IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL N0. : AAU0006 OF 1995S
(High Court Criminal Case N0. 0009 of 1994)

BETWEEN:

GANESHWAR PRASAD S/O TILAK RAM

Appellant

-and-

THE STATE

Respondent

Mr. *G. P. Shankar* with Mr. *A. Singh* for the Appellant.

Mr. *K. D. Wilkinson* for the Respondent.

Date and Place of Hearing : 21, 27 November 1996, Suva

Date of Decision : 29 November 1996

JUDGMENT OF THE COURT

The appellant was charged with murder pursuant to Sections 199 and 200 of the ***Penal Code*** (Cap. 17). He pleaded not guilty to the charge.

The State case against the appellant was as follows. The deceased was the appellant's defacto wife. At the time of the commission of the offence they were not living together. The deceased was living in a separate residence while the appellant was living at the police barracks.

On the night of the commission of the offence the appellant visited her at her residence and that he was accompanied there by Constable Amrit Lal. Constable Amrit Lal was outside the house while the appellant went inside the house to see the deceased.

The State alleged that the appellant had sexual intercourse with the deceased and then they appeared to have developed an argument. The argument is alleged to have developed because the appellant had asked the deceased to accompany him to Constable Amrit Lal's house but she refused. During the course of the argument the appellant was alleged to have pressed a pillow against the deceased's mouth and as a result suffocated the deceased.

There was no dispute at the trial that the deceased died of asphyxia by suffocation.

The issue at the trial was whether the appellant was the one who caused the death of the deceased. Evidence against the appellant consisted of the eye witness account by Constable Amrit Lal, confessional statement in a record of interview (Ex 12) and a charge statement (Ex 19).

The appellant denied any involvement in the murder and called two alibi witnesses to prove that he was elsewhere at the relevant time. He elected not to give evidence at the trial.

The trial judge summed up the case to the assessors. The assessors gave their opinion finding the appellant guilty of murder. The trial judge then convicted the appellant in a brief decision:

" I now deliver the Judgment of the Court. The Accused, Ganeshwar Prasad, is charged with the offence of Murder, contrary to Sections 199 and 200 of the Penal Code, Cap. 17.

The particulars alleged against him are that on the 7th of February, 1994 at Visama, Nausori, the Accused murdered Shanti Shantoshni Devi d/o Bechu Ram.

I have directed myself in accordance with my summing up to the Assessors and I have born in mind the nature and quality of the evidence adduced at the trial.

The three Assessors are of the unanimous opinion that the accused is guilty of murder as charged. I accept their opinions. The accused is guilty of Murder as charged and I convict him accordingly."

The appellant filed a "Petition of Appeal" in person against conviction. The Petition of Appeal was later amended by his lawyer, Mr. Shankar who filed a Supplementary Notice of Appeal dated 13 May 1996. The Supplementary Notice of Appeal constitutes the appellant's appeal in this matter. There are eleven grounds of appeal:

"1. THAT the learned trial Judge in his summing up was wrong in saying -

'Gentlemen Assessors you will have the opportunity to peruse both statements by the Accused Ex12 and Ex19. Both statements are of a confessional nature and if you believe and are satisfied beyond all reasonable doubt that they were given voluntarily and represent the truth then you may act upon them as they are the best evidence coming directly from the accused, but again these are matters for you to decide.

Gentlemen Assessors, you will appreciate that confessional statements of the accused are very important evidence in the case for the prosecution and therefore demands that you must scrutinised them very carefully the circumstances in which the interview

and the charge statements were taken in order to enable you to decide whether the contents of the statements may be true or not.

If you are satisfied that the confessional statements given by the accused were given freely and voluntarily without any threat, assault or oppression then you can act on them in considering the whole of the evidence and circumstances of the case and if you are satisfied beyond all reasonable doubt that prosecution has proved its case against the accused then in such a case it will be your duty to express the opinion that accused is guilty of murder as charged.'

without properly directing the Assessors that they must be satisfied beyond reasonable doubt as to the truth of the said statements, and if they had any doubts about the truth they must RESOLVE that doubt in favour of the appellant. This passage contains serious misdirection, as well as non-direction, and therefore there has been a substantial miscarriage of justice.

2. *THAT the learned trial Judge was wrong in summing up to the Assessors when the learned trial Judge said at the outset -*

'What you really think happened...'

is capable of being understood that the Assessors were entitled to think in isolation or without considering the evidence or basing the opinion on evidence.

3. *THAT the appellant was denied of the benefit of free consideration of the evidence by the Assessors because the trial Judge emphatically commented -*

'Now from the evidence which you have heard in this case, you may have no doubt that it was the accused's act that caused the death of the deceased.

Secondly, you may have no doubt that the act of the accused was deliberately done to harm the deceased and was not done under any mistake of fact on his part.

Thirdly, and, also on the evidence in this case you may have no doubt and this is a

matter entirely for you, that in attacking the deceased, the accused either intended to kill her or at least to cause her grievous bodily harm or alternatively, the accused's was done with reckless indifference to human life.'

and thereby there has been serious unfairness to him as well as miscarriage of Justice.

4.(a) THAT the learned trial Judge misdirected the Assessors on the effect of intoxication.

(b) The learned Judge was wrong in directing the Assessors and or giving them impression that they were to consider and rely on Prosecution contention as opposed to evidence.

(c) That the learned trial Judge failed to direct the Assessors on the question of lesser offence in view of intoxication and quarrel.

5. (a) THAT the learned trial Judge's comments about admissibility of confession and/or its challenge was unfair and wrong (at page 124).

(b) That the learned trial Judge failed to direct the Assessors on the inherent dangers involved in the Police taking the Appellant to a Justice of the Peace.

6. THAT the learned trial Judge's direction on provocation is wrong.

7. THAT the learned trial Judge did not fully and properly direct the Assessors on prior inconsistent statement, and emphasised too strongly on the value or weight of interview note.

8. THAT the learned trial Judge was wrong in not directing the Assessors to consider the evidence, and the value of evidence of Pathologist, and also consider whether the deceased committed suicide because there was evidence of previous attempt by her to commit suicide.

9. THAT while the trial Judge emphasised too much on the evidence of the Prosecution and summarised the evidence to the Assessors the learned trial Judge failed to assist the Assessors in not saying

about Defence evidence and therefore there has been a substantial miscarriage of Justice.

10. THAT the learned trial Judge was wrong in admitting the confessional statements (including interview notes).

11. THAT the verdict (including opinion of Assessors) is unsafe and unsatisfactory having regard to all acts and facts and circumstances, including the fact -

(1) That the confessional statements were clearly unreliable and unworthy of any evidence, and not supported by any confirmatory evidence.

(2) That the evidence of witness Mahen, Jiten, and Barmanand whilst the evidence of Amrit Lal was very suspicious and covered by high and dark cloud of doubts."

At the hearing, the appellant's lawyer made a further application to add a new ground of appeal. Counsel for the respondent did not oppose the application and we allowed the amendment. This further ground of appeal is raised as an alternative to all other grounds of appeal:

"That the Appellant did not and was not able to make free choice in exercise of his legal right to give evidence in trial proper because his Solicitor/Counsel assured him that the Appellant would get acquitted and that the Appellant must not give evidence in trial proper. Having regard to the confessional statements having been admitted by the learned judge, the decision and/or advice to the Appellant by his Counsel, and Appellant's acceptance of such decision of his Counsel and advice deprived the Appellant of having his evidence heard and considered in trial proper."

Ground 1.

This ground of appeal criticises the trial judge's direction in relation to the confessional statement (Exh. 12) and the charge statement (Exh. 19). Counsel for the appellant submitted that the summing up was confusing in

that it merely directed the assessors to speculate whether the contents of the statements "may" be true.

There is no substance in this submission. When the direction by the trial judge is read in its full context it is clear to us that the direction to the assessors was to determine beyond reasonable doubt whether the statements were true. We would dismiss this ground of appeal.

Ground 2

In this ground of appeal the trial judge is criticised for misdirecting the assessors on the use of evidence. In particular, counsel for the appellant submitted that the assessors were left with the impression that they were entitled to speculate on the facts without basing their opinion on evidence.

We find that the trial judge gave clear and careful directions on the proper approach to the evidence. At page 118 of the record the trial judge stated:

> *"However, as far as the facts of the case are concerned, what you think really happened, which witnesses are reliable and so on, these are matters upon which you are free to form your own opinions. So, if I express any opinions on the facts, or if I appear to express any opinions, my opinions on the facts of this case, then it is entirely a matter for you whether you accept what I say or form your own opinions. In other words, you are your own masters where the facts of this case are concerned."*

At page 119 of the record the trial judge continued:

> *" I must repeat and emphasise what I have told you before that your decision in this case must be based solely and exclusively upon the evidence which you have heard in this Court and upon nothing else."*

There is no substance in this submission. We would dismiss this ground of appeal.

Ground 3

In this ground of appeal counsel for the appellant criticises the trial judge's direction on the issue of "malice aforethought". In our view the passage referred to by counsel for the appellant has been criticised in isolation. The trial judge's direction in respect of malice aforethought begins on page 120 of the record through to page 122 in which the trial judge identified the factual issues and directed the assessors to have regard to the evidence in the trial. This passage has to be considered with other passages in the direction which deal with the quality and nature of the evidence, the burden of proof and the relative views open on the facts. There is no substance in this ground of appeal. We would dismiss it.

Ground 4 (a)

In giving his directions in relation to the effect of intoxication the trial judge stated:

> *" Only if the accused was so drunk as to be incapable of forming any intention to attack the deceased and to cause grievous bodily harm, then in such circumstances, it could not be said that the accused had the necessary intention for the offence of murder."*

Counsel for the appellant has submitted that this is a wrong direction in law. He relied upon ***Garlick*** 72 Cr. App. R 291 at 293 where the Lord Chief Justice said:

> *"In each of those two cases it was pointed out by this Court that when the question of drunkenness arises it is not a*

question of the capacity of the defendant to form particular intent which is in issue. What is in issue is the question simply whether he did form such an intent."

Later on at page 294 he said:

"In any case such as this if the Jury considers that the defendant by reason of the drink he has taken, and had taken at the time, may not have had the necessary intent, then the offence of murder is not made out."

We agree with counsel for the appellant that the direction given by the trial judge is wrong in law. The question is not one of capacity of the appellant to form a particular intent but whether the appellant formed the intent in question.

While we consider that the trial judge erred in his direction there is no miscarriage of justice in this case because it is clear from the evidence that the appellant was fully aware of what he was doing at the time of the commission of the offence. In the record of interview (Exh. 12) the following question was put:

"Q92 Do you agree that last night after consuming beer for sometimes, you were not in your sober mind?
A Yes, I was drunk but I knew what I was doing."

It is clear from this that the appellant understood the nature of what he was doing and therefore the question of intoxication did not have any effect on the question of intent.

Grounds 4 (b) and (c) do not take the matter further. We would dismiss them.

Ground 5.

Counsel for the appellant submitted that the trial judges comments about the admissibility of confession on page 124 was unfair and wrong. He submitted that this direction was likely to create the impression that (a) the burden of proof was on the appellant (b) the charge statement was to be accepted without consideration of the truth of it (c) the effect of assault, improper conduct, threat and oppression were not required to be considered.

In our view this passage has been criticised in isolation. We agree with submission of counsel for the respondent that the trial judge gave sufficient direction with regard to the burden of proof which lay on the prosecution. At page 138 to page 141 the trial judge directed the assessors to scrutinise the statements carefully and decide whether or not the contents were true. We would dismiss this ground of appeal.

Counsel for the appellant further criticised the direction of the trial judge in relation to the effect of the visit to the JP. There is no substance in this ground and we would dismiss it.

Ground 6

This ground of appeal criticises the trial judge's direction on the defence of provocation. Counsel for the appellant did not make any specific submissions on this ground of appeal. Counsel dealt with this ground in a general way with ground 4.

We find that the trial judge gave detailed directions as to the law and the evidence relevant to the issue. These directions were given dispite the fact that the appellant did not raise the issue directly. The appellant's

case in the trial was that he was not at the scene of the murder and therefore not responsible for the death. We do not find any error. We would dismiss ground of appeal.

Ground 7

This ground of appeal criticises the trial judge's direction in relation to the prior inconsistent statement by the appellant that he was not responsible for the death of the deceased. Counsel for the appellant did not make any submissions in respect of this ground in his written submissions. However, he indicated in the written submissions that he would seek to amend the ground to include a further ground 7(b). His written submissions relate to this proposed amendment. At the hearing counsel for the appellant did not seek any such amendment. However we have considered what he had to say on this point and are satisfied there was nothing of substance in his submissions.

Ground 8

Counsel for the appellant in his written submissions stated that "There was evidence of suicidal attempt and was found hanging." With respect counsel for the appellant mis-stated the facts. The deceased was found lying on the floor with one end of the saree over the rafter and the other end around her waist.

The trial judge gave sufficient direction on the question of suicide on page 131 of the record in which he directed that evidence given by the pathologist ruled out the possibility of suicide by hanging. We would dismiss this ground of appeal.

Ground 9 and 11

Counsel for the appellant submitted that the summing up was unfair in that it favoured the prosecution. We do not find any substance in this submission. We find that the summing up as a whole was fair and balanced. We would dismiss this ground of appeal.

Ground 11 challenges the verdict by the trial judge. We find that the trial judge properly directed the assessors on the confessional statements and the evidence given by the prosecution witnesses and we cannot find any error. We would dismiss this ground of appeal.

Ground 10

This ground of appeal challenges the admissibility of the confessional statements. In this regard the trial judge gave detailed reasons for admitting the confessional statements. We cannot find any error in his ruling. We would dismiss this ground of appeal.

Alternative Ground.

Counsel for the appellant has submitted in the alternative that the appellant was unable to make a free choice in exercising his legal right to give evidence at the trial because his counsel assured him that he would be acquitted and therefore on this basis he did not give evidence in the trial.

Counsel for the respondent has submitted that in the circumstances of this case this cannot be a valid ground of appeal.

We have been advised by counsel that there is no local authority on this point. There are English authorities which provide some guidance on the circumstances in which a court may quash a verdict when the grounds

advanced consist wholly or substantially of criticisms of defence counsel's conduct of the trial.

The Court of Appeal in ***Reg. v Clinton*** [1993] 1 WLR 1181 discussed the relevant authorities in England. The facts of this case can be cited from the headnote. Following her kidnap and indecent assault the complainant made a statement to the police describing her attacker. Fourteen months later she saw the appellant in a market place and identified him as her assailant. The appellant was arrested and charged. The case against him depended on the correctness of the complainant's identification and two incriminating statements alleged to have been made by him after his arrest. The appellant did not give evidence and was not advised by his counsel to do so and no evidence was called on his behalf. As a result, important discrepancies between the appellant's actual appearance and the complainant's description of her attacker were not put before the jury and no explanation was given for the appellant's comments in interview. The appellant was convicted.

On appeal, counsel for the appellant submitted that the important differences between the appearance of the appellant and the description by the complainant were never put to the jury. The failure to do this stems from the fact that the appellant did not give evidence, nor advised to do so, nor was any evidence called on his behalf.

The Court of Appeal reviewed the relevant authorities in England. At page 1187 the Court said:

> *"During the course of any criminal trial counsel for the defence is called upon to make a number of tactical decisions not the least of which is whether or not to call his client to give evidence. Some of these reasons turn out well,*

others less happily. In Reg. v Gautam, The Times, 4 March 1987, this court concisely explained why such decisions could not generally afford valid grounds of appeal. They held that, provided counsel had properly discussed the case with his client, the court would not permit the defendant to have another opportunity to run an alternative defence which had not been run at his trial. In Reg v Ensor [1989] 1 WLR 497 the court considered both Reg v Irwin [1987] 1 WLR 902 and Reg v Gautam, The Times, 4 March 1987, and expressly approved the approach in the latter case subject only to the qualification which had been inserted in an intervening case called Reg v Swain (unreported), 12 March 1987, that if the court had any lurking doubt that the appellant might have suffered some injustice as the result of flagrantly incompetent advocacy by his counsel, then it would quash the convictions. In the case before them they decided that what was described as 'counsel's carefully considered decision,' even if erroneous, could not possibly be described as incompetent let alone flagrantly incompetent advocacy.

Most recently Reg v Wellins (unreported), 20 December 1991, heard in another division of this court, repeated the principle. Giving the judgment of the court, Lord Lane CJ said:

> *'The fact that counsel may appear to have made at trial a mistaken decision, or has indeed made a decision when in retrospect is shown to have been mistaken, is seldom a proper ground of appeal. Generally speaking, it is only when counsel's conduct of the case can be described as flagrantly incompetent advocacy that this court will be minded to intervene.'*

We would, however, draw attention to the fact that in both Reg v Gautam, The Times, 4 March 1987 and Reg v Wellings, 20 December 1991 the principle was stated in general rather than restrictive, inflexible terms. In our judgment the court was not thereby intending to derogate from the plain wording of section 2 (1)(a) of the Criminal Appeal Act 1968....We think that the proper interpretation of the cases to which we have referred is that the court was doing no more than providing general guidelines as to the proper approach. The court was rightly concerned to emphasise that where counsel had made a decision in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe or unsatisfactory. Particularly does this apply to the decision as to whether or not to call the defendant. Conversely and we stress, exceptionally, where it is shown that the decision was taken

either in defiance of or without proper instructions, or when all the promptings of reason and good sense pointed the other way, it may be open to an appellate court to set aside the verdict by reason of the terms of section 2(1)(a) of the Act. It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to asses the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict according to the terms of the subsection."

With respect we would adopt these principles as appropriate and applicable in Fiji.

In the present case, there is no allegation that counsel at trial was flagrantly incompetent. Secondly counsel had sought instructions from the appellant and then gave advice not to give evidence. Thirdly, counsel for the appellant at the trial called two alibi witnesses and gave evidence to show that the appellant could not have been at the scene of the murder at the time of commission of the offence. It cannot be said that appellants version of facts were not given at the trial.

We have reached the conclusion that the various matters referred to in the alternative ground cannot constitute valid grounds of appeal. We would dismiss this ground of appeal.

Alternative Verdict of Manslaughter.

During the course of the hearing, the Court raised an additional matter with regard to the adequacy of the trial judge's summing up in relation to the alternative verdict of manslaughter under section 198 of the ***Penal Code*** (Cap. 17) on the facts of this case.

In his summing up, the trial judge directed the assessors that the nature of the case against the appellant was that either he was guilty of

murder or that he was not responsible for the death of the deceased. He did not leave the verdict of manslaughter open on the prosecution case. This point is different to the defence of provocation which may reduce a charge of murder to manslaughter. We have already dealt with this issue and concluded that the trial judge gave detailed directions on the defence of provocation in his summing up.

The particular matter which the Court raises here relate to the manner in which the offence was committed. The relevant facts are set out in the confession of the appellant (Ex 12):

> *"Q71 What happened when you followed your wife into the room?*
> *A She went and lay on the bed. I stood beside her and asked her to change her clothes and go with me to Amrit's house. She said its night time and she won't go. I persuaded her but she won't agree to go so I sat beside her on the bed and started making love to her by kissing her. She also hugged me and finally we ended up having sex. I undressed myself completely and I removed my wife's panty. I didn't discharge as I thought Amrit might come in. I then dressed up myself.*
>
> *Q72 What happened, after that?*
> *A I asked her to accompany me to Amrit's house but she again refused and started to abuse me. She also started to pull me by my shirt. She became very argumentative and she told me to come and stay with her. She blamed me for living in the barrack as a prostitute and not going to with her.*
> *Q73 What was she doing at that time?*
> *A She was sitting on the bed and I was standing beside the bed. As she was being quarrelsome and talking loudly, I fisted her once when I lost my temper. I punched her once on the face and pushed her on the bed. I told her to sleep.*
> *Q74 What part of the face the punch land?*
> *A When she got up on the bed, I punched her on the forehead and pushed her back on the bed. I picked up the pillow and pressed on her face. She removed the pillow. After this I went outside by the rear door to urinate.*
> *Q75 Do you know where was Amrit all this time?*

A *After I entered the house did not bother about him. I did not see where he was.*
Q76 *What did you do after urinating?*
A *I went back into the house.*
Q77 *How did you enter the house?*
A *As before I used the kitchen door*
Q78 *What happened when you re-entered the house?*
A *As I entered my bedroom I saw my wife standing on a chair. I noticed one end of a saree was tied to the rafter and she was holding the same saree, trying to wrap around her neck and when she saw me, she said (today kill myself). Same time I punched her somewhere on the body and she fell down with the chair. Wen she fell down, I fisted her on the mouth and questioned her why she was doing that. She started yelling loudly saying she would die so I picked up the pillow and pressed over her mouth. After a while I removed the pillow and saw she was motionless. I got excited and I ran away from there."*

In our considered opinion, the trial judge failed to direct the assessors that in the circumstances of the case as set out above, it was open to them to consider the alternative verdict of manslaughter. It is clear to us that the use of the pillow in the first instance (Q74 and A) was not intended to kill or do any grievous bodily harm. The second occasion when the appellant pressed the pillow over the deceased's mouth (Q78 and A), this was immediately after she began to yell loudly.

It was open on these facts that the appellant was simply trying to stop the deceased from yelling loudly. We consider that in the circumstances, the trial judge should have left the issue of the alternative verdict of manslaughter to the assessors. In failing to give such direction to the assessors he fell into error. It would follow from this that when the trial judge convicted the appellant he did not direct himself properly in this regard.

The question then arises as to the appropriate order we should make in the circumstances. We had considered the possibility of directing a new trial under section 23 (3) of the ***Court of Appeal Act*** and we put this matter to counsel for the respondent. However, he agreed that the matter could be dealt with under section 24 (2) of the ***Court of Appeal Act*** (Cap. 12). It states:

> *"Where the appellant has been convicted of an offence, and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the Court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."*

We have reluctantly decided to deal with this matter under section 24 (2) of the ***Court of Appeal Act***.

We conclude from the summing up and the judgement of the trial judge that he found the facts as set out in the record of interview (Ex 12). In Q97 and Answer the appellant denied that he had any intention of killing the deceased. We are satisfied from all the circumstances that there was at least a reasonable doubt about any intention on the part of the appellant to either kill or do grievous bodily harm to the deceased in holding the pillow against her face. The facts as found by the trial judge would support an alternative verdict of manslaughter. In accordance with our powers under s 24 (2) of the ***Court of Appeal Act*** (Cap. 12) we would set aside the conviction of murder and substitute a verdict of manslaughter.

Sentence.

The sentence imposed by the trial judge was a mandatory sentence and therefore no submissions were made on mitigation of sentence at the trial. As the penalty for manslaughter under section 201 of the ***Penal Code*** is a maximum of life imprisonment, we heard counsel on the question of the appropriate sentence.

The offence of manslaughter may be committed in a wide variety of circumstances. Therefore the appropriate sentence in each case will vary according to the circumstances of each case. It is therefore not proper to attempt to give any general directions concerning an appropriate range of sentences in such cases. We note that the Court of Appeal refused to do this for this very reason in ***Kishori Lal v Reg*** Criminal Appeal N0. 54 of 1984, dated 4 March 1985.

Counsel for the appellant has referred us to cases in Fiji with sentences ranging from term of imprisonment up to 2 years with a suspension of the sentence to a sentence of 12 years in the most serious cases. In our opinion it would serve no useful purpose to cite the facts of all the cases we have been referred to by counsel. The range of sentence indicated is sufficient to give us an idea of the range of sentences that have been imposed in Fiji.

In determining the appropriate penalty for this case it is important to have regard to the circumstances and the manner in which death was caused. In this regard counsel for the appellant has submitted that there was no preplan to assault the deceased in any way. It was submitted that in fact they made love and it was only when it was suggested that the

deceased should accompany the appellant to Amrit Lal's house that an argument developed and he reacted violently.

Counsel for the appellant submitted that the period spent in custody up to this point (about 3 years) is sufficient punishment for the offence and we should discharge the appellant immediately.

Counsel for the respondent on the other hand submitted that this was a serious case of domestic violence (although they were not legally married) and involve two occasions when the appellant assaulted and use the pillow to cover the deceased mouth resulting in death.

Firstly, we consider that this case is comparable to a case of domestic violence even though the parties were not legally married and were not living together. The appellant treated the deceased as his wife. In our opinion defacto wives in the position of the deceased need to be protected from this kind of violence as in domestic violence.

Secondly, having regard to the medical evidence, the nature of the injuries received by the deceased and the number of times the deceased was assaulted, we consider that using the pillow was part of a brutal attack on the deceased, even though the appellant may not have appreciated the risk of death from it.

Having regard to all the circumstances and the fact that this was a trial as distinct from a plea of guilty, the appropriate sentence for this case would be 8 years.

Under s 28 (5) of the ***Penal Code*** (Cap. 17) a sentence is deemed to take effect from and to include the day on which it is pronounced except where otherwise provided in the Code or otherwise ordered by the court. In this matter the trial judge ordered the sentence to take effect from 8 February 1994. We understand this to be the date when the appellant was taken into custody. The practical effect of this order was that the period spent in custody awaiting trial was taken into account as part of the sentence. We would likewise direct that the sentence of 8 years to take effect from 8 February 1994.

We make the following orders:

1. The conviction of murder is set aside.
2. We substitute a conviction for manslaughter.
3. We impose a sentence of 8 years imprisonment to take effect from 8 February 1994.

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Sir Mari Kapi
Judge of Appeal

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Sir Edward Williams
Judge of Appeal

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Sir Maurice Casey
Judge of Appeal