A

## RAM SAMI

*v.*

## REGINAM

B

[COURT OF APPEAL, 1975 (Gould V.P., Marsack J.A., Henry J.A.), 5th, 17th March]

Criminal Jurisdiction

*Criminal law—sentence—manslaughter committed under provocation—whether life imprisonment appropriate—length of sentence.*

*Criminal law—manslaughter committed under provocation—sentence—appropriate length of imprisonment—life sentence.* C

*Prison—provisions for release of offender on licence prior to completion of his sentence—Prison Ordinance* (Cap. 69) ss. 66, 67(1)—*Criminal Justice Act* 1967 (9 & 10 Eliz. 2, c.80) (Imp) ss.60, 61.

Originally the appellant had been charged with murder, but the Director of Public Prosecutions entered a Nolle Prosequi and accepted a plea to the lesser charge of manslaughter, for which the appellant was sentenced to life imprisonment. D

The appellant applied for leave to appeal on the grounds that for the offence of manslaughter, such a sentence was inappropriate in any case where the mental condition of the offender was not in question.

*Held* : 1. The trial judge was not so restricted in the imposition of a life sentence. In England a sentence of life imprisonment came to be used by the Court as an indefinite preventive measure for certain categories of mentally disordered offenders. The life sentence as being imposed " in mercy " was not necessary or appropriate in Fiji. E

2. Because of the attitude in court of the Director of Public Prosecutions and because of the stress laid on the question of provocation, the trial judge had no option but to treat the case as one in which there had been provocation by the deceased and therefore should have taken such provocation into account when passing sentence. The maximum sentence of life imprisonment was wrong in principle and would be reduced to 12 years. F

The Court set out the occasions both in Fiji and England when a prisoner might be released on licence prior to the completion of his sentence. G

Cases referred to :

*R. v. Picker* [1970] 2 All E.R. 226 ; 54 Cr. App. R. 330.
*R. v. O'Connor* [1960] Crim. L.R. 275.
*R. v. Hodgson* (1968) 52 Cr. App. R. 113 ; [1968] Crim. L.R. 46.
*R. v. Radich* [1954] N.Z.L.R. 86.

Appeal against a sentence of life imprisonment imposed upon the appellant for manslaughter. H

*G. P. Shankar* for the appellant.
*A. I. N. Deoki* (Director of Public Prosecutions) for the respondent.

Judgment of the Court (read by GOULD V.P.) : [17th March 1975]

A This is an application for leave to appeal against a sentence of life imprisonment passed upon the appellant in the Supreme Court at Lautoka upon his conviction of the crime of manslaughter. He had pleaded guilty.

The appellant was originally charged with murder but the Director of Public Prosecutions entered a Nolle Prosequi and presented a separate information charging manslaughter. Having outlined the facts to the Supreme Court, counsel for the prosecution said that his instructions from the Director were
B that on those facts the prosecution would be unable to discharge the onus of proving that the act committed by the accused was done without provocation. The learned judge said—" Very well—the accused will be formally convicted of manslaughter. He had pleaded guilty to that offence. " In this court the Director appeared personally and enlarged upon his reasons for this decision ; we will advert to them later.

C The appellant killed his wife Amelia Dorothy Raghwan on the 23rd June 1974, by inflicting three very severe and one superficial wound on the back of her neck with a long-handled knife. They had been married only since the 13th January of that year. It was an arranged marriage and the appellant had gone to Canada on the 10th February 1974. The following passage from the judgment of the learned judge on passing sentence contains the narrative of events from that point.

D " From there he wrote to his father and he also spoke by telephone to both his father and his wife. He appears to have believed that his wife was possessed of an evil spirit called MUNI. There is no other evidence of this. He returned unexpectedly on Saturday 13th April 1974 and the deceased was at that time at the accused's parents' house at Tagitagi. During the Easter weekend, deceased's parents and some relatives went to accused's parents' house. Accused had apparently expressed concern at the
E fact that his wife's menstrual periods had ceased about two months before her marriage, but his wife's relatives seem to have persuaded him that this was not unusual. However, on 26th April 1974 he took her to the Namosau Hospital at Ba where two days later she was aborted of an approximate 14 weeks pregnancy. The deceased seems to have gone back to her husband's house, and her stepbrother saw her in June and found her with a swollen lip and when he remonstrated with the accused, the
F accused told him that he had hit her because she would not tell him why she had left her work in December 1973 and whether she had been going to the pictures with men. A man named Yenkatsami went to accused's house and after some difficulty he gained admission to the house and found deceased crying. He spoke to accused, with a view to pacifying the couple. That was on Friday 21st June. On the night of that day the deceased seems to have confessed to her husband that she had had sexual
G intercourse forced upon her about 3 years before her marriage and this caused the accused to be very upset and he went and got his mother to whom the deceased apparently repeated the confession. The accused sent her away from his own house to his parents' house but later on he went there and slept with her. Nothing particular appears to have happened on the Saturday but on the Sunday, the accused and his wife went fishing, the fishing gear including a long handled knife. When they had not
H returned about 3.00 p.m. the accused's father searched for them and about 4.30 p.m. accused's wife was found dead. Death was caused by bleeding and shock, from four wounds on the back of the neck and the accused was interviewed about 5.00 p.m. and admitted that he had hit her, and he stated that he had asked his wife to tell him about the intercourse of which she had told him again and he struck her. Whether or not

this story of premarital intercourse on the part of his wife was true, it is clear that the accused believed it and was considerably upset by it. There is no suggestion in his statements to the police that he linked it up with the pregnancy in any way, and although this story might have caused the deprivation of the power of self-control sufficient to induce the accused to kill his wife, what appears to have happened here is that accused having received the confession on the Friday night, slept with his wife later on that night after his first flush of anger had worn off, and during Saturday brooded upon the matter, with the result that on Sunday he took his wife fishing, and lacerated himself afresh by hearing a repetition of the story and apparently worked himself into a frenzy and killed her. I can only say that such action appears to me reprehensible and wicked in the highest degree, and society must be protected from people who do such thing. It is important, also, perhaps to protect the marriage relationship, so far as the law can properly do so. The prosecution told the Court that there is no sign of mental instability in the accused. The accused is convicted of manslaughter as charged and sentenced to imprisonment for life. ''

The text of the statement made by the appellant at the interview referred to by the learned judge is as follows :

'' Last Friday night at about 9.00 p.m. I said to Dorothy that she was hiding something from me. My wife did not say anything. I then hit her. My father and others heard and came running and wanted to assault me. The door to my house was locked and my father and brothers forced me to open the door. I asked my father and brothers to go away. I was suspecting that someone have had sexual intercourse with my wife before our marriage. I was asking my wife if anyone had sexual intercourse with her or not. My wife thought that there might be a quarrel between my brothers and father, she then admitted to me that her father have had sexual intercourse with her when she was schooling in Class 8. I did not do anything. I was thinking whether this is true or untrue. This morning I said to my wife that we go fishing. My wife got ready. I took with me from home cold drink, gutline, crab fishing net, and big knife and left. We went to the ' mangrove corner '. We sat in the bush after laying the sack. I again asked my wife to relate truthfully how her father had intercourse with her. My wife said to me that when she was schooling in Class 8 her father forcibly had intercourse with her. She added that her father held his ears, sat and stood and asked for apology and said do not disclose this to anyone. My wife said that she did not disclose this to anyone. I had knife with me and I struck my wife three times with it on the back of her neck, and she died. I thought what I have done and got excited. I went towards the hill and sat on the hill. I thought I go and report straight away. I went as far as the tramline and noticed police van. Police called me and I told everything. ''

For completeness, there is another statement by the appellant of which evidence appears in the deposition of Police Inspector Atma Prasad Shandil ; it is as follows :

'' Yes, Sir, see I do not want to hide anything I cut my wife DOROTHY with the knife. She told me on last Friday night that when she was schooling then her father MICHAEL RAGHUWAN did bad thing to her. I did not trust this so this morning at about 10 o'clock I brought her to the sea side and when my wife again admitted the same thing then I hit her once with the knife and seeing that she won't survive then I hit her three more times and ran away towards the hills. ''

Before passing sentence the learned judge heard counsel for the appellant on the question of provocation. Mr Gordon, who than appeared, made his main submission that the wife's confession on the Friday of the incident of incest with her father, confirmed with further detail on the Sunday, was, to a person in the appellant's station in life, a gross insult. He alluded also to the fact that the wife had not informed her husband of her pregnancy and to the appellant's concern about the question of menstrual cycles.

The emphasis throughout, in the statements of the appellant and the address of counsel, so far as provocation is concerned, appears to have been upon the revelation of the alleged previous act of incest by the father of the deceased. We think that that also was the approach of the learned judge.

Before this court, counsel for the appellant submitted that for the offence of manslaughter, punishment by the imposition of a sentence of imprisonment for life was in-appropriate in any case where the mental condition of the prisoner was not in question. He relied upon English authorities. In *R. v. Picker* (1970) 2 All E.R. 226 (a conviction of manslaughter on the ground of the absence of intent) Lord Parker C.J. said :

> " This case does raise the question of the right principles to be applied in deciding whether to impose life sentences. There is no doubt that a life sentence can properly be imposed in mercy. Thus, in a case where the nature of the offence and the make-up of the offender are of such a nature that the public require protection for a considerable time unless there is a change in his condition, may be a mental condition at present unknown, it is right for the judge to impose a life sentence. This will enable some other authority to ascertain from time to time whether the condition has changed and it is safe for the offender to be released. If this were not done it might be necessary for the judge to impose a long sentence. But where no such condition exists, it is quite clear in the opinion of this court that a judge should not pass the difficult matter of sentencing and the length of detention to others. This was a simple case ; it was not murder, it was not manslaughter on the grounds of provocation or diminished responsibility, it was simply manslaughter because no intent either to murder or to do grievous bodily harm had been found by the jury. Quite clearly the appellant had to be punished, and he had to be sent to prison, and it was for the judge, in the opinion of this court, to say what the proper term of imprisonment for this sentence was. The court has come to the conclusion that the proper sentence for the appellant was a determinate sentence of four years' imprisonment. "

The case of *R. v. O'Connor,* referred to in the Criminal Law Review (1960) at page 275, was of exactly the same type, a conviction of manslaughter based on the absence of intent either to kill or to do grievous harm. Again the judge imposed a life sentence, saying that he did so out of mercy, so that the prisoner mght be allowed out when the authorities thought fit. The Court of Criminal Appeal held that the sentence was wrong in principle—

> " There was here no question of mental disease or of anything requiring mental treatment. The case merited punishment for a definite number of years and not a sentence which would put the duty of deciding when to release the prisoner on other authorities. The appropriate sentence was five years' imprisonment and, accordingly, that sentence would be substituted for the sentence of imprisonment for life. "

We fully accept these and like authorities as examples of the practice in England, where the life sentence has tended to become a wholly indefinite sentence. The position is summed up in *Thomas on Principles of Sentencing* (1970 at pp. 273-4) :

> " As was shown in chapter 2, the sentence of life imprisonment has come to be used by the Court as an indefinite preventive measure for certain categories of mentally disordered offenders. In using the sentence in this way the Court has regard to the provisions for the release of the offender on licence at any time, and has many times expressed the view that the sentence is more favourable to the offender than a long fixed-term sentence. The Court has also stated in strong terms that where a potentially violent offender is involved the indefinite sentence is preferable in the interest of public safety to a fixed term sentence from which the offender might be released on the expiration of the period of the sentence less remission, although still potentially dangerous. "

What was said by the English Court of Appeal in *R. v. Hodgson* (1967) 52 Cr. App. R. 113 at 114, is of interest—

> " When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified : (1) where the offence or offences are in themselves grave enough to require a very long sentence ; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future ; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence. We think that these conditions are satisfied in the present case and that they justify an indeterminate life sentence. The Home Secretary has of course the power to release the appellant on licence when it is thought safe to release him, if that time comes. "

Three life sentences had been passed on that appellant for acts of rape and buggery upon women and the case is illustrative of the fact that the protection of the public can become, in some cases, the all important consideration.

The position in England, where we think it likely that the admission of diminished responsibility as a defence may have placed emphasis on the mental condition of an accused person, has no complete counterpart in Fiji. In England, where a prisoner is sentenced to imprisonment for a fixed term he may, under section 60 of the Criminal Justice Act 1967, be released on licence by the Home Secretary after he has served one third of his sentence, or twelve months, whichever expires *later*.

In the case of a life sentence the Home Secretary (currently under section 61 of the same Act) has power to release the prisoner on licence at any stage after sentence has been passed. This is a simplification of the detailed position but serves as a basis of comparison with the Fiji legislation, which is contained in the Prisons Ordinance (Cap. 69), as amended by the Prisons Amendment Ordinance, 1968.

Prior to 1968 in Fiji a prisoner sentenced to a period of three years or more might be given a licence to be at large when he had served one half of his sentence ; a prisoner undergoing a life sentence after he had served seven years. So far as the possibility of a licence was concerned that equated the life sentence with a term of fourteen years. By the 1968 Amendment Ordinance, the licence (in that form) was abolished and the new section 67(1) provided that the Minister might " at any time, in his discretion, direct that a prisoner shall be released on an order of compulsory supervision, for such period as

the Minister shall think fit." No distinction is made between imprisonment for life and that for a fixed period, which means that if the question of release on compulsory supervision turns upon response by a prisoner to treatment, there is nothing to distinguish the two types. Section 66 does contain one slight and, we think, not very material difference, in that the Controller of Prisons is required to furnish a report on the general condition of prisoners as follows: (a) Those undergoing life sentence after the first year and thereafter every two years and (b) Those sentenced to seven years or more, after the first two years and thereafter every two years. If the Minister directs or the Controller thinks fit, reports may in any case be called for or sent at more frequent intervals.

We have devoted some time to this topic in order to indicate our view that the description of a life sentence as being imposed "in mercy" is not necessary or appropriate in Fiji; further, the criticism "a judge should not pass the difficult matter of sentencing and the length of detention to others" does not apply, at least with equal force. Whether the sentence of imprisonment passed is determinate or a life sentence, its duration in actual fact is in the hands of others.

It is of course for the Minister to evolve a policy in the matter and he has no doubt done so, but the function of the judge, in sentencing, albeit an important one, appears to be to provide a base upon which the policy can operate. We have not been provided with any information about such a policy and assume it to be irrelevant to this appeal. For these reasons, counsel's submission on this ground fails. The mere acceptance by the learned judge of the prosecution's statement that there was no sign of mental instability in the appellant does not render his imposition of the life sentence a breach of established practice or wrong in principle.

The question next arises whether the appeal should succeed on the ground that, for some other reason, the sentence is manifestly excessive or wrong in principle. Clearly the learned judge considered the crime a terrible one—reprehensible and wicked in the highest degree. He considered that society must be protected from people who do such things.

We fully agree that this was a terrible crime. So far as the protection of society is concerned we are not quite so convinced that it is a crime which is likely to be repeated by the accused, as the exact circumstances are unlikely to recur. It may be that what the learned judge meant was that society required protection, as one who was capable of conduct so atrocious might be equally unrestrained whenever he thought himself provoked. We would not regard however, the factor of the protection of society as having the same pre-eminence as it did in the case of *R. v. Hodgson,* mentioned above. On the other hand the learned judge was fully entitled to adopt the approach of the New Zealand Court of Appeal in *R. v. Radich* (1954) N.Z.L.R. 86 when they held that "one of the main purposes of punishment is to protect the public from the commission of crime by making it clear to the offender and to other persons with similar impulses, that, if they yield to them, they will meet with severe punishment."

The core of the matter is, we consider, the question of provocation. Having regard to the course the prosecution took, the learned judge had no option but to treat the case as one in which there had been provocation by the deceased. Before this court, Mr Deoki said that from his knowledge of the class of people from whom the appellant came, and having regard to the appellant's position in life and the degree of his inability to cope with circum-

stances, he was satisfied that the circumstances narrated amounted to provocation. The repetition of the deceased's account of the incest on the Sunday, with the convincing account of her father holding her ears, would finally satisfy the appellant that she was telling the truth. It was for these reasons that he directed the entering of the Nolle Prosequi and laid the information for manslaughter.

The adoption of this procedure was entirely within the province of the Director of Public Prosecutions. We must be careful to point out, however, that the withdrawal of the charge of murder means that there has been no judicial determination that the particular circumstances were capable of amounting to provocation in the legal sense, and no determination by the court, including the assessors, that they did in fact amount to provocation. In spite of this however, and whether or not the learned judge's opinion was to the contrary, it was incumbent upon him in passing sentence, to accept that the appellant had been provoked in the legal sense.

In this aspect of the matter, with great respect, we think that in imposing the maximum sentence of imprisonment, the learned judge erred in principle. He was quite entitled, if such was his view, to regard the provocation as being in the lowest possible category of legal provocation—but still legal provocation with all that implies.

The text book we have already cited, by Thomas, sums up (at page 76 et seq.) sentences for manslaughter involving provocation which have been upheld in England as ranging from three years' imprisonment to ten. Higher sentences than ten are usually imposed only in bad cases of involuntary manslaughter by dangerous acts. There is some guidance in this, but the variety of circumstances and the degrees of blameworthiness are infinite. Having considered all aspects of the matter we agree with the learned judge that the case is an extremely bad one. Even assuming that the appellant only fully believed the deceased's story on the Sunday, he had heard it on Friday and should have been prepared to an extent which would have enabled him to guard against the frenzy which apparently possessed him. In our view the learned judge's error in principle is little more than technical and the appellant must expect a heavy sentence.

The application for leave to appeal is granted ; we treat the application as the appeal, which is allowed to the extent we now indicate. The sentence of imprisonment for life is set aside and the appellant is sentenced to imprisonment for twelve years, to run from the same date as the sentence originally imposed.

*Appeal allowed ; sentence of imprisonment reduced from life to that of 12 years.*