IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 81 of 2011
(High Court HAC 91 of 2010)

BETWEEN : **SALESI BALEKIVUYA**
SAIMONI TUKANA

Appellants

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
A. Fernando JA
P. Fernando JA

Counsel : **Mr. M. Yunus for the Appellants**
Mr. M. Korovou for the Respondent

Date of Hearing : **9 February 2016**

Date of Judgment : **26 February 2016**

JUDGMENT

Calanchini P

[1] The Appellants were jointly charged with 2 counts of attempted robbery contrary to sections 44(1) and 310(1) of the Crimes Decree 2009 (the Decree) and with one count

of murder contrary to section 237 of the Decree. The First Appellant (Balekivuya) was charged with one count of damaging property contrary to section 369(1) of the Decree. The Second Appellant (Tukana) was charged with one count of theft contrary to section 291(1) of the Decree.

[2] Before the trial commenced on 4 July 2011 Tukana pleaded guilty to the count of theft. Following a trial lasting some 18 days the assessors returned majority opinions of guilty in respect of the charge of murder for Balekivuya and guilty of manslaughter for Tukana. On the first attempted robbery charge (in respect of the complainant Rajnesh Chand) the assessors returned unanimous opinions of not guilty for Balekivuya and guilty for Tukana. On the second attempted robbery charge (in respect of the complainant Ashwin Chand) the assessors returned unanimous opinions of guilty for Balekivuya and not guilty for Tukana. Finally on the charge of damaging property the assessors returned unanimous opinions of guilty for Balekivuya.

[3] In his judgment delivered on 5 August 2011 the learned trial Judge indicated his agreement with the opinions of the assessors. Consequently the learned Judge convicted Balekivuya on one count of murder, one count of attempted robbery and one count of damaging property. The learned Judge convicted Tukana on one count of manslaughter, one count of attempted robbery and one count of theft. The Appellants were acquitted on the remaining charges.

[4] On 12 August 2011 Balekivuya was sentenced to terms of mandatory imprisonment for life for murder, 9 years for attempted robbery and 9 months for damaging property. The sentences were ordered to be served concurrently with a minimum term of 20 years to be served for the murder conviction. Tukana was sentenced on the same day to terms of imprisonment of 12 years for manslaughter, 9 years for attempted robbery and 9 months for theft. The sentences were ordered to be served concurrently with a non-parole term of 10 years in respect of the manslaughter conviction.

[5] The Appellant Balekivuya filed in person a timely application for leave to appeal against conviction and sentence on 30 August 2011. The Appellant Tukana filed in person his application for leave to appeal against conviction and sentence on 18

September 2011. An application for leave to appeal or a notice of appeal is required to be lodged within 30 days from the conclusion of the proceedings under section 26 of the Court of Appeal Act Cap 12 (the Act). Tukana's application was 6 days out of time. The issue of an enlargement of time for Tukana was not addressed by the Justice of Appeal who heard the applications for leave, possibly on the basis that the delay of six days for an unrepresented appellant was not sufficient to warrant the Court's consideration. In any event I am prepared, to the extent that it is, necessary for the appeal to proceed, to grant an enlargement of time.

[6] A number of amendments to the grounds of appeal against conviction and sentence were subsequently filed by both appellants. On 26 March 2014 both appellants were granted leave to appeal against conviction and sentence. By that time the Appellants were represented by Counsel from the Legal Aid Commission.

[7] On 30 December 2015 the Legal Aid Commission filed an Amended Notice of Appeal against conviction and sentence on behalf of both Appellants. The grounds of appeal upon which the Appellants now rely are:

> *"1. The learned trial Judge erred in law when he failed to define the words "self-induced intoxication" to the assessors and also failed to inform them that self-induced intoxication was a valid defence available to the appellants resulting in substantial miscarriage of justice.*
>
> *2. The learned trial Judge erred in law when he misdirected the assessors on one of the elements of murder under section 237 of the Crimes Decree 2009 in that there has to be a willful act on the part of the Appellants to cause the death of the deceased. This essentially meant that learned trial Judge was adding an additional element of the offence resulting in substantial miscarriage of justice.*
>
> *3. The learned trial Judge erred in law and in fact when he directed the assessors about the elements of the offence of murder by giving examples which were similar to the facts of the case against the Appellant resulting in a substantial prejudice to the Appellant.*
>
> *4. The learned trial Judge erred in principle when he did not consider the length of time the Appellants spent in remand.*

5. *The sentence (imposed on the First Appellant) is harsh and excessive and in conflict with section 14 (2) (n) of the Constitution of (Fiji).*

6. *The sentence (imposed on the Second Appellant) is harsh and excessive in all the circumstances of the case."*

[8] The Appellants had been granted leave to appeal in relation to grounds 1, 2 and 4 by the Justice of Appeal. In passing it should be noted that ground 2 raises a question of law only for which leave was not required. Grounds 3, 5 and 6 have been added as amended grounds of appeal and for which the question of leave must also be considered by this Court.

Background facts

[9] On 4 May 2010 the Appellants were part of a group of men at a drinking party from about the middle of the day till later in the afternoon at the Jittu Estate Youth Hall in Raiwasa. The two Appellants then walked to 65 Shalimar Street Samabula so that the Appellant Tukana could borrow money from a friend who resided at that address.

[10] The deceased (Krishneel) and two friends had arrived at 67 Shalimar Street Samabula in a vehicle driven by Krishneel for the purpose of collecting some tools from his father's house which was then occupied by tenants. Krishneel parked his vehicle in the driveway and walked down the driveway towards the house. The Appellants were standing outside 65 Shalimar Street.

[11] Both Appellants using force by punching and kicking had attempted to steal money from the two passengers. While these incidents were taking place Krishneel returned to the vehicle with a spade. Krishneel saw the Appellant Tukana attacking one of his passengers and hit Tukana with the spade. The two struggled for possession of the spade. The Appellant Balekivuya came to assist Tukana and they all struggled for the spade. The Appellant Tukana kicked and punched Krishneel to the ground. Balekivuya grabbed the spade and repeatedly struck Krishneel on the head. Tukana kicked Krishneel in the head before they both walked away. Balekivuya was still angry and returned again to repeatedly hit Krishneel's head with the spade. Tukana went to Balekivuya and took him away. Krishneel subsequently died at CWM Hospital later that day as a result of serious skull and brain injuries.

Grounds of Appeal - intoxication

[12] The first ground of appeal raises the issue of intoxication. It is not clear whether intoxication affecting criminal responsibility under section 30 of the Crimes Decree 2009 was raised as a defence at the trial by the Appellants.

[13] Counsel for Balekivuya in closing submissions had this to say about the issue:

> *"The next issue is the state of the 1st Accused's drunkenness. Evidence has been adduced in Court that the accused persons had been drinking before they came to Shalimar Street. Please bring your life experiences to this issue. When someone is drunk and is provoked into a fight, what happens? Especially when he has not done anything wrong to the other person who has provoked him."*

[14] Counsel for Tukana made only passing reference to the issue of drunkenness in closing submissions by stating:

> *"Remember he was drunk at the time, having consumed beers and rum throughout the afternoon with 4-5 others. _ _ _. This swearing plus the alcohol in his system caused him to react swifter than he should have and slapped the boy."*

[15] The evidence given by Balekivuya at the trial was that he had left his home at about 7.30am on the day in question. He heard that there was a drinking party at the Jittu Estate youth hall. He went to the hall and saw about 5 youths drinking beer. He joined them. After the first carton of beer had been finished they then drank a second carton of beer. They were smoking cigarettes and later they smoked 2 or 3 rolls of marijuana. After the beer was finished they acquired a 40oz bottle of rum which Balekivuya claimed they had consumed by about 1.30pm. He said they mixed the rum with water. They then apparently consumed 2 one litre bottles of home brew by 4.30pm. He said that by then he was very drunk. He then described in some detail why and how he went to Shalimar Street and described the events, as he could remember them that followed from the time he arrived at Shalimar Street. Towards the end of his evidence he stated:

> *"When I hit him I wanted him to lie down. I hit him to release my anger. I didn't mean to kill him. Because of my anger I hit him."*

[16] Under cross-examination Balekivuya confirmed the evidence he had given in chief. He also stated that he did not know why he had said in his caution statement that he had got up at 11.00am on the day in question. Both caution interviews had been admitted into evidence following a voir dire hearing and will be considered shortly.

[17] The evidence given by Tukana at the trial was brief and can be quoted from the record:

> *"I was invited to a drinking party at the Jittu Estate youth hall after 10am. I don't have a watch. At the party was Akariva, Joseva, Ravula, Koma Tuwai and myself. After that I saw Manu, Salesi (Balekivuya) and Navi. We were drinking one small bottle of rum and a carton of beer. On arrival a glass of rum was given to me. I went to check my son and then returned. We continued drinking. We were playing cards for money. We drank until the afternoon."*

[18] Tukana also gave a detailed account of the events that occurred at Shalimar Street leading to the death of Krishneel. Under cross-examination he confirmed that he joined the drinking party at 10.00am and that Balekivuya was not there at that time. He confirmed that they were drinking and playing cards.

[19] In his caution interview that concluded on 6 May 2010 (just two days after the death of Krishneel on 4 May 2010) Balekivuya stated that he woke up at about 11.00am on 4 May 2010. His uncle told him that there was a drinking party at the Jittu Estate youth hall. After his bath he went to join the party. He said that there were four youths drinking at the hall (including Tukana) when he arrived. They were drinking beer from one carton and had already consumed four bottles when he arrived. Balekivuya joined the party and together they continued drinking until there was no beer left at about 12.30pm. They then arranged to purchase one 40oz bottle of rum which they drank at the hall. At the same time they smoked 2 rolls of marijuana. Although he couldn't remember the time he said they finished the rum in the afternoon. He admitted that he was *"heavily drunk."* He said that they left the Estate, walked to Raiwaqa, then returned to Jittu at about 5.00pm.

[20] Balekivuya stated that Tukana and one other then went to Shalimar Street *"to look for some cash."* When asked why he committed the offence he stated that he *"was heavily drunk and was not cautious with my violent act."*

[21] In his Record of Interview dated 10 May 2010 Tukana stated that he and the four others drank two cartons of beer. Tukana had joined the group of about 5 youths at about 11.45am. He stated that they only drank the two cartons of beer and no other alcohol. He said that after they finished the beer he went to Shalimar Street to borrow $10.00 from a person called "*Ulai.*"

[22] To the extent that there are any significant inconsistencies between the evidence in the caution statements and their testimony at the trial, then the material in the caution statements, being only a matter of days after the incident, should be regarded as more reliable than the testimony given at the trial in July 2011 being over three years later. In my judgment memory and recollection become less reliable and subsequent versions are based more on reconstruction which either intentionally or sub-consciously becomes increasingly self-serving.

[23] The learned trial Judge discussed briefly the issue of the Appellants drunkenness in paragraphs 16 and 33 of the summing up. Counsel for the Appellants in the written submissions in this Court referred to the directions given in paragraph 33:

> *"On the murder charge (i.e. Count No.5) both accused denied the allegation. They admitted that prior to the Shalimar Street incident, they consumed a vast amount of liquor. Both admitted they were pretty drunk before the incident _ _ _."*

[24] It is the contention of the Appellants that the learned Judge should have given directions to the assessors and himself on the issue of intoxication with particular reference to self-induced intoxication and how if at all it impacts on the requirement to establish the requisite intention for murder. The law relating to self-induced intoxication is to be found in section 30 of the Decree. The question to be determined was whether the trial Judge was required to give directions in terms of section 30 in this case.

[25] As Counsel for the Appellants has conceded in written submissions at paragraph 24 intoxication was not raised as a defence by the Appellants at the trial. However, regardless of whether the Appellants relied on the defence at the trial, if there is an evidential basis for a defence of intoxication then the trial Judge should give directions as to the defence. (**Ram –v- The State** (CAV 1 of 2011; 9 May 2012). On the other hand the trial Judge is not required to consider hypotheses that the evidence does not reasonably raise (**Deo –v- The State** (AAU 45 of 2006; 23 June 2008).

[26] In this case it was not disputed that the Appellants had both consumed a considerable amount of alcohol prior to the commission of the offences. The Respondent did not dispute that the Appellants were probably drunk at the time of the offences. However there was no evidence to suggest that due to their drunkenness they were unable to form the intentions to commit the offences. The fact that the evidence establishes that the Appellants were drunk does not by itself constitute evidence of intoxication that may require the trial Judge to consider directions on the statutory defence of intoxication. There was no evidence of intoxication sufficient to indicate that the Appellants may have been incapable of forming the requisite intention to commit the offences on 4 May 2010. The trial Judge had reached that conclusion when he stated in paragraph 16 of his summing up:

> *"It was said both were extremely drunk at the time of the alleged murder, and at the time they allegedly committed the other offences. In ascertaining their intentions at the time of the alleged murder and the other offences, you must disregard any evidence that suggested that they were too drunk as to be incapable of forming the intent to cause death. A drunken intent to cause death is still an intent _ _ _. In other words a drunken intent to cause death is still sufficient to satisfy the third element of murder _ _ _."*

[27] The evidence established that the drinking party had come to an end when the alcohol came to an end. The Appellants then went looking for money to continue their drinking party. Having carefully considered the evidence in the form of the caution statements and the record of oral testimony given at the trial by the Appellants I have concluded that there was no error made by the learned Judge in not directing on intoxication.

Elements of murder

[28] The second ground of appeal against conviction relates to the directions given by the learned trial Judge relating to the elements of murder. Section 237 of the Decree states that:

> *"A person commits an indictable offence if:-*
> *(a) the person engages in conduct; and*
> *(b) the conduct causes the death of another person; and*
> *(c) the first mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct."*

[29] In relation to element (a) the learned Judge directed the assessors that the prosecution must prove beyond reasonable doubt that *"the accused did a willful act."* The Appellant Balekivuya had taken issue with the word "*willful*" being included in the directions on the first element in his written submissions filed before the Court. However, at the hearing he informed the Court that he would not pursue this ground of appeal and would leave it to the Court.

[30] In my judgment the learned Judge has not erred in his use of the words *"willful act."* Section 15(2) of the Decree defines *"conduct"* as meaning "*an act or an omission to perform an act or a state of affairs.*" Section 16(1) of the Decree provides that conduct (i.e. an act) can only be a physical element of the offence if it is voluntary and section 16(2) provides that conduct is only voluntary if it is a product of the will of the person whose conduct it is. The Judge has done so more than utilize the definitions to assist in directing the assessors and himself in relation to the elements of murder.

[31] There is no definition of willful in the Crimes Decree. Some of the meanings ascribed to "*willful*" in the Shorter Oxford English Dictionary include "*done of one's own free will or choice*", "*voluntary*", "*done on purpose or wittingly*", "*deliberate*" and "*intentional*". To the extent that the use of the word added anything beyond the statutory definition of "*conduct*" and "*voluntary*" then it must be said that the Appellants were not prejudiced. If anything the prosecution, it could be said, was required to establish something extra in order for the Appellants to be found guilty. It worked in their favour. This ground would not have succeeded.

Prejudicial examples

[32] The third ground of appeal relates to the use by the learned Judge of examples to demonstrate the physical element of murder that were similar to or the same as the facts of the present case. It is claimed that the examples were prejudicial to the Appellants in the sense that they may have given the impression to the assessors that the Judge was bolstering the case for the prosecution and was as a result not giving a balanced summing up. The learned Judge did use as examples persons being punched, kicked and hit with a spade.

[33] It must be stated at the outset that the directions on the elements of murder were correct. Furthermore there is no error in using examples to explain the elements of the offence to the assessors. Certainly kicking and punching are forms of assault and are unlawful acts. However the use of hitting a person on the head with a spade is the same as the conduct that formed part of the case for the prosecution. As a result it may have been perceived as bolstering the case for the prosecution. However the prosecution's case did not need bolstering since there were no apparent deficiencies in the prosecution case. At no stage was it disputed by the Appellants that they were present in Shalimar Street at the time of the incidents. The Appellants disputed the events that were alleged to have occurred. Although the practice of using examples that too closely resemble the facts upon which the prosecution relies is not appropriate, in this case there was nothing added to the prosecution case. There was direct evidence from two witnesses who had survived the assaults as to how Krishneel had met his death. In my judgment the Appellants were not prejudiced by the use of the similar examples in this case. The learned Judge as the ultimate trier of fact and law had no hesitation in indicating his agreement with the opinions of the assessors after reviewing the evidence. There was no miscarriage of justice and this ground does not succeed.

Appeals against sentence

[34] The appeals against sentence raise issues that for the Appellant Balekivuya to some extent overlap and for the Appellant Tukana can be considered separately. Balekivuya's appeal relates only to his sentence for murder. It is submitted that the time spent in remand being 15 months was not deducted from his sentence in the manner prescribed by section 24 of the Sentencing and Penalties Decree 2009 (the

Sentencing Decree). It is also submitted that the minimum term of 20 years that was ordered by the trial Judge was (1) harsh and excessive and (2) in conflict with section 14(2) (n) of the Constitution. Section 14(2) (n) provides in effect that a convicted person has the right of the least severe of the prescribed punishments if there has been a change between the time that the offence was committed and the time of sentencing. Tukana submits that his time spent in remand before trial also being 15 months was not considered by the trial Judge. He also submits that his sentence was harsh and excessive in the circumstances. His complaint relates to the sentences of (1) 12 years imprisonment with a non-parole term of 10 years for the manslaughter conviction and (2) 9 years imprisonment for the attempted robbery conviction.

Appeal against sentence for murder

[35] The starting point for Balekivuya's appeal against sentence is section 237 of the Crimes Decree which provides the penalty for murder as:

> "*Mandatory sentence of imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered.*"

[36] Section 237 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 (not 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] Balekivuya also challenges the length of the minimum period set by the trial Judge. 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.

[44] The trial judge has adopted an approach that resembles the approach to fixing a head sentence. It is also the approach that is followed by the Courts and recommended by the Sentencing Council in England. Furthermore it was also the approach adopted by the Courts in Fiji under the Penal Code Cap 17.

[45] It must be noted, however, that the English legislation on mandatory life sentence for murder is quite different from section 237 and section 119(3) of the Constitution. As a result only limited guidance can be gained from the English decisions.

[46] Under section 200 of the Penal Code (now repealed by the Decree) a person convicted of murder faced a sentence of imprisonment for life. Unlike in section 237 of the Decree, the word "*mandatory*" did not appear. However the Courts interpreted that provision as amounting to a mandatory sentence of life imprisonment due to the absence of the words "*liable to*" which would otherwise have indicated a maximum penalty (**Waqanivalu –v- The State** CAV 5 of 2007; 27 February 2007).

[47] Under section 33 of the Penal Code where an offence in any written law prescribed a maximum term of imprisonment of ten years or more, including life imprisonment, any court passing sentence could fix a minimum term that a convicted person must serve. It is clear on its face that section 33 applied to a maximum sentence of life imprisonment and not to a mandatory sentence of life imprisonment. However it would appear that in the application of section 33 the distinction between maximum and mandatory life sentences was disregarded by the courts. Furthermore in determining whether there should be a minimum term that must be served the courts took into account the same matters that are now considered when arriving at the head sentence before determining what non-parole term should be imposed.

[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. In this case the trial judge has arrived at a minimum term by considering matters which in my judgment he ought not to have considered. In my judgment the minimum term set is inappropriate given the age of the Appellant. He was 19 years old at the time of the offence. I would quash the minimum term of 20 years and order a minimum term of 15 years in its place. In my judgment section 14(2)(n) of the Constitution has no application in this case. Furthermore, the fact that a mandatory life sentence is of an indeterminate duration does not necessarily mean it is cruel or inhumane: **Waqanivalu –v- The State** (supra).

[49] For the reasons stated above the appeal against sentence by Balekivuya is allowed on one ground. The significant changes to sentencing for murder brought about by the coming into effect of the Crimes Decree, the Sentencing Decree and the Constitution indicate that the imposition of a mandatory life sentence is discreet and different from the sentencing process where maximum penalties are prescribed.

Appeal against sentence for manslaughter

[50] The second Appellant Tukana submits that his time spent in remand was not taken into account by the trial Judge. It is apparent from the sentencing decision that the learned judge has not made reference to the period of 15 months spent in remand. That ground of appeal succeeds.

[51] The second Appellant also claims that the head sentence and the non-parole period imposed for the convictions of manslaughter and attempted robbery were harsh and excessive in the circumstances. An appeal court will only interfere with the sentence imposed if an appellant establishes an error in the exercise of the sentencing discretion. In my judgment the trial Judge has erred by selecting a high starting point within the tariff applicable for manslaughter (**Bae –v- The State** AAU 15 of 1998. 26 February 1999) and then adding a further 6 years for aggravating factors some of which must have been considered in selecting the high starting point. I say must have been considered since the trial Judge has not explained how he arrived at a starting point of 9 years which is certainly at the higher end of what was the accepted tariff for manslaughter at the time. The only inference to be drawn is that the trial Judge has considered the same matters in fixing both the starting point and the aggravating

factors. I would allow the appeal against sentence for manslaughter. The sentence for manslaughter should be a head sentence of 10 years imprisonment with a non-parole term of 7 years. There is no error in sentence for attempted robbery which should remain as a term of imprisonment of 9 years with both sentences to be served concurrently.

A. Fernando JA

[52] I agree with the reasons and conclusions arrived at by Calanchini P.

P. Fernando JA

[53] I also agree.

Orders:

1. *Appeals against convictions dismissed.*

2. *Appeal against sentence by Balekivuya is allowed and the minimum term under section 237 of the Crimes Decree is now 15 years.*

3. *The Appeal against sentence by Tukana is allowed in respect of the sentence for manslaughter. Tukana is sentenced to 9 years imprisonment with a non-parole term of 6 years.*

4. *Tukana's appeal against sentence for attempted robbery is dismissed.*

W. Calanchini

Hon Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon Mr Justice A. Fernando
JUSTICE OF APPEAL

Hon Mr Justice P. Fernando
JUSTICE OF APPEAL