



*"Vikash Shankla Goundar [the deceased] was the son of Narayan Sami Goundar. He was employed as a driver and lived at DAVUILEVU Housing, 9 miles Nasinu. He was 24 years of age at the time of his death. He was the first cousin of the second accused, Satish Reddy.*

*The first accused is Sashi KAPOOR he is the son of Kat Rayan. He was 32 years of age at the time of his arrest.*

*The second accused is Satish REDDY he is the son of Narayan Reddy. He was 31 years of age, at the time of his arrest.*

*On the 28<sup>th</sup> November 1999 between midnight and 00.30 hours the two accused assaulted Vikash GOUNDAR. This resulted in Mr. Goundar dying on the 29<sup>th</sup> November 1999 from injuries received in the assault.*

*On the day in question, the wife of the second accused was at home at 38 Kula Street. The deceased arrived at the second accused's home drunk. At about 8.00 p.m. both accused left the second accused's home. They went drinking gin at Sekoula Road until 23.30 hours. They then returned home, arriving about midnight.*

*On their return Subhashni Reddy the wife of the second accused complained about the behaviour of the deceased after they left home. The allegation concerned sexual advances.*

*At this time the deceased was sleeping on the floor of the sitting room. The first and second accused pulled the deceased out of the house.*

*The first accused punched and kicked the deceased outside the house. The first accused pulled the deceased by his shirt down the driveway and left him on a pile of rubbish at the gate.*

*Two neighbours witnessed this. The first accused kicked the deceased and then left.*

*The first accused got in a car and left the scene. Witnesses summoned help. Meli DELAI went over to where the deceased was lying to revive him. He saw he was bleeding. Mr. Goundar woke up and he pulled up his trousers which had fallen below his knees, and then walked away.*

*Evidence reveals the deceased went home. He changed his clothes with some assistance from his mother. She noted scratches to the deceased's neck and back and saw that his mouth and nose was bleeding.*

*As a result of his injuries he was taken to the CWM Hospital and admitted to the surgical ward on the 29<sup>th</sup> November 1999. He died at 08.00 on the 29<sup>th</sup> November 1999.*

*Doctor Cayari carried out a Post Mortem examination on the 1<sup>st</sup> December 1999 at*

09.05 hours at CWM Hospital.

Cause of death was recorded as.

HEMORRHAGE, ABDOMINAL AND RETROPERITONEA, SECONDARY TO PHYSICAL ASSAULT, RUPTURED DUODENUM.

The defendants were arrested and interviewed by the police. Sashi Kapoor was interviewed on the 30<sup>th</sup> November 1999 commencing at 01.15.

CAUTION CHARGE OF SASHI KAPOOR.

*I punched and kicked him inside the house and then grabbed him outside. Outside I again kicked him and punched him and then held him by the armpit and left him near the road. With me was also Satish Reddy alias BINNU who also assaulted him. After that I went away to my house. The reason for assaulting him was that Vikash alias Babu he approached Binnu's wife (Satish Reddy) to have sex with him which made me angry. I didn't mean to cause his death just to frighten him.*

*The Defendants were charged with murder and have been in custody from the end of November until today's date. The charge was reduced from Murder to Manslaughter on the 30<sup>th</sup> August 2000."*

The facts as outlined were admitted by the Appellant, and he was convicted as charged.

Mr Raza, Counsel, mitigated on his behalf, and the case was adjourned to the 22<sup>nd</sup> of September 2000, and on that date Sadal J. sentenced the Appellant to 3 years imprisonment.

The Appellant now appeals against that sentence. He says that the sentence is harsh and excessive, and wrong in principle, having regard to all the circumstances of the case, and in particular, he says that Sadal J. did not give sufficient weight to the fact that he acted under grave provocation, and that he was wrong to regard the provocation as minimal.

Mr M.V. Bhai who represented the Appellant at hearing of this appeal submitted that the provocation was very grave, and that the sentence does not reflect the gravity of the

provocation. We cannot agree. While we are inclined to the view that the provocation might have been more than minimal to Satish Reddy who was Subhashni Reddy's husband, the provocation could not be regarded as anything other than minimal as far as the Appellant is concerned.

Mr Bhai also argued that the deceased died not as a direct result of the injuries he received but due to failure of timely and competent medical and/or surgical intervention. Again, we cannot agree. If that were so than the Appellant should not have pleaded guilty. He pleaded guilty and admitted the facts as outlined. We do not see that Section 206 of the Penal Code, referred to by Mr Bhai, assists the Appellant. According to that Section the injury does not have to be the immediate or the sole cause of death.

We do not see such merit in any of the matters now urged upon us, as would justify interference with the sentence imposed by the learned Judge. It is well established law, that this Court can only interfere with the sentencing discretion of the Court below, if it can be demonstrated that it fell into an error in exercising that discretion.

Such error may occur in a variety of ways. If the sentencing Judge acts upon a wrong principle, if he allows extraneous and irrelevant matters to colour his judgment, if he makes mistakes as to facts, or if he does not take into account some relevant considerations, then, and then alone can an Appellate Court interfere with the sentence imposed by the Court below. As was pointed out by this Court in Kim Nam Bae v State, Cr. Appeal No. 15 of 1998, such an error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence. Normally an appeal against sentence would succeed only where the

sentence is unlawful, wrong in principle or manifestly excessive. (See R v Johnson [1994] Crim. L.R. 537.

As is to be expected, sentences for manslaughter vary widely, depending on the facts and circumstances of each case. Penalties range from suspended sentence to 12 years imprisonment. In the latter category the degree of violence is high and provocation minimal. In Rauve v State (Criminal Appeal No. 13 of 1990) this Court observed: "However, we note that punishment in Fiji for manslaughter of a serious kind has normally ranged from 7 to 10 years imprisonment depending on the degree of gravity."

In the case of Katatia Kabua v Reginam, Criminal Appeal No. 8 of 1976 (an appeal from the High Court of the Gilbert Islands) this Court expressed itself in full agreement with what is said by Thomas in Principles of Sentencing at page 76 (Second Edition):

*"The Court appears to consider a sentence of imprisonment necessary in all cases of manslaughter under provocation, and a sentence of less than three years would be exceptional. At the other extreme, sentences in excess of ten years' imprisonment are rarely upheld. The factors which influence the Court in arriving at a figure between these limits are clearly the nature and extent of the provocation, the degree to which the offender was affected by it, and the readiness of the offender to resort to violence without provocation."*

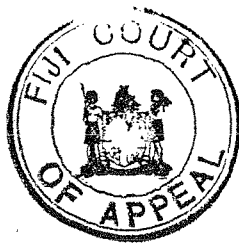
While this case does not fall into the serious category, nonetheless, the facts were such that, an immediate custodial sentence was called for. We agree with Sadal J. that the provocation was minimal. The deceased was sleeping on the floor of the sitting room, and was pulled out of the house by the Appellant and Satish Reddy. The Appellant punched and kicked the deceased outside the house, pulled him along the driveway and kicked him again

as he lay on the ground. The Appellant was the main aggressor, and while alcohol may account for his behaviour that night, it is not an excuse. The deceased died as a result of haemorrhage, (abdominal and retroperitoneal), and a ruptured duodenum. These injuries could only have been caused as result of being kicked in the abdominal region more than once.

The learned Judge said that he took into account all that was urged upon him in mitigation, including the fact that the Appellant had spent some 10 months in custody, on remand, and he was a first offender.

CONCLUSION

We see no merits in this appeal. It is dismissed.



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Reddy J R, President

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Eichelbaum, JA

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Gallen, JA

Solicitors:

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