respect of sentence, he complains that the trial judge fell into error in that he did not take into account:

1. The period of one year four months spent in custody awaiting trial.
2. The loss of his partner [i.e. the woman he killed) was in itself a punishment.
3. That he co-operated with the police.
4. That he pleaded guilty to manslaughter.

5. That he had no prior convictions.
6. That sentences imposed by the High Court in other manslaughter cases are much lower than the present case.

Counsel for the respondent has filed written submissions in response. His submissions may be summarised in the following paragraph of his submissions:

"The seriousness with which manslaughter is viewed in Fiji is marked by the penalty capable of being imposed under the Penal Code, Cap 17, together with the guidelines given in recent decisions.

*Under section 201 of the Penal Code, Cap 17, the maximum sentence for any person convicted of the offence of manslaughter is imprisonment for life. However, sentences in Fiji for manslaughter have generally ranged from 9 months to 6 years, and in a number of cases where the provocation was grave, the sentences have been suspended. Only in exceptionally serious cases where the provocation was minimal have sentences been higher than 6 years imprisonment (see *Ajipote Koroi v The State*, Cr. App. No. 4 of 1988, at p. 4). For the appellant to say, therefore, that the sentence was harsh and manifestly excessive by reason of its length, is unjustifiable as his sentence was not disparate from the normal run of sentences imposed in similar cases. It was perfectly appropriate, in the circumstances, to impose a sentence of 6 years on the appellant. In addition, the sentence adequately reflects the mitigating factors which the learned Trial Judge had taken into account (as fore-mentioned) when passing sentence.*

Moreover, considering that there was minimum provocation, the Respondent submits that it sees no reason why a custodial sentence in the particular circumstances of this case should be regarded as wrong in principle. It correctly reflects the Court's duty to protect the public and to punish and deter the culprit."

The appellant responded to these submissions in writing but in our view he does not add any new substantive argument to those already noted in the earlier written submissions.

The first five matters complained of by the appellant are proper matters that should be taken into account on sentence. All these matters were expressly taken into account and dealt with by the trial judge in his remarks for sentence. We do not find any error in relation to these complaints and we would dismiss them.

Is the sentence excessive? For the purposes of determining this question, we need to have regard to the effective sentence imposed by the trial judge. In the remarks for sentence, the trial judge took into account the period of one year four months in custody and then imposed the period of 6 years to take effect from the date of sentence. We conclude from this that the overall effective sentence is seven years four months.

We have been referred to several cases of sentence on manslaughter in the High Court as well as in the Court of Appeal to enable us to determine the correct range of sentence for this type of offence. With respect, this is the correct approach that should be taken by the courts. The task of sentencing is not an exact science which is capable of mathematical calculation. This is particularly so with manslaughter where the circumstances and the offender's culpability can vary greatly from case to case. An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the courts must have regard to sentences imposed by the High Court and the Court of Appeal for offences of the type in question to determine the appropriate range of sentence.

The cases demonstrate that the penalty imposed for manslaughter ranges from a suspended sentence where there may have been grave provocation to 12 years

imprisonment where the degree of violence is high and provocation is minimal. It is important to bear in mind that this range covers a very wide set of varying circumstances which attract different sentences in different manslaughter cases. Each case will attract the appropriate sentence within the range depending on its own facts.

The facts in the present case are set out in Lyons J's remarks on sentence:

"The prisoner and the deceased came to Fiji to start a restaurant business. They lived as man and wife. As often happens in business, financial pressures fell on them. Monies were borrowed through friends. There came difficulties with repayments. This added to the pressures. Those pressures soon caused disharmony in the relationship.

On the 4th February 1997, the deceased opened the restaurant and then went to Nadi to see a friend (a Korean man). She returned with \$1,000. She would not tell the prisoner where she got the money from.

During her absence, the prisoner had imbibed of alcohol. He was thus in no mood for nor had any tolerance of any satisfactory explanation from the deceased. An argument erupted. This soon descended into a fight when the deceased tried to stop the prisoner from drinking.

During this fight, which lasted for some considerable duration - it seems it may have been initially a stop start affair - the prisoner punched and kicked the deceased, pulled her around by the hair and hit her across the head with a 2 litre plastic juice bottle which it seems was filled (to some degree or another) with water.

The deceased became unconscious. The prisoner, even in his intoxicated state, must then have then realised the gravity of his actions. He called for help. He saw that the deceased was taken to the hospital where he rendered some assistance. He then waited for the inevitable arrival of the police. It was to no avail. Regrettably the deceased died in hospital some short time later."

The medical report sets out the injuries sustained by the deceased as follows:

“(A) EXTERNAL

1. *Superficial cut oriented backwards, measures 1.0cm*
2. *Left eye black with peri-orbital haematoma.*
3. *Multiple superficial bruises as depicted in sketch with minor cuts and abrasions, face and neck.*
4. *Superficial bruises over the upper chest and breast, both flanks of abdomen.*
5. *Multiple severe bruising of both upper extremities. Right arm appears ecchymosed.*
6. *Transverse cut 1.2cm superficial on left forearm 2cm above the wrist - radial side postero-laterally.*
7. *Both thighs reveal multiple bruises.*
8. *Both knee areas and legs also reveals bruises.*

INTERNAL INJURIES

1. *# Base of skull - Hairline # of the petrous portion of temporal bone and sphenoid process of palate (Lt sided).*
2. *# body of sternum corresponding to 3rd and 4th ribs.*
3. *# 6th right rib to antero-lateral side.*
4. *Diffuse sub-cutaneous haemorrhage in scalp. Most pronounced in occipital and left forehead region.*
5. *Multiple sub-cutaneous haematomas all over anterior chest wall.*
6. *Large haematoma in the anterior mediastinum extending from suprathyroid area.*

BRAIN AND MENINGES

Moderate sub-arachnoid haemorrhages, focal, left parietal lobe. Rt. temporo-parietal lobes. Rt. occipital lobe. Generalised congestion of meninges covering cerebellum haemorrhage into pons and medulla.

LUNGS


Both pleural cavities contains approximately 200mls fresh blood each side. Both lungs congested. Trachea reveals blood froths.”

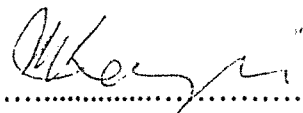
The trial judge considered that the facts in the present case called for a deterrent sentence. We agree. The nature of the injuries received by the deceased was extensive. They show that the attack on the deceased was a very violent one. The appellant admitted to using a plastic bottle with water in it to assault the deceased.

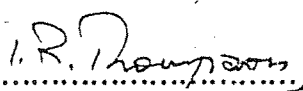
In addition, we consider that this death arises out of a domestic dispute. Recently, social workers in Fiji have expressed a concern over the high incidence of domestic violence in the community and sentences in respect of this type of offence must reflect the Court's disapproval of this kind of behaviour and the desire to protect women in domestic disputes.

Having regard to all these matters, the sentence imposed in the present case falls well within the range and cannot be described as an excessive one. We dismiss the appeal and affirm the sentence imposed by the trial judge.

Decision: Appeal dismissed; sentence affirmed.


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Sir Maurice Casey
Presiding Judge


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Sir Mari Kapi
Justice of Appeal


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Mr Justice I. R. Thompson
Justice of Appeal

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent