

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0019 OF 2002S
CRIMINAL APPEAL NO. AAU0004 OF 2002S
(High Court Criminal Case No. HAC0013 of 2000)

BETWEEN:

1. ORISI ROKO
2. FILIMONI DRUA
3. WAIKAKE NACORO
4. VERESI RORAKUITA
5. MELI RASILEKA
6. SEKOVE VAKOSIA

Appellants

AND:

THE STATE

Respondent

Coram: Tompkins, JA
Henry, JA
Penlington, JA

Hearing: Monday 26 May 2003, Suva

Counsel: Mr G.P. Shankar for the Appellants
Mr G.H. Allan for the Respondent

Date of Judgment: Friday 30 May 2003

JUDGMENT OF THE COURT

The six appellants were charged with the murder of Jioji Qilai at the Kilikali settlement on 30 April 2000. They pleaded not guilty to the charge. After a lengthy trial at the end of 2001 they were unanimously found not guilty of murder but guilty of manslaughter. The Judge accepted the assessors' opinion and convicted the appellants.

There was also a charge of robbery with violence against the 5th appellant Meli Rasileka. The State did not proceed with that count.

On 12 December 2001 each of the appellants was sentenced to 7 years imprisonment. They now apply for leave to appeal against sentence.

Abandonment of conviction appeals

Originally the 2nd, 3rd and 5th appellants sought leave to appeal against conviction and sentence while the remainder sought leave to appeal against sentence only.

Ahead of the hearing in this Court the 2nd, 3rd and 5th appellants filed submissions in person in support of their appeals against conviction. When however the appeal was called before us Mr Shankar entered an appearance as counsel for all the appellants. He formally withdrew the appeals against conviction.

Having carefully read the record of the trial we consider that that withdrawal was entirely proper.

Factual outline

The facts of the case were as follows:

On 22 April 2001 a young man, Simeli Roace was injured. His eyes was speared by a stick and he lost his eyesight. Simeli lived with his family in the Kilikali village close to the home of the deceased Jioji. He was a close relative of the appellants who were from Naitasiri.

Early on the morning of 30 April 2001 the six appellants visited Simeli's father. By then charges had not been laid in respect of the Simeli incident. There was some drinking at this time. According to him the appellants were angry about Simeli's injuries and they indicated that they wanted to go out into the village and damage it. The case of the appellants was that Jioji's son had inflicted the injuries to Simeli and that Jioji was present with a torch when the injuries were inflicted.

A number of witnesses in the Kilikali settlement gave evidence about the events on the morning of 30 April 2001. There was a disturbance in the village involving up to eight trouble makers. At least five of them spoke in the Naitasiri dialect. Several witnesses described an attack on Jioji outside his house. Jioji was

pulled along the ground, punched and he was seen to fall to the ground. One witness saw Jioji being punched in the face.

There was also evidence of other incidents of punching and fighting in the village about the same time. Five of the appellants (not the 6th appellant) chased a police officer to a police post. Another villager was seen to be attacked. There were however no charges in respect of any of these incidents.

The deceased was found by his niece sitting inside his own house. She said that he had a gash on the top of his forehead. She could not detect any pulse. After she discovered him she said that one of the Naitasiri men came into the deceased's house and punched him on the chest. At this stage the niece thought that her uncle was dead.

The deceased's wife also saw her husband in their home. She too said that he had no pulse. The deceased was taken to hospital where, later, a post mortem was carried out. The time of death was put at 6.00 am on 30 April 2000. The deceased was found to have suffered a laceration over the left eye, a fracture of the fourth left rib, bruising of the third and fourth ribs and a complete fracture of the body of the chest wall. The cause of death was stated to be fractures of the body of the sternum and the fourth rib as the result of a physical assault. The deceased was aged 58 years at the time of his death.

The case for the State was that each appellant was party to a joint enterprise. In her summing up the Judge put the defence of provocation.

The sentencing of the appellants

On sentence the appellants were represented by counsel. Each appellant sought a suspended sentence.

The Judge accepted that the finding of manslaughter was possible either on the basis that the appellants did not intend or foresee grievous bodily harm or that provocation had been offered to the appellants' close relative, Simeli, by the deceased.

The Judge found that both the degree of violence and the degree of provocation were serious. She regarded the six appellants as equally culpable (a finding which was not attacked on appeal). The Judge's view of the case was encapsulated in the following passage in her sentencing remarks:

"... The evidence led by the prosecution showed a joint attack by up to 8 men on an unarmed, defenceless old man in the early hours of the 30th of April. And no matter how angry and provoked you might have been at his act of shining a light on your relative as his eye was stabbed by Jioji Qilai's son, and how frustrated you were because no one was arrested for the offence, there can be no avoiding of the fact that this was a case of a pack of men ganging up on one old man to inflict violence on him. Your behaviour was cowardly and shameful. For that reason, I must pass a sentence on you that reflects society's disapproval of gang violence and vigilante killings."

As well the Judge later observed that the actions of the appellants had not only killed the deceased but also had "caused terror in the entire community at Kilikali".

The Judge reviewed the personal circumstances of each appellant. She referred to their remorse, their frustration at the police inaction in relation to the Simeli assault, their participation in the traditional ceremony seeking the deceased's family for forgiveness and the fact that ahead of the trial they were prepared to plead guilty to manslaughter.

In guiding herself as to the appropriate sentence the Judge cited the judgment of this Court in Kim Nam Bae v The State Crim. App. AAU0015/998S, delivered on 26 February 1999. In that case the Court observed that the penalty imposed for manslaughter ranges from a suspended sentence where there may have been grave provocation to twelve years imprisonment where the degree of violence is high and the provocation is minimal.

The Judge rejected the urgings of counsel to impose a suspended sentence. She imposed a sentence of 7 years imprisonment after expressly taking into account the 20 months spent on remand.

Appeals against sentence

For the appellants it is submitted that the sentences were manifestly excessive. The State on the other hand seeks to uphold the sentences.

The relevant principles

The principles governing our approach to this appeal are well settled.

In *Kim Nam Bae* (supra) it was stated at p2

“The question we have to determine is whether we “think that a different sentence should be passed” (s 23 (3) of the Court of Appeal Act (Cap 12)? It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).”

Counsel’s submissions

In support of the appeal Mr Shankar submitted that when the time spent on remand was taken into account an effective sentence of 8 years 8 months had been imposed. He contended that given the circumstances of the case this was outside the range for normal cases of manslaughter and was therefore excessive.

Mr Shankar relied on the serious provocation as found by the Judge. Counsel emphasised that when the appellants went to the village charges arising out of the assault on the appellants' close relative had not been laid, that the appellants wanted to find out more about the incident, that they did not have a plan to kill the deceased and that it was only when they were in the village that they gave way to criminal conduct in determining to punish but not kill the deceased.

Mr Allan acknowledged that sentences for manslaughter were not normally above 6 years unless there were serious aggravating features. In making this acknowledgment he cited a judgment of this Court in Ajipote Koroi v The State Criminal Appeal No. 4 of 1988 judgment 2 November 1988. Notwithstanding this acknowledgment Mr Allan submitted that the sentence in this case was within the sentencing discretion of the Judge. He contended that while the Simeli incident was "potentially provocative", the subsequent acts of the appellants in going to the village to ruminate on what happened to Simeli and then attack the deceased as a pack had to be brought into the scales as an aggravating factor.

Secondly Mr Shankar submitted that there were a number of mitigating factors which ought to have been given weight by the Judge. They were

(a) The degree of violence

While the Judge regarded the case as one involving serious violence Mr Shankar submitted that by comparison with other homicide cases the degree of

violence, as reflected in the injuries found at post mortem, were at the lower end of the scale.

(b) The absence of a weapon

Mr Shankar emphasised that there was no evidence of a weapon being applied to the deceased by any of the appellants.

(c) Up to 8 persons involved

Mr Shankar submitted that the evidence showed that up to 8 persons were involved but that only 6 had been charged. Counsel contended that the others were equally culpable but that they had in the event escaped the full reach of the law.

Mr Allan did not joint issue on the validity of these three matters.

Thirdly Mr Shankar submitted that the Judge had given insufficient weight to a number of mitigating factors which were mentioned by her. Those matters were:

- (a) The fact that ahead of the trial the appellants were prepared to plead guilty to manslaughter and thereby avoid a trial.
- (b) The previous good character of all the appellants.

- (c) The stable family circumstances of each appellant.

- (d) And in the case of the 1st appellant his diabetic condition and his wife's heart condition.

In response Mr Allan submitted that with the exception of the point relating to the health of the 1st appellant and his wife, the matters referred to by Mr Shankar under this head had been expressly mentioned by the Judge and, inferentially, brought into account.

Fourthly Mr Shankar submitted that the Judge had given undue weight to the terror factor and, implicitly, the need to protect society from persons who were prepared to perpetrate the kind of conduct evident in this case. Under this head Mr Shankar urged the point that no charges in respect of any of the other events in the Kilikali village on the morning of 30 April 2000 had been preferred or proceeded with against the appellants.

Mr Allan in response contended that the conduct of the kind perpetrated by the appellants on that morning did instil fear into an entire community.

Our decision

Having carefully considered the very helpful submissions of both counsel we have reached the clear view that the Judge did fall into error in exercising her sentencing discretion and that a lesser sentence should have been imposed.

In reaching this conclusion we make it clear that vigilante conduct is not to be tolerated in the community and that the court must mark its disapproval of such behaviour in the strongest terms. A group is not entitled to take the law into its own hands, act as a pack and inflict repetitive violence on a victim even if they think they have a reasonable grievance against that person.

Having made these comments we find that an effective sentence of 8 years 8 months was outside the range given the circumstances of this case. We agree with Mr Shankar's submission on this point. We do not see that this case as one which would justify an effective sentence of 8 years 8 months.

We also consider that there was merit in Mr Shankar's contentions as to the degree of violence as reflected in the injuries found at post mortem, and the absence of a weapon. These two factors favoured the appellants and were deserving of weight.

We are not to be taken as minimising the fact that death occurred. We nevertheless consider that while the violence was serious as found by the Judge it was of a lesser nature than is evident in some homicide cases.

The absence of a weapon is a proper point for consideration in the appellants' favour. A more severe punishment will normally occur where a weapon is used.

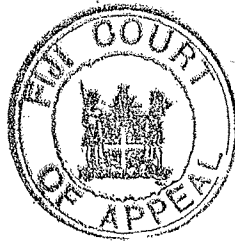
As to the third group of mitigating factors urged upon us by Mr Shankar, we agree with Mr Allan that they were referred to by the Judge. In our view these factors were properly brought into account.

And finally 'the terrorism point'. While we agree with the Judge's comments it is important to remember that the appellants did not face any other charges in relation to their conduct in the Kilikali village and the punishment imposed must be for the offence committed.

Result

For the reasons given the sentence must be reduced to 5 years, an effective sentence of 6 years 8 months when the time on remand is included.

The appeal is accordingly allowed. There will be leave to appeal against sentence. The sentence of 7 years imprisonment is quashed. In substitution each of the appellants are sentenced to 5 years imprisonment.



[Handwritten signature]
Tompkins, JA

[Handwritten signature]
Henry, JA

[Handwritten signature]
Penlington, JA

Solicitors:

Messrs G.P. Shankar & Co., Ba for the Appellants
Office of the Director of Public Prosecutions, Suva for the Respondent