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

CRIMINAL APPEAL NO.AAU 130 of 2020
[High Court of Suva Criminal Case No. HAC 356 of 2018S)

BETWEEN : **VILIAME RAIBULU RATOTO**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. S. Lavo for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **15 July 2020**

Date of Judgment : **18 July 2022**

RULING

[1] The appellant had been charged with two counts of **MANSLAUGHTER** contrary to section 239 of the Crimes Act, 2009, one count of **BREACH OF ZERO ALCOHOL LIMIT c**ontrary to section 105 (1) (b) and 114 of the Land Transport Act, 1998 and one count of **DISOBEDIENCE OF LAWFUL ORDERS c**ontrary to section 202 of the Crimes Act, 2009.

[2] The appellant had pleaded guilty to all counts and sentenced to 09 years of imprisonment each on the two counts of manslaughter, 02 years' imprisonment with a disqualification from driving for 04 years on count 03 and 01 year imprisonment on count 04; all sentences to run concurrently with a non-parole period of 08 years.

[3] The appellant's notice of appeal against sentence is timely. H had urged altogether three grounds of appeal. Both parties have filed written submissions for the leave to appeal hearing.

[4] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal against sentence is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[5] The grounds for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). For a ground of appeal timely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a reasonable prospect of its success in appeal.

[6] The grounds of appeal urged on behalf of the appellant:

Sentence

1. That the learned Judge erred in fact and in law in imposing a sentence of 9 years imprisonment with a non-parole of 8 years imprisonment.

2. That the sentence imposed by the learned Judge was harsh and excessive in all the circumstances of the matter leading to an error of the law in consideration of the same.

3. That the learned Judge erred in law in disregarding current sentencing practice and the terms of any applicable guideline judgment as specified in section 4(2) (b) of the Sentencing and Penalties Act, 2009.

[7] The summary of facts has recoded *inter alia* the following facts.

> ***"****……..At around 7 am on the morning of the 16th of September 2018, the accused VILIAME RATOTO was drinking (alcohol) Joskies with his friends at Newtown, Nasinu. The accused and his four friends drank 48 cans of (alcohol) Joskies till 12 pm that day.*
>
> *The accused then at around 12 pm went home and decided to hand over his company vehicle registration "EVENTS". The accused was accompanied by his friends namely Waise and Eliki. The accused was driving vehicle registration "EVENTS" whilst being intoxicated along Kanace Road at 70 km/ph when the said vehicle he was driving went off road and hit a crossing sign and then hit a mango tree.*
>
> *After hitting the mango tree, the vehicle accused was driving spun and hit the complainants ANJULA CHAND (deceased) and ARCHANA AMRITA CHAND (deceased) who were walking along Kanace Road, Nasinu.*
>
> *As the complainants were walking on the footpath along Kanace Road, Nasinu vehicle registration "EVENTS" driven by the accused collided with the complainants and as a result of the collision the complainants were thrown across the road.*
>
> *Thereafter the complainants were rushed to the hospital where ARCHANA AMRITA CHAND had died the same day and ANJULA CHAND had died on the 19th of September 2018 (3 days later).*
>
> *As the accident report was received, PC Binay had then attended to accident scene, drew the rough sketch plan and later drew the fair sketch plan. Herein attached and marked as "A" is the Rough Sketch Plan together with the fair sketch plan.*
>
> *The accused person was arrested and taken to Nabua Police Station where a breathalyzer test was conducted by PC 3114 Waisea. Upon being tested for alcohol it was noted that the accused had 71 micrograms of alcohol present in his blood that was beyond the prescribed limit of 35 micrograms in 100 milliliters. Herein attached and marked as "B" is the Breath Test Analysis Certificate.*
>
> *……..***"**

01st, 02nd, 03rd grounds of appeal (sentence)

[8] I think all appeal grounds could be considered together, as had indeed been done by the appellant's counsel in his written submissions, as in the end they all collectively challenge the length of the sentence imposed on the appellant.

[9] His counsel cites **Hill v State** [2018] FJCA 123; AAU109.2015 (10 August 2018) in support of this contention.

[10] The Court of Appeal in **Hill v State** (supra) confirmed that currently the tariff for manslaughter ranges from suspended sentence to 12 years of imprisonment which is one of the widest in the criminal justice system in Fiji. Both counsel in ***Hill*** had agreed that the sentencing tariff for manslaughter is so wide that it provides little guidance to a sentencing judge, particularly in the case of manslaughter arising from reckless driving.

[11] The Court of Appeal in ***Hill*** had engaged in a useful discussion on this issue and affirming the sentence of 07 years on the count of manslaughter imposed by the High Court judge, had observed as follows

> *'[62] Road accidents cause immense human suffering. Every year, a considerable number of people are killed and seriously injured. This represents a serious economic burden. It is understandable that cases of serious driving offences causing death are referred to courts by the DPP in the form of Manslaughter because he considers that the prescribed sentence and tariff for Causing Death by Dangerous Driving is unduly lenient.*
>
> *[63] Motor manslaughter cases cause particular difficulty for sentencers. By definition, it is one which always gives rise to extremely serious harm. Understandably this often leads to calls from victims' families, and from the wider community, for tough sentencing. On the other hand, an offender sentenced for causing death by reckless driving did not intend to cause death or serious injury, even in the extreme case where he or she deliberately drove for a prolonged period with no regard for the safety of others. Therefore, the sentencing should strike an appropriate balance between the level of culpability of the offender and the magnitude of the harm resulting from the offence.*
>
> *[64] A factor that courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the*

> *road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving. Motor vehicles can be lethal if they are not driven properly and this being so, drivers must know that if as a result of their driving dangerously a person is killed, no matter what the mitigating circumstances, normally only a custodial sentence will be imposed. This is because of the need to deter other drivers from driving in a dangerous manner and because of the gravity of the offence. [**R v Cooksley** (supra)]*.

[12] The Court of Appeal had also remarked in ***Hill***

> *'[31] In the absence of availability of the defence of intoxication, the culpability of a driver who kills a person under the influence of alcohol should attract a sentence in the upper region of the tariff.'*

[13] On the appellant, the trial judge had picked the starting point at 06 years on the count of manslaughter and added 05 more years for aggravating factors. After allowing discount for remand period and mitigating factors he had ended up with the sentence of 09 years.

[14] The appellant's counsel also submits that the trial judge had considered a charged act in count 03 as an aggravating factor to enhance the sentence in the first and second counts. More accurately, matters considered by the trial judge under the first aggravating factor namely 'reckless driving' includes matters relating to both the 03rd and 04th counts.

[15] The facts relating to the 03rd and 04th counts are very serious as far any motorist is concerned and the trial judge cannot be faulted for considering them in the matter of sentence. The question is whether the trial judge is in breach of the trite principle of sentencing that charged acts should not be considered as aggravating factors, because the accused is punished separately for those.

[16] From the sentencing order it is clear that the trial judge, for all practical purposes, had not made the appellant suffer any additional term of imprisonment on account of the sentences imposed on the 03rd and 04th counts because the very short imprisonment terms imposed on those charges were ordered to run concurrently to the sentences on the 01st and 02nd counts.

[17] Therefore, in those circumstances could not the trial judge have considered those matters in the matter of sentence as aggravating factors in respect of the 01st and 02nd count? This is an interesting question of law that the full court may look into at the hearing of the appeal. Supposing the 03rd and 04th charges were not there the trial judge would have had no impediment at all to consider the facts relating them as aggravating factors to enhance the sentence on 01st and 02nd counts.

[18] In any event, leaving aside the matters coming under the 03rd and 04th counts, the trial judge had found other serious aggravating factors while considering the sentences under the 01st and 02nd grounds of appeal which may still justify the final sentence. According the trial judge at paragraph 13 (i) of the sentencing order:

> *'……..He drove the motor vehicle at 70kmp/h on Kanace Road. Any driver would know that such a speed is reserved for the highway, not Kanace Road, which is normally busy with pedestrians, in a highly populated area. By doing the above acts, that is, driving a motor vehicle at 70kmp/h on Kanace Road….. he was unleashing a high degree of violence on the community, who had not provoked him. He was clearly exhibiting a reckless driving attitude towards the community, and he must not complain when he is punished according to law. His negative driving attitude was clearly an aggravating factor.'*

[19] On the other hand, when the trial judge had picked the starting point at 06 years he may have already taken into account some aggravating features associated with the incident. Which of the aggravating factors mentioned by him had been so considered cannot be ascertained. Then, if the same factors had been taken into account to enhance the sentence the judge may have unwittingly committed the sentencing error of double counting [see **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019)].

[20] However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the

sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[21] In a similar appeal namely **Gounder v State** [2020] FJCA 190; AAU0014.2018 (7 October 2020) I had the occasion to remark that

> *[39] I think it is high time for the DPP to move the Court of Appeal or the Supreme Court to issue a guideline judgment (after complying with the procedural steps under the Sentencing and Penalties Act) regarding applicable tariff on manslaughter arising from reckless or gross negligent driving also known as 'motor manslaughter' for future guidance. Needless to state that this is obviously a fit case to do so and the full court of the Court of Appeal may then consider the propriety of the sentence imposed on the appellant after having set the applicable sentencing guidelines and the tariff for 'motor manslaughter'.*

[22] For all the reason mentioned above I allow leave to appeal against sentence. However, I must not be taken to have meant that the appellant may succeed in his appeal against sentence. It is an entirely a matter for the full court.

The Order

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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