IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CRIMINAL APPEAL NO. AAU 94 OF 2014
(High Court HAC No.012 of 2013)

BETWEEN : **SAMUELA VAKARURU**

Appellant

A N D : **THE STATE**

Respondent

Coram : **Calanchini P**
Goundar JA
Sharma JA

Counsel : **Mr. S. Waqainabete with Mr. M. Fesaitu for the Appellant.**
Mr. M. Korovou for the Respondent.

Date of Hearing : **5 July 2018**

Date of Judgment : **17 August 2018**

JUDGMENT

Calanchini P

[1] I have had the advantage of reading in draft form the judgment of Sharma JA and agree that the appeal against conviction should be dismissed and the appeal against sentence allowed.

Goundar JA

[2] I have read in draft the judgment of Sharma JA. I agree the conviction for manslaughter should be affirmed and the appeal against sentence should be allowed.

Sharma JA

Background Information

[3] The appellant was charged with murder contrary to section 237 of the Crimes Act. It was alleged that the appellant on the 18th day of December, 2012 at Suva had unlawfully assaulted Anthony Paul Tokelau thereby causing his death and at the time of the assault, the appellant was reckless as to whether death would be caused.

[4] The appellant pleaded not guilty to the charge. At the conclusion of the trial the three assessors unanimously found the appellant not guilty of murder but guilty of the lesser offence of manslaughter. The learned trial judge concurred with the opinion of the assessors and convicted the appellant for the lesser offence of manslaughter.

Brief Facts

[5] On 17 December, 2012 the appellant was sheltering at an evacuation centre when the Country was threatened by Cyclone Evan.

[6] It was an agreed fact that from around 5 pm on Monday 17th December until Tuesday 18th at around 2 am, the victim was drinking home brew with four (4) others at a house at Nanuku Settlement in Suva.

[7] One Timoci Delai joined the victim and others in the afternoon of 17 December. Timoci wanted to leave a few hours after joining the group but the victim did not want this and punched Timoci on his ribs. Timoci replied by punching the victim on the cheek. Timoci left at about 11pm that night. The victim and the others continued drinking.

[8] At around 11pm the same night and at about 2am on 18 December, arguments and sound similar to punches were heard coming from the house where the victim and the others were drinking.

[9] On the 18th at about 2.45am, Samisoni Bai a police officer on foot patrol met the victim and he noticed that the victim's forehead was swollen and that the victim smelt of liquor.

[10] At about 3.43am, the victim entered the house of the accused in an attempt to steal a stereo system but was caught by the boys sleeping inside the house. An argument developed between the victim and the three boys who were in the house. The boys punched the victim on his chest, back and shoulder. The fight continued outside the house and at one point in time the victim fell into a nearby drain but managed to get himself out and ran home.

[11] In the morning of 18 December the appellant came to know that the victim had broken into his house and had attempted to steal his stereo. At about 8.30am the appellant who was a cousin of the victim wearing his steel capped boots took a knife and went to confront the victim. The victim was sleeping at his house at this time, but was awoken by the appellant. The appellant went into the victim's room and started punching and kicking him with his boots. The appellant punched the victim with both his hands, kicked him on his face and head. The appellant also stepped on the victim's face and chest.

[12] The appellant was obviously angry with the victim and he continued this violent and relentless attack for a while. After the appellant left, the victim was seen to be lying down with his face injured and blood was seen to be coming out from his nose.

[13] The victim was rushed to the CWM Hospital and at about 4pm the same day he was pronounced dead. The post mortem examination was conducted on 19th by pathologist Dr. Goundar at the CWM Hospital. The cause of death was left subdural haemorrhage (brain injury) due to assault. The pathologist had also noted multiple injuries on and around the victim's face.

[14] On 8 August, 2014, the learned trial judge concurred with the opinions of the assessors and convicted the appellant of the lesser offence of manslaughter.

[15] After hearing mitigation, the appellant was sentenced to twelve (12) years imprisonment with a non-parole period of ten (10) years to be served before being eligible for parole.

[16] Being dissatisfied with the conviction and sentence the appellant filed a timely appeal in this court.

[17] At the leave hearing the appellant through his counsel had advanced two grounds of appeal against conviction and one ground of appeal against sentence.These grounds were:

> *"1. The Court erred in law and in fact when it found the actions of the Appellant against the deceased was the substantial contribution to the cause of death when the pathologist did not give his expert opinion as to who substantially caused the death of the deceased.*
>
> *2. That the Court erred when it did not consider the other possible substantial causes of death apart from the assault from by Timoci Delai and the appellant.*
>
> *3. The Court erred in law and in fact when it imposed a sentence against the Appellant to the higher end of the scale of the tariff given the circumstances of the case."*

[18] On 12 August, 2015, the single justice granted leave to appeal on grounds two and three only.

[19] Both counsel filed written submissions and also made helpful oral submissions during the hearing for which this Court is grateful.

Appeal against Conviction

Ground One

That the Court erred when it did not consider the other possible substantial causes of death apart from the assault from by Timoci Delai and the appellant.

[20] The learned counsel for the appellant submitted that before the appellant had assaulted the victim there were others who had already assaulted the victim. When the police officer Samisoni Bai saw the victim at about 2.45am on 18 December during his regular patrol, he had observed that the victim's forehead was already swollen. Counsel relies on the evidence of the pathologist Dr. Goundar that whoever caused the death of the victim or whose actions had substantially caused the death of the victim could not be ascertained.

[21] From the submissions of the counsel the issue raised is one of causation that is, whether there was evidence before the court that would point to the fact that the assault by the appellant was the substantial cause of the victim's death.

[22] To address the issue raised there is a need to consider the evidence of the two prosecution witnesses who had seen the appellant assault the victim and the evidence of the pathologist.

Evidence

[23] There was evidence from two prosecution witnesses of what they had seen in the morning of 18 December 2012. Inise Toganiyasana (PW1) informed the court that she heard and saw the appellant calling the victim and knocking on the door of his house. The appellant was holding a knife he pushed the door open and went in. He was wearing safety boots, brown in colour which was normally worn by soldiers.

[24] The witness heard the appellant ask the victim why he had gone into his house, the victim replied *"Fuck, can't you wait, having chow then I will come"*. At this time she heard the sound of three punches and she saw the victim lying down. The witness was about three (3) meters away so she was able to see clearly what was happening. The appellant continued to punch the victim on his head. She did not see the victim hit the appellant. This happened for about less than 5 minutes. After about half an hour later she saw the victim had a swollen face when he was smoking a cigarette with two other boys.

[25] The second prosecution witness Asena Kawakawalagi (PW2) who lived in the same house as the victim informed the court that in the morning of the 18th at about 7am she had a conversation with the victim who appeared alright. She did not notice anything unusual about him, that is, she did not see any injuries on the victim unlike what the pathologist had seen when he conducted the post mortem examination. The victim had mentioned that he had a headache apparently a "hang-over" from drinking the previous night.

[26] At about midday the appellant came and kicked the door open after he did not get a reply from the victim. As the appellant entered the room she heard a sound of boots going inside the victim's room thereafter she heard the sound of punching and kicking. The victim told the appellant to wait and for them to have a talk. The appellant swore at the victim. At this time the witness stood up and went to look inside the victim's room she saw the appellant was kicking the victim with his boots. She could remember seeing the appellant kick the victim three times on his face at that time she was peeping inside the victim's room. After the appellant left, the victim was seen to be lying face down. Asena noticed the victim's face was injured and blood was coming out from his nose.

[27] The pathologist Dr. Goundar informed the court that the cause of death was left subdural haemorrhage consequent to assault. He had noted extensive injuries around the face and forehead of the victim, his lower lip was cut and there were blood collections around both eyes and the cheeks. Although the pathologist was not able to say who was responsible for the injuries but was certain the extensive injuries on or around the face were the cause of the brain damage which caused the death of the victim.

[28] Furthermore in his caution interview the appellant admits punching and kicking the victim on the face, nose and forehead. He also admitted stepping on the victim's face and chest. As the appellant was leaving the room he turned and kicked the victim's nose for the last time. He then saw blood coming out of the victim's mouth.

LAW

[29] Causation in criminal law is the link between the unlawful conduct of the accused and its consequences. This term generally applied to crimes of violence. In other words, did the act or omission of the accused cause the injury or death of the victim?

[30] In **R v Smith [1959] 2 QB 35 (Courts Martial Appeal Court)** the accused had stabbed the victim in a barrack room brawl. Both were soldiers. The victim had a punctured lung and haemorrhage. On the way to the medicos the victim was dropped twice. On arrival the treatment was thoroughly bad and might have affected his chances of recovery. Lord Parker CJ said at pages 42 and 43:

> *"...if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound."*

[31] The finding on causation was a question of fact for the assessors to decide. In ***R v David Keith Pagett*** *(1983) 76 Crim. App R. 279 at 288*, Robert Goff L. J. stated:

> *"In cases of homicide, it is rarely necessary to give the jury any direction on causation as such. Of course, a necessary ingredient of the crimes of murder and manslaughter is that the accused has by his act caused the victim's death... Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause of the victim's death, it being enough that his act contributed significantly to that result."*

[32] Section 246 (1) of the Crimes Act defines causation as *"a person's conduct causes death or harm if it substantially contributes to the death or harm."*

[33] Section 246 (2) (d) of the Crimes Act is also relevant:

"(2) Without limiting the right of a court to make a finding in accordance with sub-section (1), a person is deemed to have caused the death of another person although the act is not the immediate or the sole cause of death in any of the following cases—

(d) if by any act or omission he or she hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death..."

[34] The trial judge in his direction to the assessors on the issue of causation correctly referred to the assaults by other persons prior to the acts of the appellant at paragraph 13 of the summing up. In this case the victim had been assaulted by some others prior to being assaulted by the appellant.

[35] The learned trial judge also correctly stated at paragraph 14 of the summing up that it was a matter for the assessors to decide whether the appellant's unlawful acts substantially caused the death of the victim. The evidence of the pathologist Dr. Goundar and his report was explained to the assessors from paragraphs 38 to 40 of the summing up.

[36] Taking into account the evidence of the prosecution witnesses and the confession of the appellant there was evidence beyond reasonable doubt that the appellant had substantially contributed to the death of the victim. The acts of the appellant such as punching, kicking the victim with a steel capped boot and stepping on his face and chest had substantially caused the death of the victim. Furthermore, the appellant was reckless in causing the death of the victim. He was aware of the substantial risk that death or serious harm will occur as a result of his actions having regard to the circumstances and it was unjustifiable to take that risk.

[37] There is no error in the summing up of the learned trial judge. On the evidence adduced the trial judge and the assessors had correctly found the appellant not guilty of murder but guilty of manslaughter.

[38] This ground of appeal is dismissed due to lack of merits.

Appeal against Sentence

Ground Two

The court erred in law and in fact when it imposed a sentence against the Appellant to the higher end of the scale of the tariff given the circumstances of the case.

LAW

[39] In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell into error whilst exercising its sentencing discretion.

[40] The Supreme Court of Fiji in **Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)** stated the grounds for appeal against sentence at paragraph 19 as:-

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-*
>
> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration."*

[41] Counsel for the appellant submitted that the learned trial judge had erred in adding four (4) years for aggravation to the high starting point of 10 years imprisonment which had resulted in double counting of the aggravating factors.

[42] The maximum sentence for the offence of manslaughter in accordance with section 239 of the Crimes Act is 25 years imprisonment. The observation made by this court in *Kim Nam Bae (supra)* is that the sentence for the offence of manslaughter ranges from a suspended sentence where there was great deal of provocation by the victim to 12 years imprisonment where the provocation by the victim was minimal. However, the final sentence will be determined on the facts of each case including the aggravating and mitigating circumstances.

[43] The appeal of *Kim Nam Bae (supra)* was determined by this court on 26 February, 1999 when the Penal Code Cap. 17 was in existence. The maximum sentence for the offence of manslaughter under section 201 of the Penal Code was life imprisonment. Under section 239 of the Crimes Act the maximum sentence for the offence of manslaughter has been reduced. Sentencing is neither a scientific formula nor a mathematical formula which can be arrived at by doing additions and subtractions. Each time there is an offender before the court the circumstances and the culpability vary from case to case. An appropriate sentence is arrived at after a variety of considerations are taken into account. The sentencing regime followed in the High Court and the Court of Appeal is helpful to determine the appropriate range of a sentence.

[44] In this court's view the range of sentence observed in the case of *Kim Nam Bae (supra)* need not be revisited in light of the fact that the Crimes Act has reduced the maximum punishment for the offence of manslaughter to a term of imprisonment of 25 years. We now have the Sentencing and Penalties Act which provides guidance to a sentencing court in sentencing an offender. The sentencing structure in *Kim Nam Bae (supra)* can be said to be applicable notwithstanding the changes in the legislative framework.

[45] It cannot be ignored that the offence of manslaughter is about the loss of another person's life and therefore is a very serious offending.

[46] The current sentencing trend for the offence of manslaughter under the Crimes Act appears to be between 5 years to 12 years imprisonment. The above sentencing range does take into account the objectives of section 4 of the Sentencing and Penalties Act. Section 26 (2) (a) of the Sentencing and Penalties Act gives the High Court the powers to suspend a final sentence if it does not exceed three (3) years imprisonment. Accordingly, there is no need to establish a new tariff for the offence of manslaughter. A sentencing court can impose a suspended sentence based on the circumstances of the offending, a tariff may be construed as a restriction or may even confuse a sentencer. In exceptional cases a sentencing court should consider suspending a sentence.

[47] In **State v Suliasi Dumukuro criminal case HAC 27 of 2014** Perera J. after considering the sentences for the offence of manslaughter from 2012 to 2016 came to the conclusion that the appropriate tariff for this offending should be between 5 years and 12 years imprisonment. Under section 26 of the Sentnecing and Penalties Act a sentencing court has the powers to suspend a sentence if that sentence did not exceed three (3) years imprisonment hence the decision to suspend a particular sentence was a separate consideration.

[48] I note that a sentence of 5 years to 12 years imprisonment for the offence of manslaughter is in line with the current sentencing regime adopted by the High Court with a suspended sentence to be considered in exceptional circumstances. It does not mean that a sentencing court cannot deviate from the above range . There may be reasons to go below or higher than the range of sentencing between 5 years to 12 years imprisonment depending upon the circumstances of the offending and the sentencing court should provide reasons why the sentence is outside the range.

[49] In this case at paragraph 11 of the sentence the learned trial judge states:

> *"I take a starting point for this crime of ten years. That relatively high starting point subsumes the degree of violence used and the lack of any provocation in the legal sense. To that starting point I add a term of three years of the vigilante attack taking the law into his own hands. The fact that he took the life of his cousin is also aggravating and I add one further year for that bringing the interim total to one of fourteen years."*

[50] For the selection of a starting point this court is guided by its own decision in **Laisiasa Koroivuki vs. The State, Criminal Appeal No. AAU 0018 of 2010** at paragraphs 26 and 27 the following is stated:

> *"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*

> *[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

[51] The *Koroivuki* guidelines ensure that a court when selecting a starting point should consider the lower or middle range of the tariff. Once a high starting point is considered by a sentencing court it is quite obvious that the high starting point subsumes the aggravating factors of the offending. It will amount to double counting if the aggravating factors are again added to the already high starting point.

[52] Here the starting point was at the higher end of the range being ten years imprisonment which had taken into account the degree of violence used, lack of provocation by the victim and loss of life. The learned trial judge erred in principle and in his sentencing discretion when he added another four (4) years for the aggravating factors to the already high starting point. This was tantamount to double counting of the aggravating factors.

[53] As the sentence stands, the appellant has received an excessive imprisonment term by the double counting of the aggravating factors. In the interest of justice it is important that the sentence be revisited.

[54] The final sentence of 8 years imprisonment is justified taking into account all the circumstances of the offending particularly when this was a senseless killing of another human being. Although the appellant had not used the knife he had with him, however, the very possession of this lethal weapon by the appellant speaks volumes of the anger of the appellant at that point in time. The victim had attempted to steal the appellant's stereo did not deserve to die in the manner he was assaulted by the appellant. No amount of repentance by the appellant will bring the victim back.

[55] The sentence of 8 years imprisonment will not only meet the ends of justice but also serves as a deterrent to all would be offenders that the court will not take the loss of another life lightly. The term of imprisonment cannot be back dated it will be effective from the date of original sentence that is 12 August, 2014.

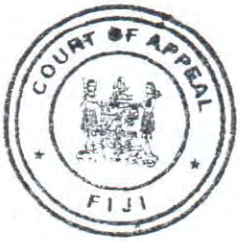
[56] Since the appellant was a young person (30 years of age at the time of the offending) who found himself on the wrong side of the law a non-parole period of 6 years should be imposed bearing in mind the rehabilitation of the appellant and expectations of the community.

[57] The appeal against sentence is allowed.

The Orders of the Court are:

1. *The appeal against conviction is dismissed.*
2. *The appeal against sentence is allowed.*
3. *The appellant is sentenced to a term of 8 years imprisonment with a non-parole period of 6 years effective from 12 August, 2014.*

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



Hon Mr Justice D. Goundar
JUSTICE OF APPEAL

Hon Mr Justice S. Sharma
JUSTICE OF APPEAL

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