IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0004/97S
(Suva High Court Criminal Case No. HAC 13/96)

BETWEEN:

KULDIP SINGH aka JOJO
(f/n DAYA SINGH)

Appellant

and

THE STATE

Respondent

Mr M. Raza for the Appellant
Mr J. Naigulevu for the Respondent

Date and Place of Hearing: 9 February 1998, Suva
Delivery of Judgment: 12 February 1998

JUDGMENT OF THE COURT

This is an appeal against a sentence of three and half years imposed on the Appellant by the Suva High Court (Pain J.) on 26 May 1997 for the offence of manslaughter. In imposing this sentence the learned Judge took into account amongst other things the period of 14 months that the Appellant had spent in custody.

The grounds of appeal are as follows -

"1. *THAT the findings of the Learned Trial Judge for the purposes of sentencing is unreasonable and cannot be supported having regard to the material before the Court despite the plea of guilty by the Appellant in as much as:*

(i) There was no evidence or sufficient evidence and/or material to find that the Appellant had a propensity for violence; OR

(ii) *The Appellant persisted to overcome her resistance to have sexual intercourse.*

2. *THE Learned Trial Judge erred in law and in fact in failing to take into account the relevant factors and/or took into account irrelevant factors:*

(i) *He failed to take into account that both the Appellant and the deceased were struggling prior to the alleged incident;*

(ii) *He failed to take into account the sobriety of both the Appellant and the deceased;*

(iii) *He took into account and gave undue weight to the Appellant's prior criminal history;*

(iv) *He erred in holding that the Appellant had a propensity for violence;*

(v) *He failed to give sufficient weight to the Appellant's plea of guilty.*

3. *THAT the sentence imposed by the Learned Trial Judge is harsh and excessive and wrong in principle having regards to all the circumstances of the case."*

The facts of this case, the circumstances surrounding the death of the victim Mohini Lata and the factors taken into account in assessing the quantum of punishment are adequately covered in the sentencing remarks of the learned Judge. We can do no better than quote them here in full -

"SENTENCING REMARKS OF PAIN J

The accused was charged with murder in the Magistrates Court on 18th January 1996. On 11th April 1996 he was committed to this Court for trial. The Depositions were received in this Court on 20th August 1996.

An information alleging murder was filed by the Director of Public Prosecutions on 10th September 1996. An amended information was filed on 20th March 1997 alleging the offences of attempted rape and murder.

On 24th March 1997 the accused was released on bail, having been held in custody for just over 14 months without trial.

The trial was due to commence today 26th May 1997. A further amended information was filed today for the offence of manslaughter only. Upon arraignment the accused pleaded guilty to this charge.

An agreed summary of facts was read to the Court. This gives details of

how the accused and a friend met the deceased, Mohini Lata aged 23, in Suva on the morning of 17th January 1996. She joined them. Together they purchased small bottles of beer and went to different places where the beer was consumed. Finally they went to a vacant piece of land on the Suva foreshore that is covered with bushes. There they consumed the last 2 bottles of beer. The facts constituting the manslaughter offence are contained in a short paragraph of the summary that reads:

> *"The accused then attempted to persuade the deceased to have sexual intercourse with him but she refused. They began arguing and both stood up. They then began to struggle physically with each other. The accused got hold of the deceased by her hair and threw her to the ground causing her head to hit the ground whereby she sustained injuries which resulted in her death. Thereafter he sat on top of her and punched her on the face twice. The accused thereafter began trying to remove the deceased's clothing."*

It is hardly necessary to say that the accused must be sentenced only on the charge of manslaughter and on the basis of the facts submitted.

The antecedent report produced by the Police shows that the accused has two previous convictions. On 2nd June 1993 he was convicted on a charge of assault occasioning actual bodily harm and was fined $60. On 11th December 1995 he was convicted on a charge of obtaining money by false pretences and sentenced to 18 months imprisonment, suspended for 2 years. There has been no application to activate this sentence.

The accused is now 23 years of age. He is married with one child. His counsel outlined his personal and family circumstances. Counsel submitted that the offence was out of character for the accused. Liquor seems to have been responsible for his behaviour. The circumstances do not show an intent to cause harm or injuries. The deceased was thrown to the ground and hit her head. It was not an act that would be expected to cause serious injury or death. It is submitted that a suspended sentence is usually imposed for this type of offence. Accordingly, in view of the time the accused has spent in custody, it is submitted that he should now be released or at most, a suspended sentence imposed.

On the facts given, it must be accepted that the fatal injury was not inflicted by a direct blow of the accused. It was sustained when he threw her to the ground and her head hit the ground. On that basis, serious injury would not have been intended. This would normally place such offence in a relatively low category of seriousness.

However, there are some aggravating circumstances present in this case.

This was an unprovoked attack on a young woman victim. It was not, as is often the case, a willing fight between two able bodied men. It occurred because the victim refused to have sexual intercourse with the accused. That was her right

and the accused should have desisted and let her leave if she wished to. Instead he persisted and endeavoured to overcome her resistance by force. He took hold of her hair and threw her to the ground. This was done with sufficient force to cause a fatal injury when her head hit the ground. The accused then sat on top of the victim, punched her twice in the face and started to take off her clothing.

The accused caused this death in the course of a deliberate assault on the victim. His series of actions clearly show his purpose. The assault was for the purpose of overcoming her resistance and forcing her to have sexual intercourse after she had refused. That is a particularly aggravating circumstance. In my view, it clearly differentiates this case from others where death is caused by a single blow in the course of a fight. It is tantamount to a killing, albeit unintentional, in the furtherance of an unalwful object. An object, I might say, of a reprehensible sexual nature that is deprecated in the community.

In view of this, a nominal or suspended sentence is inappropriate.

I do not overlook the relatively minimal nature of the assault that actually caused the death. However, the particular aggravating features in this case are substantial.

I consider the appropriate sentence for a manslaughter offence of this nature to be in the region of 5 years imprisonment.

The accused receives no concession for good character. He has shown a propensity for violent conduct with a previous conviction for assault occasioning actual bodily harm.

However, I do have regard to his age. Further he is entitled to some consideration for pleading guilty to the reduced charge of manslaughter. The plea of not guilty was only maintained in respect of a charge of murder.

More particularly he must be given credit for the 14 months he spent on remand in custody. An appropriate reduction in the sentence must be made for that.

Giving allowance for those matters, the term should be 3½ years.

The accused is convicted and sentenced to 3½ years imprisonment."

Apart from the general contention that the sentence is harsh and excessive the Appellant has 4 particular complaints.

The first is that the sentencing judge had no basis for holding that he (Appellant) had a propensity for violence. In our opinion the learned Judge had reasonable grounds for holding that view not only on the basis of undisputed facts outlined but also on the basis of the Appellant's previous conviction.

The second complaint is that the Sentencer gave undue weight to the Appellant's criminal history.

It is now well settled that a prisoner is not to be sentenced for the offence he has committed in the past and for which he has already been punished. In other words his sentence is not to be increased because of his earlier offending - see O'Donnel v Perkins 1908 VLR 537. As was said by the English Court of Appeal in R v Queen [1982] Crim. L.R. 56 the proper way to look at the matter is to decide a sentence which is appropriate to the offence for which the prisoner is before the Court and then to consider whether the Court can extend some leniency to the offender having regard among other things to his record of previous convictions. This is precisely what the learned Judge did as is clear from his sentencing remarks already quoted. In our view there is no merit in this complaint.

The third complaint is that the Sentencer failed to take into account the Appellant's plea of guilty. There is no merit in this contention either. The learned Judge specifically took into account Appellant's plea of guilty to the reduced charge and gave some credit for it. We accept as was said in R v De Hahn [1967] 3 All E.R. 618 that "It is undoubtedly right that a confession of guilt should tell in favour of an accused person for that is clearly in the public interest". However it is not desirable to lay down as a rule of thumb the precise quantum of credit that should be given in plea of guilty cases although some degree of consistency is called for.

The fourth complaint is that the sentence was wrong in principle. No reasons have been advanced for this proposition. We can see none either.

As regards the alleged severity of sentence, in our opinion a 5-year sentence for manslaughter as a starting point was well within the appropriate region in this case. The learned Judge took into account all the relevant factors in arriving at this figure. The fact that the Appellant appeared to be intending to rape the victim was certainly an aggravating feature. The fact that he must have been somewhat intoxicated at the material time cannot in the particular circumstances of this case be regarded as a mitigating factor. However the Sentencer rightly reduced the 5-year period to three and a half years by giving credit for the time that the Appellant had spent in custody, his guilty plea and for other mitigating factors.

Normally in the absence of any exceptional circumstances an appeal against sentence would succeed only where the sentence was unlawful, wrong in principle or manifestly excessive (see R v Johnson [1994] Crim. L.R. 537 C.A.).

The sentence passed on the Appellant was neither unlawful, wrong in principle nor manifestly excessive. Certainly there were no exceptional circumstances to warrant a lesser sentence.

This appeal is therefore dismissed.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Mr Justice Gordon Ward
Judge of Appeal

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Mr Justice J.D. Dillon
Judge of Appeal